Jammu and Kashmir: Erstwhile State of Exception

A Legal-Historical Analysis of Article 370 of the Constitution of India

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Introduction

This dissertation is about Article 370 of the Constitution of India.[1] In it, I seek to provide context to Article 370's abrogation on August 5, 2019, through a legal/historical analysis of the constitutional relationship between the Republic of India ("India") and the erstwhile Indian State of Jammu and Kashmir ("Jammu and Kashmir", "J&K", or the "State"). While Article 370 was enacted as a provision purporting to protect the State's autonomy, I argue it has, from its inception to its abrogation, enabled a form of emergency rule in Jammu and Kashmir. I frame my argument through Giorgio Agamben's analysis of the "state of exception" in public law, and through theoretical analyses of sovereignty and state power, including notably the works of Nasser Hussain and Marianne Constable.[2]

My analysis of Jammu and Kashmir's legal and territorial annexation is guided by Himani Bannerji's formulation of a Marxist critique of ideology.[3] Following Marx, Bannerji draws a distinction between ideology and critical approaches to theorization, or "critical epistemology".[4] Critical epistemology begins from an analysis of social reality to arrive at theoretical conclusions to be tested against that social reality.[5] Ideology, by contrast, takes discourse or "de-grounded" theoretical concepts as starting premises and proceeds to social reality, using the latter to provide illustrations of the former.[6] Centering the content of theoretical concepts, to the exclusion of their modes of production and deployment, ideology displaces "consciousness" from history and

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[1] *Constitution of India, 1950* [*COI*], Art 19, online (pdf): <legislative.gov.in/sites/default/files/COI.pdf>.
[2] Giorgio Agamben, *State of Exception*, translated by Kevin Attell (Chicago: University of Chicago Press, 2005); Nasser Hussain, *The Jurisprudence of Emergency: Colonialism and the Rule of Law* (Ann Arbor: University of Michigan Press, 2003); Marianne Constable, *The Law of the Other: The Mixed Jury and Changing Conceptions of Citizenship, Law, and Knowledge* (Chicago: University of Chicago Press, 1994).
[3] Himani Bannerji, *Demography and Democracy: Essays on Nationalism, Gender and Ideology* (Toronto: Canadian Scholars' Press, 2011) at 24.
[4] *Ibid* at 24, 26.
[5] *Ibid* at 26.
[6] *Ibid* at 27.

society, obscuring its production by and for a ruling class.[7] By obscuring their methods of deployment or articulation, conceptual categories can be "employed in a reifying manner" to "produce occlusions".[8] In hiding its methods of production, ideology "lays claim to universal applicability".[9] Through an examination of Jammu and Kashmir's constitutional history, I argue 'State security' is the ideological vessel through which Jammu and Kashmir's autonomy has been eroded and the constitutional rights of its residents suppressed.

Roadmap

I begin the dissertation with a summary of the events surrounding Article 370's abrogation. This is followed by a brief overview of the theoretical framework discussed above. I then canvass Jammu and Kashmir's history, from its creation as a Princely State under the rule of the East India Company in 1846, to the independence and partition of the Indian subcontinent in 1947 and the subsequent war between India and Pakistan ("First Indo-Pak War") from 1947-48. The purpose of this historical overview is to provide context to the Princely State of Jammu and Kashmir's accession to India through the Instrument of Accession signed by the State's ruler, Maharaja Hari Singh, on October 26, 1947.[10]

Next, I discuss the drafting of Article 370, the constitutional provision through which the Indian constitution was made applicable to the newly acceded State of Jammu and Kashmir. Like the Instrument of Accession, Article 370 was conceived with the aim of preserving a degree of autonomy for the State, reflecting the unique circumstances under which the State acceded to the

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[7] *Ibid* at 24-30, 34.
[8] *Ibid* at 38.
[9] *Ibid* at 33.
[10] *Instrument of Accession of Jammu and Kashmir State dated 26 October, 1947*, cited in AG Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (New Delhi: Oxford University Press, 2011) at 37-39.

Indian Union. I explain how, in the decades following the State's accession, this autonomy was gradually eroded through Presidential Orders issued under the authority of Article 370 itself. This section focuses in particular on Article 370's role in suspending the right of J&K residents to challenge the State's preventive detention legislation as infringing the Fundamental Rights provisions of the Indian constitution, where that legislation is aimed at protecting 'state security'.

In the final chapter, I examine the case law interpreting Article 370 and the Presidential Orders issued under its authority, particularly as they relate to the State's preventive detention legislation and to the Fundamental Rights provisions of the Indian constitution. I focus in particular on six cases, including the Indian Supreme Court's three major decisions interpreting Article 370, as well as cases examining the operation of preventive detention legislation in the State in light of the Presidential Orders issued under Article 370. Through this exploration of Article 370's jurisprudence, I analyze the role of state security as a legal justification in the Court's evaluation – and limitation – of the former State's autonomy and the civil liberties of its inhabitants.

The first case I discuss is the J&K High Court's decision in *Ghulam Ahmad Ashai v State of J&K*, the first legal challenge to the *Jammu and Kashmir Preventive Detention Act, 1954* and to a detention order issued under the *Act* on the grounds of maintaining public safety and peace. I then discuss the Indian Supreme Court's decision in *P L Lakhanpal v The State of Jammu and Kashmir*, the leading case on Article 35(c) – a constitutional provision put in place through Presidential Order under Article 370 immunizing the State's preventive detention legislation from constitutional challenge for violating the Indian constitution's Fundamental Rights provisions. Next, I discuss the first of the Supreme Court's three major decisions on Article 370: *Prem Nath Kaul v State of J&K*. While the decision largely concerns the plenary powers of the Maharaja of

Jammu and Kashmir before and after the State's accession to India, it is noteworthy for the Court's analysis of the historical and constitutional relationship between India and the State.

After a brief interlude, in which I compare competing opinions prevalent in the 1960s regarding the extent of the State's accession to India, I examine the Indian Supreme Court's decision in *Puranlal Lakhanpal v President of India and Ors*. The case dealt with a challenge to a Presidential Order under Article 370 modifying voting rules in the State. The Court held the President of India had broad powers under Article 370 to modify the Indian constitution's application to Jammu and Kashmir.

This view was confirmed in *Sampat Prakash v State of J&K and Anr*, where the Supreme Court discussed in detail the relationship between Article 370, the Presidential Orders issued under its authority, and the moratorium on constitutional challenges to preventive detention legislation introduced through those Presidential Orders. The Court upheld the moratorium, referring both to the President's broad modificatory powers under Article 370 and to an ever-present exceptional state of affairs in the State threatening its security. Finally, I discuss the case of *Mohd. Maqbool Damnoo v State of Jammu and Kashmir* – the last of the Supreme Court's major decisions on Article 370 – in which the Court once again upheld the constitutionality of the State's preventive detention legislation and confirmed the President's broad power to modify the application of Article 370 – and through it the Indian constitution – to the State.

The BJP and the RSS: Jammu and Kashmir in the "Hindu Rashtra"

My discussion of the State's history draws heavily on the works of Mridu Rai and A.G. Noorani, who write, respectively, on Jammu and Kashmir's history as a Princely State under British

suzerainty, and on the history of Article 370.[11] While I focus particularly on legal developments under the Indian National Congress party, including the enactment of Article 370 and the issuance of many of the Presidential Orders discussed in this dissertation, the Order abrogating Article 370 was issued under the currently ruling *Bharatiya Janata Party* ("BJP"). The abrogation of Article 370 has long been an aim of the BJP, justified as necessary for preserving national unity and territorial integrity.[12] The BJP and its parent organization, the *Rashtriya Swayamsevak Sangh* ("RSS"), also share the goal of creating a *Hindu Rashtra* – a nation unified under a racialized vision of Hindu cultural hegemony. This dissertation thus also discusses how Jammu and Kashmir's integration, and the subordination of its Muslim population, have been fundamental to these right-wing organizations' historical enunciations of their Hindu nationalist vision.[13]

Background: The Abrogation of Article 370

On August 5, 2019, the President of India issued the *Constitution (Application to Jammu and Kashmir) Order, 2019*,[14] rendering Articles 370 and 35A of the Constitution of India[15] inoperative, revoking the Indian State of Jammu and Kashmir's semi-autonomous status, and making it subject to the Indian constitution in its entirety.[16] The *Jammu and Kashmir Reorganisation Act, 2019*[17]

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[11] Noorani, *supra* note 10; Mridu Rai, *Hindu Rulers, Muslim Subjects: Islam, Rights, and the History of Kashmir* (Princeton: Princeton University Press, 2004).
[12] Mona Bhan, Haley Duschinski & Ather Zia, ""Rebels of the Streets": Violence, Protest, and Freedom in Kashmir" in Haley Duschinski, Mona Bhan, Ather Zia & Cynthia Mahmood, eds, *Resisting Occupation in Kashmir* (Philadelphia: University of Pennsylvania Press, 2018) 1 at 8, 14, 16-17, 24-25; Mridu Rai, "Kashmiris in the Hindu *Rashtra*" in Angana P Chatterji, Thomas Blom Hansen & Christophe Jaffrelot, eds, *Majoritarian State: How Hindu Nationalism is Changing India* (London, UK: C Hurst & Co, 2019) 259 at 263, 267, 270-271, 278.
[13] Bhan, Duschinski & Zia, *supra* note 12 at 24, 27-28; Rai, "Kashmiris in the Hindu Rashtra", *supra* note 12 at 259, 261-269, 271, 276-277.
[14] *Constitution (Application to Jammu and Kashmir) Order, 2019,* CO 272, online (pdf): <cdnbbsr.s3waas.gov.in/s395192c98732387165bf8e396c0f2dad2/uploads/2019/10/20191029100.pdf>.
[15] *COI*, Art 370; *COI*, Art 35A, in *COI*, Appendix I: *Constitution (Application to Jammu and Kashmir) Order 1954*, CO 48, online (pdf): <iitk.ac.in/wc/data/coi-4March2016.pdf> at 366.
[16] Kaushik Deka, "Kashmir: Now for the legal battle", *India Today* (19 August 2019), online: <indiatoday.in>.
[17] *Jammu and Kashmir Reorganisation Act, 2019*, online (pdf): <egazette.nic.in/WriteReadData/2019/210407.pdf>.

(the "Reorganisation Act") was introduced in, and passed by the Indian Parliament's *Rajya Sabha* [upper house] the same day, and passed by the *Lok Sabha* [lower house] the following day. The Reorganisation Act divided the State into two Union Territories: 1) Jammu and Kashmir and 2) Ladakh. Legislative jurisdiction over "police" and "public order" in the Jammu and Kashmir Union Territory remained with the central (Indian) government (the "Centre").[18]

The former State had been under 'President's Rule' – a state of emergency in which the region was governed by the Indian executive rather than the State legislature – since June 2018.[19] In the lead-up to the revocation of Article 370 the region saw large-scale troop movements; mass evacuations of tourists, non-Kashmiri students, and Hindu pilgrims; and on the night of August 4, 2019, the suspension of all phone lines and internet connections. Phone lines were gradually restored a month later and partial internet access was restored in March 2020 but restricted to 2G connection. This was, at the time, the longest internet shutdown of any democracy and the second-longest in any country after Myanmar.[20] The shutdown was accompanied by various repressive measures including curfews, arbitrary arrests and detentions, enforced disappearances, and custodial torture.[21]

Reorganisation of Land Laws

Between October 2019 and October 2020, the Centre issued ten Orders under the Reorganisation Act,[22] including three Orders repealing, amending, and replacing the former State's legislation

[18] "Jammu & Kashmir Reorganisation Bill passed by Rajya Sabha: Key takeaways", *The Indian Express* (5 August 2019), online: <indianexpress.com>.
[19] Jammu and Kashmir Coalition for Civil Society, *Kashmir's Internet Siege: An Ongoing Assault on Digital Rights* (2020), online (pdf): <jkccs.net/report-kashmirs-internet-siege> at 11.
[20] *Ibid* at 5-6.
[21] *Ibid* at 6, 60; Meenakshi Ganguly, "India Failing on Kashmiri Human Rights", *Human Rights Watch* (17 January 2020), online: <hrw.org>.
[22] *Jammu and Kashmir Reorganisation (Removal of Difficulties) Order, 2019*; *Jammu and Kashmir Reorganisation (Removal of Difficulties) Second Order, 2019*; *Jammu and Kashmir Reorganisation (Adaptation of Central Laws)*

governing the rights of Jammu and Kashmir's permanent residents, formerly protected under Article 35A of the Indian constitution. The first two Orders, issued in March[23] and May[24] 2020, replaced the category of 'permanent resident' with that of 'domicile', a status applying to anyone who has resided in the region for 15 years or more (10 for central government officials and their children and 7 for students). Domiciles are eligible for any job in the Union Territory formerly reserved for permanent residents.[25] On October 26, 2020, the Centre issued the *Union Territory of Jammu and Kashmir Reorganisation (Adaptation of Central Laws) Third Order, 2020*[26], repealing 12 State laws and amending 26 others. Through these changes, the category of 'permanent resident' was removed from all legislation affecting Jammu and Kashmir.

The changes are directed particularly at Jammu and Kashmir's "land laws", and allow any Indian citizen to purchase land and property in the Union Territory.[27] The revocation of Jammu and Kashmir's special status and the subsequent changes to its land laws were lauded by both government officials and major corporate leaders as paving the way for economic modernization,

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Order, 2020; *Jammu and Kashmir Reorganisation (Adaptation of State Laws) Order, 2020*; *Jammu and Kashmir Reorganisation (Removal of Difficulties) Order, 2020*; *Jammu and Kashmir Reorganisation (Adaptation of State Laws) Second Order, 2020*; *Union Territory of Jammu and Kashmir Reorganisation (Adaptation of Central Laws) Second Order, 2020*; *Union Territory of Ladakh Reorganisation (Adaptation of Central Laws) Order, 2020*; *Union Territory of Ladakh Reorganisation (Adaptation of Central Laws) Second Order, 2020*; *Union Territory of Jammu and Kashmir Reorganisation (Adaptation of Central Laws) Third Order, 2020*. PDF versions of the ten Orders available online: <indiacode.nic.in/handle/123456789/12030?locale=hi>.

[23] *Jammu and Kashmir Reorganisation (Adaptation of State Laws) Order, 2020*, SO 1229, online (pdf): <static.pib.gov.in/WriteReadData/userfiles/218978.pdf> at 47.

[24] *Jammu and Kashmir Reorganisation (Adaptation of State Laws) Second Order, 2020*, SO 1245, online (pdf): <upload.indiacode.nic.in/showfile?actid=AC_CEN_3_20_00071_201934_1568889824041&type=order&filename=219002.pdf >.

[25] Riyaz Wani, "India's new domicile law for Jammu & Kashmir is making residents anxious", *Quartz India* (7 April 2020), online: <qz.com>; Rahul Tripathi, "Centre notifies amendments to the act providing domicile reservation for govt jobs in Jammu & Kashmir", *The Economic Times* (4 April 2020), online: <economictimes.indiatimes.com>; "Jammu and Kashmir domicile rules: Centre trying to change demography of UT, claim political parties", *The New Indian Express* (19 May 2020), online: <www.newindianexpress.com>.

[26] *Union Territory of Jammu and Kashmir Reorganisation (Adaptation of Central Laws) Third Order, 2020*, online (pdf): <https://upload.indiacode.nic.in/showfile?actid=AC_CEN_3_20_00071_201934_1568889824041&type=order&filename=222742.pdf>.

[27] "Centre notifies new laws allowing anyone to buy land in J&K", *Scroll.in* (28 October 2020), online: <scroll.in>.

development, and private sector investment in the region.[28] These changes include the repeal of the *Big Landed Estates Abolition Act, 1950*[29] and amendments to the *Jammu and Kashmir Agrarian Reforms Act, 1976*[30] and the *Jammu and Kashmir Development Act, 1970*.[31] The *Big Landed Estates Abolition Act* was the first major agrarian reform law in the post-independence sub-continent. It restricted land ownership to 22.75 acres with all excess land confiscated and redistributed amongst its tillers. The *Jammu and Kashmir Agrarian Reforms Act* had reduced this ceiling to 12.5 acres and sought to abolish absentee-landlordism. The 2020 amendments minimize restrictions on the selling and leasing of land to non-residents and allow agricultural land to be alienated to the government in exchange for contract farming, where before it could only be exchanged for mortgage loans. Agricultural land, which could previously only be sold to agriculturalists, can now be sold for non-agricultural purposes with government approval. Changes to the *Jammu and Kashmir Development Act* include: allowing government officials to create "development zones" exempted from land use restrictions; allowing armed forces officers to designate "strategic areas" for military training and operations; and the creation of an Industrial Development Corporation empowered to buy and develop any property or sell/ lease it to private corporations for development.[32]

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[28] Bhan, Duschinski & Zia, *supra* note 12 at 14, 19; Safwat Zargar, "Explainer: What exactly are the changes to land laws in Jammu and Kashmir?", *Scroll.in* (29 October 2020), online: <scroll.in>; Naveed Iqbal, "Explained: What land laws have changed in J&K? How have parties responded?", *The Indian Express* (18 November 2020), online: <indianexpress.com>; "Mukesh Ambani promises investment in Jammu & Kashmir, says Reliance will set up special team", *India Today* (12 August 2019), online: <www.indiatoday.in>.

[29] *Jammu and Kashmir Big Landed Estates Abolition Act, 1950*, online (pdf): <prsindia.org/files/bills_acts/acts_states/jammu-and-kashmir/1950/1950J&K17.pdf>.

[30] *Jammu and Kashmir Agrarian Reforms Act, 1976*, online (pdf): <jklaw.nic.in/pdfs/acts/Agrarian%20Reforms%20Act,%201976.pdf>.

[31] *Jammu and Kashmir Development Act, 1970*, online (pdf): <prsindia.org/files/bills_acts/acts_states/jammu-and-kashmir/1970/1970J&K19.pdf>.

[32] Zargar, *supra* note 28; Iqbal, *supra* note 28; Saqib Khan, "How Amended Land Laws Undo Historic Reforms in J&K", *NewsClick* (2 November 2020), online: <www.newsclick.in>.

These changes are significant, as the protections for the State's permanent residents under Article 35A were among the few vestiges of the State's autonomy that had not already been eroded through Orders under Article 370. These protections were designed to respond to the social inequalities present in the Princely State at the time of its contentious accession to India. The protections were made possible by Article 370, which has operated paradoxically to protect certain economic rights of the State's inhabitants while stripping them of their civil liberties and facilitating the State's assimilation with India.

In the following chapter I lay out my theoretical approach for understanding Article 370's paradoxical nature. I examine how, in a 'state of exception', the rule of law is suspended through the law's operation, enabling the centralization of authority and the violent suppression of resistance to that authority.

Theoretical Framework

This chapter lays out the theoretical approaches through which I analyze Article 370, its history, jurisprudence, and application. After briefly summarizing some of the contemporary emergency powers at play in Jammu and Kashmir, it describes Giorgio Agamben's theory of the 'state of exception' in public law and Nasser Hussain's analysis of emergency powers and colonial rule. In particular, it discusses the deployment of 'exceptional' legal mechanisms, the states of necessity that justify their invocation, the zones of *anomie* in which they operate, and their grounding in colonial racial hierarchies. It also examines and contrasts the approaches of H.L.A. Hart and Marianne Constable to questions of sovereignty, legal authority, legitimacy, and violence. These approaches are central to my understanding of Article 370 as a provision that, through its legal application, suspended the legal protections of the people it purportedly protected.

AFSPA & PSA: Emergency Powers in Jammu and Kashmir

Emergency powers were familiar in Jammu and Kashmir long before the invocation of President's Rule in June 2018. The State had, for example, been under martial law since the introduction of the *Armed Forces (Jammu and Kashmir) Special Powers Act, 1990*[33] ("*AFSPA*") following the outbreak of armed insurgency in 1989. There have been a number of *Armed Forces Special Powers Acts* in India, modeled on a British ordinance used to suppress the Indian independence movement during the second world war. The first such post-independence Act was implemented by the Indian government to suppress armed separatist insurgencies in the northeastern states of Assam and Manipur in 1958. The Jammu and Kashmir *AFSPA* enabled part or all of the State to be designated

[33] *Armed Forces (Jammu and Kashmir) Special Powers Act, 1990*, online (pdf): <mha.gov.in/sites/default/files/The%20Armed%20Forces%20%28Jammu%20and%20Kashmir%29%20Special%20Powers%20Act%2C%201990_0.pdf>.

a ‘disturbed area’. This designation allows government forces to use violence to the point of causing death against anyone violating any law, if such force is believed necessary to maintain public order.[34] The former State (with a population of 12.5 million civilians) had been occupied by a standing army of 500-700,000 military and paramilitary troops (a ratio of 17:1). These forces have carried out widespread human rights abuses including enforced disappearances, arbitrary detentions and arrests, extrajudicial killings, torture, and sexual assault. More than 70,000 people have been killed and over 8,000 have been forcibly disappeared, their bodies often discovered later in the region’s more than 6,000 unmarked or mass graves.[35]

In addition to the *AFSPA*, Jammu and Kashmir is subject to the *Jammu and Kashmir Public Safety Act, 1978*[36] (“*PSA*”). The *PSA* is one of many laws currently in place, facilitating preventive detention in Jammu and Kashmir on grounds of state security. In 2016, more than 8000 civilians were detained illegally in Jammu and Kashmir, of whom 582 were detained under the *PSA*.[37] The *PSA* allows for individuals to be placed under administrative detention for up to 2 years without charge or trial for suspected involvement in activities that may threaten the maintenance of order or national security. This preventive detention is enabled through executive orders issued by government officials relying on information dossiers provided by police with input from intelligence officers. The *PSA* has been used to detain protestors, human rights activists, lawyers, journalists, former militants, and political leaders who advocate for Kashmiri independence or

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[34] Haley Duschinski, “Reproducing Regimes of Impunity: Fake Encounters and the Informalization of Everyday Violence in Kashmir Valley” (2010) 24:1 Cultural Studies 110 at 117, 128-129.
[35] Bhan, Duschinski & Zia, *supra* note 12 at 2-3; *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan*, UNOHCHR (2018); Update of the Situation of Human Rights in Indian-Administered Kashmir and Pakistan-Administered Kashmir from May 2018 to April 2019, UNOHCHR (2019).
[36] *Jammu and Kashmir Public Safety Act, 1978*, online (pdf): <jkhome.nic.in/pdf/PSA0001.pdf>.
[37] Haley Duschinski & Shrimoyee Nandini Ghosh, “Constituting the Occupation: Preventive Detention and Permanent Emergency in Kashmir” (2017) 49:3 Journal of Legal Pluralism and Unofficial Law 314 at 320; Jammu and Kashmir Coalition of Civil Society, *Human Rights Review 2016* (2017), online: <jkccs.net/annual-human-rights-review> at 9.

challenge the legitimacy of Indian state action.[38] Duschinski and Ghosh describe how the *PSA* is used illegally in practice:

> The state's deployment of PSA in Kashmir exceeds its legal limits, as demonstrated through the common practice of revolving-door detentions in which individuals are detained, released on paper but held illegally without charges, and then immediately detained again under a new detention order under PSA. This system is perpetuated through the common police practice of writing open-ended complaints, called "open" First Information Reports (FIRs), against unnamed suspects participating in a crowd accused of violent and riotous acts causing injuries to police personnel or damage to property. These open FIRs create a wide legal dragnet charging any person detained under PSA with involvement in activities that threaten public order. In such cases, the police cite numerous prior open FIR complaints in the police dossier that forms the basis of the detention order, without subjecting these open complaints to the ordinary criminal law requirements of investigation, indictment, trial, or conviction. Thus PSA is used to detain people for long periods of time on the basis of intelligence and police materials that are often not disclosed to detainees, without charging or prosecuting the detainees through the courts with a recognized criminal offense.[39]

The 1978 *PSA* is a successor to the various *Jammu and Kashmir Preventive Detention Acts*, which, through Presidential Orders issued under Article 370, were made immune to challenge for violating the Fundamental Rights provisions of the Indian constitution.[40] The relationship between Article 370 and these *Preventive Detention Acts*, and the Indian Supreme Court's analysis thereof, are central to the arguments advanced in this dissertation. Relying on the theoretical framework described below, I show that Article 370 allowed for the selective application or non-application of the Indian constitution to the State with the effect that for a period of 25 years, residents of the State had no constitutional mechanism through which to challenge the legality of preventive detentions ordered on grounds of state security.

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[38] Duschinski & Ghosh, *supra* note 37 at 320.
[39] *Ibid* at 320-321.
[40] *Ibid* at 319-320, 328-330.

Agamben: The State of Exception

My analysis relies on Giorgio Agamben's framing of the theory of the state of exception in public law in *State of Exception*. While other authors have applied this theory to Jammu and Kashmir,[41] to my knowledge, none have used the state of exception as a framework through which to understand Article 370. The notion of the 'state of exception' refers to the paradoxical situation in which the rule of law is suspended, and that suspension is itself brought about through the law, or as Agamben describes it, "the original structure in which law encompasses living beings by means of its own suspension".[42] The concept of the state of exception is inextricably linked to that of sovereignty, as Agamben notes in referring to Carl Schmitt's definition of 'the sovereign' as "he who decides on the state of exception".[43] Exception is also intrinsically tied to, and dependent on, necessity, as reflected in the ancient Roman legal maxim "*necessitas legem non habet*" [necessity has no law].[44]

The difficulty of establishing a public law theory of the state of exception is linked to this maxim and the central question Agamben seeks to answer is whether the existence of a "state of necessity", which justifies the use of exceptional measures such as martial law or emergency powers, is a question of fact, politics, or law:

> if exceptional measures are the result of periods of political crisis and, as such, must be understood on political and not juridico-constitutional grounds, then they find themselves in the paradoxical position of being juridical measures that cannot be understood in legal terms, and the state of exception appears as the legal form of what cannot have legal form. On the other hand, if the law employs the exception—that is the suspension of law itself—as its original means of referring to and encompassing life, then a theory of the state of exception is the

[41] See e.g., Duschinski, *supra* note 34 at 114-115, 120, 125; Gowhar Fazili, "Police Subjectivity in Occupied Kashmir: Reflections on an Account of a Police Officer" in " in Haley Duschinski, Mona Bhan, Ather Zia & Cynthia Mahmood, eds, *Resisting Occupation in Kashmir* (Philadelphia: University of Pennsylvania Press, 2018) 184 at 196.
[42] Agamben, *supra* note 2 at 3.
[43] *Ibid* at 1.
[44] *Ibid*.

> preliminary condition for any definition of the relation that binds and, at the same time, abandons the living being to law.[45]

The State of Necessity

Agamben ultimately rejects the idea that necessity is the factual, objective foundation underlying the invocation of exception, as "far from occurring as an objective given, necessity clearly entails a subjective judgment, and that obviously the only circumstances that are necessary and objective are those that are declared to be so".[46] Nevertheless, he acknowledges that an analysis of the legal concept of necessity remains essential to any discussion of the state of exception's meaning and structure. He notes that the adage "*necessitas legem non habet*" [necessity has no law] has been interpreted as meaning both "necessity does not recognize any law" and "necessity creates its own law" and argues that in both these seemingly opposing formulations "the theory of the state of exception is wholly reduced to the theory of the *status necessitatis*, so that a judgment concerning the existence of the latter resolves the question concerning the legitimacy of the former".[47]

While under the Roman Emperor Gratian "necessity has no law" meant that necessity could justify single instances of legal transgression – rather than a permanent state of exception – in the modern period necessity becomes the ground and source of law.[48] Agamben explores historical forms of exceptional legal measures ranging from the "Decree for the Protection of the People" in Nazi Germany to the USA Patriot Act. He notes that the state of exception has historical and linguistic analogues in the French *état de siege* or *pleins pouvoirs* and English *martial law* or *emergency powers*[49] but sticks with the expression 'state of exception' as "[t]he state of exception

[45] *Ibid* at 1 [citations omitted].
[46] *Ibid* at 29-30.
[47] *Ibid* at 24.
[48] *Ibid* at 24-26.
[49] *Ibid* at 3-4.

is not a special kind of law (like the law of war); rather, insofar as it is a suspension of the juridical order itself, it defines law's threshold or limit concept".[50]

Following a historical review of Western states' uses of exceptional law in the 20th century, Agamben concludes "[t]he differences in the legal traditions correspond in scholarship to the division between those who seek to include the state of exception within the sphere of the juridical order and those who consider it something external, that is, an essentially political, or in any case extrajuridical, phenomenon".[51] The problem is that the state of exception is paradoxical:

> If the state of exception's characteristic property is a (total or partial) suspension of the juridical order, how can such a suspension still be contained within it? How can an anomie be inscribed within the juridical order? And if the state of exception is instead only a de facto situation, and is as such unrelated or contrary to law, how is it possible for the order to contain a lacuna precisely where the decisive situation is concerned? And what is the meaning of this lacuna?[52]

His answer is that "the state of exception is neither external nor internal to the juridical order, and the problem of defining it concerns precisely a threshold, or a zone of indifference, where inside and outside do not exclude each other but rather blur with each other. The suspension of the norm does not mean its abolition, and the zone of anomie that it establishes is not (or at least claims not to be) unrelated to the juridical order".[53]

It is in this zone of indifference or anomie that Article 370 operates. Relying on threats to State security as the underlying *status necessitatis* – one which requires no objective verification – the Presidential Orders under Article 370 apply the Indian constitution to the State while simultaneously suspending the availability of constitutional rights to the State's inhabitants. This state of affairs is upheld by a judiciary that confirms the legality of the law's suspension,

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[50] *Ibid* at 4.
[51] *Ibid* at 22-23.
[52] *Ibid* at 23.
[53] *Ibid*.

positioning the legal lacuna as legitimately within the juridical order. Notably, Agamben's work focuses largely on Western legal systems, analyzing states of exception in the imperial metropoles without examining their operation in the colonies. Nasser Hussain's work bridges this gap, addressing the use of emergency powers in Britain's colonial positions, and identifying racial difference as the threshold at which those inside and outside the law are distinguished.

Hussain: Necessity and Normative Lacunae in Emergency Rule

In *The Jurisprudence of Emergency: Colonialism and the Rule of Law*, Nasser Hussain links the exceptionality of emergency powers, their justifying states of necessity and the normative lacunae in which they operate, to the rule of law and modern conceptions of sovereignty. After reviewing the theories of H.L.A. Hart, Michel Foucault, and Carl Schmitt[54], and noting the "constitutive role emergency plays alongside the rule of law in the conception of modern sovereignty" [55], Hussain argues:

> The notion that a situation of factual danger, whereby the existence of the state is threatened, allows for the suspension of the normative universe of a rule of law is provided for in almost every account of modern lawful rule. These moments invoke what one could call the "but for" clause, by which the supremacy of regular law is continuous but for the requirements of state sovereignty.[56]

Hussain notes such moments are provided for in "nearly all conceptions of lawful and legitimate government" from Locke's definition of "prerogative" as the "power to act according to discretion, for the publick good, without the prescription of the law and sometimes even against it", to Montesquieu's qualification of the conditions of "Political Liberty and the Constitution"— the

[54] Hussain, *supra* note 2 at 12-15.
[55] *Ibid* at 16.
[56] *Ibid*.

absence of discretion, and the separation of execution from judgment—with an exception: "if the legislative power believed itself endangered by some secret conspiracy against the state".[57] Hussain notes that such allowances can be found in most modern constitutions and in the "derogation provisions" of the United Nations International Covenant on Civil and Political Rights.[58]

An earlier example, on which Agamben relies as roughly analogous to the modern state of exception, is the phenomenon of the *iustitium* in the Roman Republic. Translated literally as a "standstill" or "suspension" of the law, the term *iustitium* implied "a suspension not simply of the administration of justice but of the law as such".[59] Agamben explains, "[u]pon learning of a situation that endangered the Republic, the Senate would issue a *senatus consultum ultimum* [final decree of the Senate] by which it called upon the consuls", or those acting in their stead, and in some extreme cases, all civilians, "to take whatever measures they considered necessary for the salvation of the state".[60] He notes, "[a]t the base of this *senatus consultum* was a decree declaring a *tumultus* (that is, an emergency situation in Rome resulting from a foreign war, insurrection, or civil war), which usually led to the proclamation of a *iustitium*".[61]

Suspending the Norm to Save the Law

As discussed briefly above, Agamben answers the question of whether the suspension of the juridical order is a phenomenon internal or external to that juridical order by arguing that the state of exception creates a threshold or zone of indifference or anomie, or a normative lacuna:

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[57] *Ibid* at 16-17 [footnotes omitted].
[58] *Ibid*.
[59] Agamben, *supra* note 2 at 41.
[60] *Ibid*.
[61] *Ibid*.

> Here, the lacuna does not concern a deficiency in the text of the legislation that must be completed by the judge; it concerns, rather, a suspension of the order that is in force in order to guarantee its existence. Far from being a response to a normative lacuna, the state of exception appears as the opening of a fictitious lacuna in the order for the purpose of safeguarding the existence of the norm and its applicability to the normal situation. The lacuna is not within the law [*la legge*], but concerns its relation to reality, the very possibility of its application. It is as if the juridical order [*il diritto*] contained an essential fracture between the position of the norm and its application, which, in extreme situations, can be filled only by means of the state of exception, that is, by creating a zone in which application is suspended, but the law [*la legge*], as such, remains in force.[62]

That the opening of this fictitious normative lacuna, the suspension of the juridical order, serves to protect the existence of that order, is fundamental to Hussain's understanding of emergency powers as well, as he explores in relation to the historical use of martial law in the British colonies. Like Agamben, Hussain links the necessity justifying the exception to a lacuna in the legal order:

> Martial law, like other responses to emergency, simply rested not on the authorization of ordinary law but on the legal maxim *Salus populi suprema est lex* (safety of the people is the supreme law). Notice how in such a formulation martial law is the manifestation of both the highest law and of no law at all. But while martial law is based on necessity, there are rules that can govern the perception of what constitutes necessity, and these rules are historically variable.[63]

Referring to A.V. Dicey's understanding of martial law in English jurisprudence, Hussain argues, "in order to understand the ideological and jurisprudential significance of martial law, we must read it within the general prerogative of the Crown to resort to violence to check a challenge to its authority—read it, in other words, in connection with the form of response to domestic riots and rebellions".[64] Hussain explores the exercise of such prerogative power through the institution of *posse comitatus*, comparing it with 19th century jurisprudence on Britain's "Riot Act", noting:

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[62] *Ibid* at 31.
[63] Hussain, *supra* note 2 at 102.
[64] *Ibid* at 104.

> In both cases a state of necessity is the initial justification, a post facto indemnification is often the result, and an impossible demand for a precision of force regulates the authority. This is, of course, why judges attempting to determine an abuse of authority under a colonial martial law could turn to domestic cases following riots as a legal guide. But beyond these specific connections, the responses to domestic unrest and martial law show a commonality in their discursive revelation of the law's ambivalent relation to violence—both the specific act of violence and the general effect produced by it.
>
> Because a given act of violence contains no integral difference whether executed by those under legal authority or by those set against it, the law in resorting to violence, a material act of killing, produces an intensified need for the external signature of legality in order to distinguish the two. Indeed, it is this identity between the force within law and that without that produces a situation whereby the greater the need for an immediate use of force outside the ordinary protocols of legal procedure, the greater the need for that very regulative procedure. The effect of a generalized situation of violence thus becomes a threat not to this or that property or individual right but to the law itself.[65]

He relies on Walter Benjamin's "Critique of Violence" for the argument that "the law's fear of such violence is different from its fear of crime. Crime is a transgression against the law that may be checked by it. A more general unrest threatens not so much to transgress the law as to set up an alternative logic and authority to it".[66]

Hart and Constable: Violence, Legal Authority, and the Legal/Juridical Order

Before expanding on Hussain's argument, that martial law involves the suspension of legal norms to enable the violent suppression of threats to established legal authority, I wish to explore the relationships between the legal/juridical order, legal authority, sovereignty, and violence. To this end, I turn to the works of H.L.A. Hart and Marianne Constable. In *The Concept of Law* H.L.A. Hart enunciates his theory of legal positivism. Hart distinguishes societies of "primary rules of

[65] *Ibid* at 106-107 [footnotes omitted].
[66] *Ibid* at 107.

obligation" – "simple" societies without legislatures, courts, or official authorities, governed only by custom, kinship, and social pressure – from societies with "secondary rules".[67] Societies governed only by primary rules of obligation suffer from three defects: their rules are uncertain, static, and inefficient. Hart describes three secondary rules as remedies for these defects: rules of recognition, rules of change, and rules of adjudication. Rules of recognition remedy the problem of uncertainty by providing an "authoritative mark" to identify valid primary rules.[68] Rules of change remedy the static nature of "pre-legal" societies by enabling the replacement of old primary rules with new ones.[69] Rules of adjudication confer authority on officials, empowering them to determine what the primary rules are (guided by the rules of recognition) and whether they have been violated, and granting them a monopoly on legal sanctions.[70] By unifying discrete rules and allowing for the identification of authorized rules, the authoritative mark provided by a rule of recognition introduces into a society the embryonic idea of a legal system, as well as the concept of legal validity.[71]

Responding to Hart's positivist theory, Marianne Constable notes Hart's system is governed not by a community's acceptance of its laws, but by those laws' legal validity (their acceptance by authorized officials). The rule of law means members of the society can comfort themselves with the knowledge that such authorized officials are subject to the same coercive system as the rest of society.[72] Constable argues, moreover, that the perceived validity of legal authority is established through force and domination. To demonstrate this point, Constable explores the legal mechanisms underlying the Norman Conquest and the centralization of Anglo-

[67] HLA Hart, *The Concept of Law* (Oxford: Oxford University Press, 1961) at 89-91.
[68] *Ibid* at 92-93.
[69] *Ibid*.
[70] *Ibid* at 94-95.
[71] *Ibid* at 92-93.
[72] Constable, *supra* note 2 at 73-74.

Saxon land under William the Conqueror's sovereign authority.[73] She describes how William acknowledged the customs of the conquered Anglo-Saxons, and in the process created a distinction between his own Norman law and the "law of the other".[74] This acknowledgment can be characterized as either respect for the laws of the conquered people, or as the unification of two sets of laws and two peoples (the Normans and the Anglo-Saxons) through the domination of one over the other.[75]

Constable notes however, that William's acknowledgment of the conquered Anglo-Saxons' customs *through his own will* cements his position as the land's undisputed authority. In this way his will becomes the "authoritative mark" of Hart's rule of recognition.[76] By virtue of his authoritative mark, he can explain the law of the land to the conquered Anglo-Saxons, destroying them as a distinct people by unifying them with the Normans under his authority.[77] Yet Constable emphasizes that it is William's conquest *through force* that puts him in the position of dominance from which he acknowledges the customs of the dominated in the first place.[78] His authority – the legitimacy underlying his monopoly on violence – is itself brought about through violence.

What I aim to demonstrate in this dissertation is that Article 370 functions as such an authoritative mark. Article 370 applied the Indian constitution to Jammu and Kashmir. To the extent it purported to guarantee some autonomy to the State, it did so through the will of the Centre, personified in the President of India. In practice, Article 370 served, through Presidential Orders issued under its authority, to integrate or unify the State with the rest of the Indian Union under the Indian constitution. As will be seen, challenges to this integration and to the authority under

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[73] *Ibid* at 78.
[74] *Ibid* at 80-81.
[75] *Ibid* at 81-82.
[76] *Ibid* at 83.
[77] *Ibid*.
[78] *Ibid* at 83-84.

which it has been carried out have been met with coercive force. This force was enabled by Presidential Orders issued under Article 370 that suspended the application of constitutional rights in the State. Article 370 thus allowed for the suspension of the law in its application to the State, in order to preserve the broader legal-constitutional order being applied to the State and defend the authority under which that legal order is applied. Ultimately, through its abrogation under its own authority, Article 370 allowed for the State's destruction and its simultaneous unification with the rest of the Indian Union.

This same phenomenon can be seen under the *AFSPA* as well, which, relying on a threat to the public order and disobedience of the law, allows for the law's suspension and the deployment of violence. In this regard, Hussain explains:

> What martial law does, and does terribly well, becomes clear only if we nuance the catchall phrase "law and order," distinguishing issues of force and order from issues of authority. It is the reconstitution of the general authority of the state that martial law performs, and while this involves the exercise of violence, it is a specific form of violence.[79]

Difference as Law's Limit Condition

In referring to a "specific form of violence", Hussain describes how, in the context of colonial emergency powers, the existence of the normative lacuna rests on racial difference:

> If we are to explicate the function of violence in martial law, to explicate its extreme condition, we shall have to reemphasize the limit condition to which it responds—the inscription of racial difference. The presence of race must here be more than an acknowledgment of a racial animus that would putatively explain the vigor and venom of much of the rhetoric. Rather, we must once again view race as the limit condition within the articulation of both the liberal conditions of rule and of positivist legality.[80]

[79] Hussain, *supra* note 2 at 119.
[80] *Ibid*.

Constable recognizes this when she notes that William attains his position of dominance, from which he acknowledges the customs of the dominated, by virtue of his authoritative mark, itself brought about by his violent conquest of that dominated 'other'.[81] After comparing the views of H.L.A. Hart, Walter Benjamin, and John Stuart Mill on law, violence, race, and social development,[82] Hussain returns to an earlier discussion of the 1919 Jallianwala Bagh massacre in Amritsar.[83] He discusses the historical and political context of the massacre, including economic conditions in Punjab and popular resistance to the introduction of the "Rowlatt Act"[84]. He notes that in the Hunter Committee's report on the causes of the massacre,[85] blame is specifically placed on the Gandhian civil disobedience movement, with the reasoning that "[i]n India's particular state of political development […] to permit disobedience to one law is to invite a more general and complete disobedience to all law".[86] This attitude is repeated in a passage from Lord Chelmsford to Secretary of State Edwin Montagu:

> when this movement (Civil Disobedience) was initiated, it was apparently not obvious to its promoters, as it was to all thoughtful persons, that in India in its present state of development (whatever may be the case in other countries) the unsettling effect of the advice to the public in general to break selected laws was likely to lead to a situation which might involve the overthrow of all law and order.[87]

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[81] Constable, *supra* note 2 at 80-84.
[82] *Ibid* at 119-124.
[83] In response to a protest against the Rowlatt Act and the arrest of pro-independence activists, British forces opened fire on civilians in a confined space, killing between 379 and over 1,000 people: see Javed Iqbal Wani, "'Using a Blacksmith's Hammer to Crush a Fly': Jallianwala Bagh, Public Order and Popular Protests in late Colonial India", (2020) 14:1-2 History and Sociology of South Asia 7.
[84] *Anarchical and Revolutionary Crimes Act, 1919*, online (pdf): <https://www.indiacode.nic.in/repealed-act/repealed_act_documents/A1919-11.pdf>.
[85] *Disorders Inquiry Committee Report (1919-1920)*, (New Delhi: Indian Institute of Applied Political Research, Publication Department, 2006), online: <indianculture.gov.in/rarebooks/report-disorders-inquiry-committee-1919-1920>.
[86] Hussain, *supra* note 2 at 127.
[87] *Ibid* at 127, n 97, citing "Letter from the Government of India, Home Department (Political), to the Right Honourable Edwin Montagu, His Majesty's Secretary of State for India, No. 2, dated Simla, 3rd May, 1920," in UK, Parliament, *Correspondence Between the Government of India and the Secretary of State for India on the Report of Lord Hunter's Committee* (Cmd 705, 1920) at 22.

Hussain writes, "[a] developmental scale of judicial subjects is set up here, whereby more developed (read civilized) subjects are able to distinguish between specific laws, which may appear to them to be wrong for some reason, and the general authority of the state that subtends those laws. Thus, they are able to selectively "disobey" a specific law without threatening the overall authority of the state."[88] In India, by contrast, "[t]o call for even the nonviolent disobedience of the Rowlatt Act is to unleash a more general "disturbance" that threatens the authority of the state. Thus, the real need for martial law is not merely to put down this or that outbreak of violence but to restore this authority."[89]

Restoring the General Authority of the State

Hussain argues that, "[o]nce one explicates the state's understanding of this "real" need for martial law, the logic of its violent actions becomes clearer: not the punishment of the guilty, not the end to specific transgressions, but the restoration of a general condition."[90] This "general condition", he notes, "cannot be reduced to notions of public peace and order".[91] Rather:

> Martial law seeks to effect not just the restoration of order but the restoration of the general authority of the state. In doing so, it takes advantage of the absence of normative constraints on power not just to punish *more*—which it may or may not do—but to punish out of a different logic. This punishment, if we can even call it that, is not caused by questions of innocence or guilt or a specific transgression of the law, nor is it particularly rehabilitory or retributive in its effect. Rather, it is a purely nonmediate form, purely performative, the purpose of which is the sheer manifestation of power itself. It is the form of violence that Walter Benjamin called "mythical violence." It is in this sense, perhaps, that martial law "saves" the state, by re-creating the conditions for the possibility of its existence.[92]

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[88] Hussain, *supra* note 2 at 127.
[89] *Ibid*.
[90] *Ibid* at 128.
[91] *Ibid*.
[92] *Ibid* at 125 [footnotes omitted, emphasis in original].

While the following sections do not focus on invocations of martial law specifically, I aim to demonstrate that Jammu and Kashmir's accession to India; the enactment of Article 370; the extension of the Indian constitution to Jammu and Kashmir under Article 370; the suspension of civil liberties in the State through Article 370; and the Indian Supreme Court's interpretation of these legal acts, all rest on a similar exceptional logic. Again and again we will see assertions of emergency or necessity used to justify the suspension of legal rights in the State. These suspensions create zones of indifference or anomie, in which the law's suspension rests on its selective application. We will see that in these instances where the law suspends itself to facilitate the deployment of coercive power, the ultimate justification is the need to protect the general authority of the state – whether that state be the Indian Union, the Indian State of Jammu and Kashmir, or a colonial-era predecessor to either. Further, underlying these various suspensions and applications of law and state power is the inscription of difference – often religious difference – as a limit condition to which the state of exception responds.

The Princely State of Jammu and Kashmir

Any discussion of Article 370 and of Jammu and Kashmir's legal/constitutional relationship with India requires an examination of the historical background to the State's accession to the Indian Union. This historical overview thus begins with the creation of the Princely State of Jammu and Kashmir – the entity that in 1947 was divided into the Indian State of Jammu and Kashmir and the Pakistani administrative region of Azad [free] Jammu and Kashmir. It explores how the Dogra Maharajas, under the indirect rule of the British, privileged the interests of Hindus over the Kashmir Valley's predominantly Muslim peasantry. It examines the Maharaja's creation of the category of "hereditary state subject", the predecessor to the protections enshrined in Article 35A of the Indian constitution. Finally, it explains how the religious, regional, and political divisions in the princely state, along with the repressive policies of the Dogra Maharajas, culminated in rebellion and war on the eve of the subcontinent's partition. This historical overview thus provides the backdrop to Jammu and Kashmir's accession to India, and to the special status accorded to the State under Article 370.

The First Anglo-Sikh War

In the early 19th century, the Kashmir Valley had been part of Maharaja Ranjit Singh's Sikh Empire. As the Sikh Empire collapsed into chaos following Ranjit Singh's death in 1839 with various factions vying for power, the British East India Company (or "the Company") intervened, beginning the First Anglo-Sikh War in 1845. The Empire's demise posed a threat to the Company, as the Sikhs had served as a protective buffer against Russian and Afghan territorial expansion. The Company won the war easily, thanks in part to Gulab Singh, a Dogra chieftain and favourite former vassal in Ranjit Singh's court, whom the Maharaja had made Raja of Jammu in 1822. Gulab

Singh had been sidelined in the factional power struggles following the Maharaja's death and remained neutral during the war.[93]

The Company held the Sikhs responsible for the war, accusing them of having breached a treaty of friendship the British had signed with Ranjit Singh in 1809. As compensation, in February 1846 the Company demanded an enormous indemnity from Dalip Singh, one of Ranjit Singh's sons. Still wanting to keep the Sikhs as a territorial buffer and too weak to rule over them directly, the Company divided the territory of the Sikh Empire through two treaties. The first was the Treaty of Lahore, signed on March 9, 1846 between the Company and the Sikhs. It provided that Dalip Singh would succeed Ranjit Singh as Maharaja of the Sikh Empire. As Dalip Singh was unable to pay the indemnity, the Lahore Treaty required him instead to cede a large portion of the Sikh Empire's former territory, including the Kashmir Valley. The second treaty, the Treaty of Amritsar, was signed on March 16, 1846 between the Company and Gulab Singh. Through it, the Company sold the territory ceded by Dalip Singh, for half the price of the indemnity demanded of him, to Gulab Singh and his heirs as a reward for his neutrality during the war, creating the Princely State of Jammu and Kashmir and making Gulab Singh its first Maharaja.[94]

British India and the Princely States

Ruling Jammu and Kashmir indirectly allowed the British to maintain a buffer between themselves and the Russians and Afghans without having to commit their own resources, while at the same time keeping the Sikhs in a weakened state. The Company had also seen the value of having local rulers as allies when, during the Sepoy Rebellion of 1857, many kings served as sources of support against the rebels. Following the Rebellion, on August 2, 1858, the British Parliament passed the

[93] Rai, *Hindu Rulers, Muslim Subjects*, *supra* note 11 at 21-27.
[94] *Ibid* at 18, 24-27.

Government of India Act, 1858, transferring possession of the Company's territories to Queen Victoria, to be governed by the Queen and in her name.[95] As Parliament clarified through the *Interpretation Act 1889*, this territory of "British India" did not include the "territories of any native prince or chief under the suzerainty of Her Majesty" (the "princely states").[96] The 1858 *Act* was followed by Queen Victoria's Proclamation of November 1, 1858, which provided for religious freedom and equal protection of the law for the Queen's Indian subjects. While the territory of British India was to be governed as an example of "modern" British rule, enshrining values of religious freedom and tolerance, the rulers of the princely states under the Crown's indirect control were given greater autonomy, particularly regarding matters of religious governance.[97]

In practice, the degree of autonomy granted to the princely states varied. All princely states were sent a "Resident" from the colonial government to ensure the preservation of British interests.[98] The only exception was Gulab Singh, who, due to his neutrality in the First Anglo-Sikh War, was given greater rein. As a result, the Princely State of Jammu and Kashmir was not subject to a British Resident until the rule of its third Maharaja, Pratap Singh.[99] Whatever the variation in the internal autonomy granted to princes, by 1877 they were stripped of the right to wage war and as a result, the territory of each state became fixed and the authority of each prince was bound to that territory.[100]

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[95] *Government of India Act, 1858* (UK), s I.
[96] *Interpretation Act 1889* (UK), s 18(4)-(5).
[97] Rai, *Hindu Rulers, Muslim Subjects*, *supra* note 11 at 80-85.
[98] *Ibid* at 58.
[99] *Ibid* at 58, 134-136.
[100] *Ibid* at 27-33, 110.

Legitimizing Dogra Rule

The Princely State of Jammu and Kashmir was thus a colonial construction, the inhabitants of which had never subscribed to the arbitrary borders now imposed upon them. Nor did the people of Gulab Singh's newly acquired territory in the Kashmir Valley have any connection to him or to the other regions in his domain. Given the lack of historical or cultural connection between the Hindu Dogra rulers and the predominantly Muslim Kashmir Valley, the British advised the first Dogra Maharajas – Gulab Singh and later his son, Ranbir Singh – to ground the legitimacy of their rule in their Hindu faith and Rajput ancestry.[101] Orientalist historians at the time divided the history of India into three eras: the "Rajput" – an ancient era of "traditional" Hindu kings; the "Muhammadan" – an interruption to traditional Hindu rule, brought on by Muslim invaders, culminating in the Mughal Empire; and the "Mahratta" – the modern return to traditional Hindu rule.[102]

Advised by the British that the Dorgra Maharajas' legitimacy as rulers lay in their Hindu-ness, Gulab Singh sought to link his rule to his Hindu faith through, for example, the criminalization of cow-slaughter (forbidden for Hindus but allowed in Muslim diets).[103] Gulab Singh and his successors also sought allies among Kashmiri Pandits (the Hindu Brahmin minority of the Kashmir Valley), drawing disproportionately on them to staff the state administration, particularly the revenue department.[104] His son and successor, Ranbir Singh, expanded and formalized the association of Hindu-ness with the Dogras' sovereign legitimacy, devising a system of hierarchical regulation for Hindu temples that linked each temple to himself as Maharaja. He transformed the Dharmarth trust, a private fund put in place under Gulab Singh, into a government

[101] *Ibid* at 66-79, 80-82, 89-92, 113-114.
[102] *Ibid* at 89-90.
[103] *Ibid* at 100-101.
[104] *Ibid* at 40-41, 50.

department for the purpose of supervising and advancing Hindu life in the state, particularly through the maintenance and improvement of temples frequented by Pandits.[105]

The Pratap Code

The British later reversed their position, fearing Muslim rebellion, and attempted to depose the third Dogra Maharaja, Pratap Singh. Pratap Singh was seen as weak and ineffectual and the British wanted to shift away from Hindu identity as the basis of Dogra rule, fearing Muslim disaffection might lead to a repeat of the 1857 rebellion with Kashmiris receiving support from Muslims in Afghanistan. The Kashmir Valley suffered a devastating famine from 1877-1879 that disproportionately affected the predominantly Muslim peasantry. With the stated purpose of ensuring just treatment for the Muslim population, the British appointed a Resident with almost limitless powers to enact various financial reforms – principally, dismantling the Dogra monopoly on trade and opening up the Kashmiri market to British merchants. The Maharaja was removed from power through forged letters presented by the Resident that implicated the Maharaja in a plot with Czarist Russia. Although he was later reinstated, the British would now seek to exercise a greater deal of authority in matters of the state.[106]

Seeking to secure his place on the throne against the British, Pratap Singh issued the Pratap Code, a regulation to protect the privileges of Dogra Hindus by providing them greater land access and exemptions from firearm licencing requirements, certain taxes, and *begar* – a system of enforced labour. Some of these privileges, such as exemptions from certain land succession payments, were later extended to Kashmiri Pandits as well.[107] Certain groups were exempted from

[105] *Ibid* at 110-111, 124-126.
[106] *Ibid* at 131-137
[107] *Ibid* at 141.

begar, such as the urban Muslim artisanal classes, and cultivators working on lands owned by Pandits, Sikhs, Muslim religious figures, and the Dharmarth department. In practice, exemption from *begar* was harder to obtain for Muslims and the burden of unpaid labour fell on the predominantly Muslim cultivating classes, who often had to buy exemptions from Pandit revenue officials in exchange for their occupancy rights. Muslim cultivators working on *begar*-exempt lands still had to provide produce to the revenue officials, in addition to taxes owed to the revenue department and payments into the Dharmarth trust.[108]

Revenue officials also expropriated lands from Muslims using fabricated territory disputes that required the state to take control of lands and lease them as *chaks*, large tracts of "waste" land (land not being cultivated by the state through landowners) assigned mostly to Hindus. A special service grant was devised to encourage Dogras from Jammu to settle in the Kashmir Valley. While these grants were meant to allow the Dogra settlers to acquire salaries in the form of produce from the villages under their control, in practice they were often used to misappropriate revenues collected from villages.[109] When the Kashmir Valley was hit by a famine, in which not a single Pandit died despite half the population of Srinagar (the State's summer capital in the Valley) being wiped out, the Resident determined that the damage caused by the famine was a result of the failure of the mostly Pandit landowners to protect Muslim cultivators. The State revenue department had systematically exploited and punished cultivators for their failure to provide sufficient payments. The Dogra administration had also manipulated prices of staple products with the effect that Muslim cultivators had to sell to the State at reduced prices and buy at elevated prices.[110]

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[108] *Ibid* at 154-158.
[109] *Ibid* at 158-162.
[110] *Ibid* at 148-153.

Publication Bans and Hereditary State Subjects

In the late 19th and early 20th centuries, fearing rising nationalist movements across the subcontinent, the British encouraged Pratap Singh to crack down on defiance in the State. Newspaper publication was banned and political organization through public meetings was prohibited, except through religious and social reform societies. Such societies required State approval for their establishment and had to explicitly reject any intention of engaging in political activity. The prohibitions on newspaper publication and political organization in the Princely State remained in place until the Glancy Commission issued its report in 1932, discussed below. As a result, political organization against the State took a religious form. Rivalries between Muslim religious leaders and disputes between their followers provided Pratap Singh with a justification for further restricting sermons by Muslim leaders in the name of maintaining public order, for example by requiring 15 days' notice be given before preaching.[111]

This period also saw the creation of the legal category of "hereditary state subjects" – a precursor to Article 35A of the Indian constitution. In the late 19th century, the Dogra regime increasingly began hiring Hindus from Punjab to fill administrative posts. This was spurred on by the regime's attempt to modernize and rationalize its administration, under pressure from the British. As part of this process, the Princely State's court language was changed from Persian to Urdu, with which Pandits were less familiar. Hindus from Punjab had greater experience working in the British Indian civil service and political societies formed by Punjabi Hindus received increased patronage from Pratap Singh in the early 20th century. Kashmiri Pandits thus began organizing their own societies, calling for restrictions on hiring of non-Kashmiris in the State administration and agitating against Punjabi Hindu-dominated reform movements like the Arya

[111] *Ibid* at 213, 227, 238-239, 261.

Samaj. In 1899 the State Viceroy issued instructions that *mulkis* (natives) be given preference in State employment but this act proved ineffective, as no definition of *mulki* was given. In 1912 the State provided a legal definition to the term 'state subject', linking it to the ownership of land in Jammu and Kashmir, residence in the State for more than 20 years, or employment in the administrative service for more than 10 years. This definition left Pandits unsatisfied, as most Punjabi Hindus had lived in the State for at least 20 years and were captured by the new definition. Finally, in 1927, Pratap Singh's successor Hari Singh instituted a new definition of 'state subject', which was a hereditary category and included all persons born and residing in the State before Gulab Singh's reign, as well as all persons settled and permanently residing in the State since before 1885. Any person who did not meet that definition would not be granted employment in the State administration or allowed to purchase agricultural land in the State.[112]

The Glancy Commission, Sheikh Abdullah, and the National Conference

Religious and political tensions came to a boiling point in the early 1930s. Kashmiri Muslims had begun mobilizing for greater access to education and employment in the State administration in the early 1900s.[113] By mid-1931, rumours were circulating of the Maharaja's officials deliberately mistreating Muslims in Jammu. One such rumour which contributed significantly to rising tensions was that a Hindu police constable had prevented a Muslim subordinate from performing his prayers and thrown his Quran to the ground. Rumours were also spreading amongst Kashmiri Hindus – threatened by increasingly organized expressions of Muslim discontent – including a rumour that the Maharaja was going to start permitting cow-slaughter. Then there was the arrest and trial of Abdul Qadir, a Muslim man who had made an inflammatory speech critical of the

[112] *Ibid* at 243-253.
[113] *Ibid* at 254-256.

Dogras and called for violence against Hindus. On the date of his trial, July 13, 1931, a crowd gathered and attempted to enter the jail to protest his prosecution. Police fired on the crowd and a riot broke out in which 22 demonstrators and one policeman were killed.[114]

The Kashmir Valley was facing economic depression beginning in 1929, which was exacerbated by a food shortage in 1931 when the year's rice crop was devastated by floods and disease. In Srinagar, the urban poor's access to affordable food was further reduced by landowners hoarding meagre crops in response to the shortage. The harvest was better in 1932 and the State had started importing rice from British India, both of which led to a decline in the price of Kashmiri rice. While this benefited the urban poor, it was disastrous for rural cultivators. Jammu faced similar economic problems. The price of land had been increasing throughout the 1920s and by 1930 was far out of proportion with the decreasing price of agricultural goods. The State responded to the increase in land prices, which it saw as an indication of growing prosperity, by increasing the already high land taxes by 14.4% in a number of districts in southern Jammu province. The predominantly Muslim cultivators in the Mirpur *tehsil* of Jammu had lost significant sources of income. They had formerly supplemented their agricultural income with wages earned outside the State, particularly by working on large infrastructure projects in British India, which were suspended in 1931 due to economic depression. Many had also served in large numbers in the British army in World War One and were now discharged and unemployed.[115]

Muslim discontent in the two provinces was not unified, in part because political mobilization in the State was framed through the rivalry between the *Ahrar* and *Ahmediya* Muslim sects. In Jammu, organization was spurred on by *Ahrar* Muslims from Punjab. Punjab had been the major source of political organizations and newspaper reporting in Jammu and Kashmir, owing

[114] *Ibid* at 258-259.
[115] *Ibid* at 261-265.

to the Princely State's ban on both, in place until 1932. Organized by *Ahrars*, Muslims in Jammu and particularly in Mirpur agitated against excessive taxation in an "anti-revenue" campaign. The State responded in 1932 with revenue collectors forcibly extracting payment from the cultivators. The anti-revenue campaign spread and continued until 1934, with riots breaking out and attacks on State revenue officials and money-lenders – predominantly Hindus but Muslims and Sikhs faced violence as well.[116]

It is in this politically charged environment that Sheikh Mohammad Abdullah, later the post-independence State's first Prime Minister, came to the fore as a political force agitating for the rights of Kashmiri Muslims. He had gained popularity in Srinagar throughout the 1920s as a preacher with ties to the *Ahmediya* movement. He also built his political reputation through ties with the All India Muslim Kashmiri Conference, formed in Punjab in 1911 and later renamed the All India Kashmir Committee following the July 1931 violence in Srinagar. By September 1931, Sheikh Abdullah's growing popularity became a concern for the British, who feared spillover effects on communal tensions in the rest of India and especially Punjab. The British pressured the Dogra state to form a body to investigate and remedy Muslim grievances. In October 1931, the Maharaja formed a commission of enquiry headed by Bertrand J. Glancy, a senior member of the Indian Political Service. The Glancy Commission invited submissions from representatives of the State's religious communities, including Sheikh Abdullah, who gathered evidence and presented testimony to the Commission, using his representative capacity to build support amongst wide swathes of Kashmiri Muslims. The Commission recommended an end to the State's prohibitions on newspaper publishing and on forming political parties, and the State accepted both recommendations in 1932. Sheikh Abdullah took advantage of this change by forming the All

[116] *Ibid* at 265.

Jammu and Kashmir Muslim Conference in October 1932, which he used to reinforce his widening support base.[117] Sheikh Abdullah and his colleagues in the Muslim Conference, Mirza Afzal Beg and Bakshi Ghulam Mohammad, called for the establishment of responsible government and reductions to the land revenue collection rate and to the rates charged by money-lenders. They collected testimony from Muslim cultivators and labourers in the collapsing silk trade and campaigned on a platform that equated anti-capitalism with anti-Pandit and anti-Hindu sentiment, emphasizing the Hindu minority's dominance in landowning, administrative, and managerial positions, and criticizing the ongoing practice of *begar*.[118]

Responding to another recommendation of the Glancy Commission, in 1934 the Maharaja promulgated a constitution for the State, which provided for a legislative assembly known as the Praja Sabha.[119] He enacted a further State constitution in 1939, which clarified that all constitutional powers – legislative, executive, and judicial – were inherent in and remained with the Maharaja.[120] The Praja Sabha had limited powers and was made up of 75 members: 33 elected, 12 official, and 30 nominated. The 33 elected seats were divided into separate electorates, with 21 seats reserved to Muslims, 10 to Hindus, and 2 to Sikhs. As the non-elected members of the assembly retained a majority, Sheikh Abdullah and the Muslim Conference recognized they needed to form alliances with non-Muslims constituencies and began to secularize some of their previously anti-Hindu rhetoric. They began trying to ally with Kashmiri Pandits on a regional basis against the Dogra regime.[121] When the Dogra regime began replacing Pandits in administrative positions with Hindus from Punjab, Sheikh Abdullah renamed the Muslim Conference the All

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[117] *Ibid* at 267-270.
[118] *Ibid* at 271-274.
[119] *Ibid* at 274.
[120] Abhijit Bhattacharyya, "Hari Singh's 1939 constitution in J&K marked a first in South Asia", Op-Ed, *Deccan Chronicle* (5 September 2019), online: <deccanchronicle.com>; see also *Prem Nath Kaul v State of J&K*, 1959 AIR 749, 1959 SCR Supl. (2) 270 (Indian Kanoon), online: <indiankanoon.org/doc/816126/> at 270-271, 274, 288.
[121] Rai, *Hindu Rulers, Muslim Subjects*, *supra* note 11 at 274-275.

Jammu and Kashmir National Conference. He formed an alliance with the Indian National Congress and in the mid-1940s began the 'Quit Kashmir' movement, modeled on the Congress's 'Quit India' movement. He called on Pandits to join in anti-colonial and anti-Dogra resistance (though the majority rejected this alliance). Arguing that Kashmiris, both Hindu and Muslim, were being disadvantaged by the foreign rule of the Dogras, who had purchased the Kashmir Valley from the British in the 1846 Treaty of Amritsar, Sheikh Abdullah proposed a secular nationalist alliance of all Kashmiris.[122]

The Indian Independence Act, 1947

The *Indian Independence Act, 1947*[123] provided that on August 15, 1947, two independent Dominions of India and Pakistan would come into existence, and described the territories of British India that would form part of each Dominion. Section 7 provided that on that date, British suzerainty over the "Indian States" (the former princely states) would also lapse. Section 8 empowered the Governor General of India to adapt the *Government of India Act, 1935*[124] to serve as India's interim constitution until the enactment of a new constitution by the Constituent Assembly of India. The *Government of India Act, 1935* thus served as India's interim constitution from August 15, 1947 to January 25, 1950.[125] Subsections 6(1) and (2) of the *Government of India Act, 1935* – as amended by the *India Provisional Constitution and Provincial Legislatures*

[122] *Ibid* at 274-275, 280-281.
[123] *Indian Independence Act 1947* (UK), 10 & 11 Geo VI, c 30, cited in Noorani, *supra* note 10 at 32-35.
[124] *Government of India Act, 1935* (UK), online (pdf): <legislation.gov.uk/ukpga/1935/2/pdfs/ukpga_19350002_en.pdf>.
[125] Noorani, *supra* note 10 at 3.

(Amendment) Order, 1947, and the *India Provisional Constitution (Second Amendment) Order, 1947* – provided that:[126]

> (1) An Indian State shall be deemed to have acceded to the Dominion if the Governor-General has signified his acceptance of an Instrument of Accession executed by the Ruler thereof whereby the Ruler on behalf of the State:—
>
> (a) declares that he accedes to the Dominion with the intent that the Governor-General, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall, by virtue of his Instrument of Accession, but subject always to the terms thereof, and for the purposes only of the Dominion, exercise in relation to the State such functions as may be vested in them by order under this Act; and
>
> (b) assumes the obligation of ensuring that the effect is given within the State to the provisions of this Act so far as they are applicable therein by virtue of the Instrument of Accession.
>
> (2) An Instrument of Accession shall specify the matters which the Ruler accepts as matters with respect to which the Dominion Legislature may make laws for the State, and the limitations, if any, to which the power of the Dominion Legislature to make laws for the State, and the exercise of the executive authority of the Dominion in the State, are respectively to be subject.

Rebellion in Poonch and Mirpur

Jammu and Kashmir's accession to India took place in the context of the First Indo-Pak War. Understanding the history of the anti-Dogra insurgency that started the war is crucial for contextualizing Jammu and Kashmir's constitutional relationship with India. The insurgency began in the district of Poonch. Muslims in Poonch had contributed significant forces to the British army during World War II and to the Jammu and Kashmir State forces after the war. Many in Poonch felt an affinity to the newly forming Pakistan, with whom they shared cultural and religious connections and historic trade routes. Through the spring and early summer of 1947, they

[126] *Government of India Act 1935* (UK), s 6(1)—(2), as adapted by *The India (Provisional Constitution) Order 1947* (India) [as amended by the *India Provisional Constitution and Provincial Legislatures (Amendment) Order 1947* and the *India Provisional Constitution (Second Amendment) Order 1947*], cited in Noorani, *supra* note 10 at 36-37.

organized a "no tax" campaign, protesting their exploitation by the Dogra regime's revenue agency. Clashes between Jammu and Kashmir State forces and former soldiers in Poonch increased in June and the Maharaja imposed martial law. The violence of partition, recounted in the stories of fugitives from Punjab, exacerbated tensions and intensified communal violence. Muslims were displaced from their homes to make space for Hindus and Sikhs coming from Pakistani Punjab and there were reports that former Muslim soldiers in Poonch and neighbouring Mirpur were being disarmed – their weapons given to Hindus and Sikhs.[127]

Between September and October 1947, Muslims in Poonch and Mirpur revolted against the Maharaja's rule. The rebels sought help from Pashtun tribespeople in newly formed Pakistan who came to their aid, organized and supported unofficially by lower-level soldiers of the Pakistani army. Maharaja Hari Singh called for military aid from the Indian government in putting down the rebels and their allies from Pakistan. Thus began the First Indo-Pak War, which did not end until a ceasefire was declared on December 31, 1948.[128] While Maharaja Hari Singh wanted Jammu and Kashmir to remain an independent nation, India's military support was conditional on the Princely State's accession to India. In October 1947, the Maharaja signed the Instrument of Accession, which would form the basis of the Indian State of Jammu and Kashmir's constitutional relationship with India, later codified in Article 370.[129]

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[127] Suvir Kaul, ""'An' You Will Fight, Till the Death of it….": Past and Present in the Challenge of Kashmir" (2011) 78:1 Social Research 173 at 187; Alastair Lamb*, Kashmir: A Disputed Legacy, 1846-1990* (Oxford: Oxford University Press, 1991) at 121-125.
[128] Kaul, *supra* note 127 at 187; Lamb, *supra* note 127 at 143-144; Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War*, 5th ed (London: IB Tauris, 2021) at 41-43, 49-52; Christopher Snedden, *Kashmir: The Unwritten History* (India: HarperCollins, 2013) at 180-181.
[129] Kaul, *supra* note 127 at 189.

The Instrument of Accession

The Instrument of Accession, signed by Maharaja Hari Singh on October 26, 1947, included 9 provisions:[130]

> 1. I hereby declare that I accede to the Dominion of India with the intent that the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall, by virtue of this my Instrument of Accession, but subject always to the terms thereof, and for the purposes only of the Dominion, exercise in relation to the State of … (hereinafter referred to as 'this State') such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India on the 15th day of August 1947 (which Act as so in force is hereinafter referred to as 'the Act').
>
> 2. I hereby assume the obligation of ensuring that due effect is given to the provisions of the Act within this State so far as they are applicable therein by virtue of this my Instrument of Accession.
>
> 3. I accept the matters specified in the Schedule hereto as the matters with respect to which the Dominion Legislature may make laws for this State.
>
> 4. I hereby declare that I accede to the Dominion of India on the assurance that if an agreement is made between the Governor-General and the Ruler of this State whereby any functions in relation to the administration in this State of any law of the Dominion Legislature shall be exercised by the Ruler of this State, then any such agreement shall be deemed to form part of this Instrument and shall be construed and have effect accordingly.
>
> 5. The terms of this my Instrument of Accession shall not be varied by any amendment of the Act or of the Indian Independence Act, 1947, unless such amendment is accepted by me by an Instrument supplementary to this Instrument.
>
> 6. Nothing in this Instrument shall empower the Dominion Legislature to make any law for this State authorising the compulsory acquisition of land for any purpose, but I hereby undertake that should the Dominion for the purposes of a Dominion law which applies in this State deem it necessary to acquire any land, I will at their request acquire the land at their expense or if the land belongs to me transfer it to them on such terms as may be agreed, or, in default of agreement, determined by an arbitrator to be appointed by the Chief Justice of India.

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[130] *Instrument of Accession of Jammu and Kashmir State dated 26 October, 1947*, cited in Noorani, *supra* note 10 at 37-39.

> 7. Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future constitution.
>
> 8. Nothing in this Instrument affects the continuance of my sovereignty in and over this State, or, save as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.
>
> 9. I hereby declare that I execute this Instrument on behalf of this State and that any reference in this Instrument to me or to the Ruler of the State is to be construed as including a reference to my heirs and successors.

The Schedule, referred to in clause 3, specified the matters regarding which the Dominion Legislature could make laws for the State as follows:[131]

> Defence
>
> 1. The naval, military and air forces of the Dominion and any other armed force raised or maintained by the Dominion; any armed forces, including forces raised or maintained by an Acceding State, which are attached to, or operating with, any of the armed forces of the Dominion.
>
> 2. Naval, military and air force works, administration of cantonment areas.
>
> 3. Arms; firearms; ammunition.
>
> 4. Explosives.
>
> External Affairs
>
> 1. External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India.
>
> 2. Admission into, and emigration and expulsion from, India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India or subjects of any acceding State; pilgrimages to places beyond India.
>
> 3. Naturalisation.
>
> Communications

[131] *Ibid* at 39-41.

1. Posts and telegraphs, including telephones, wireless, broadcasting, and other like forms of communication.

2. Federal railways; the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fares, station and service terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administrations of such railways as carriers of goods and passengers.

3. Maritime shipping and navigation, including shipping and navigation on tidal waters; Admiralty jurisdiction.

4. Port quarantine.

5. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.

6. Aircraft and air navigation; the provision of aerodromes; regulation and organisation of air traffic and of aerodromes.

7. Lighthouses, including lightships, beacons and other provisions for the safety of shipping and aircraft.

8. Carriage of passengers and goods by sea or by air.

9. Extension of the powers and jurisdiction of members of the police force belonging to any unit to railway area outside that unit.

Ancillary

1. Elections to the Dominion Legislature, subject to the provisions of the Act and of any Order made thereunder.

2. Offences against laws with respect to any of the aforesaid matters.

3. Inquiries and statistics for the purposes of any of the aforesaid matters.

4. Jurisdiction and powers of all courts with respect to any of the aforesaid matters but, except with the consent of the Ruler of the Acceding State, not so as to confer any jurisdiction or powers upon any courts other than courts ordinarily exercising jurisdiction in or in relation to that State.

The Instrument was accompanied by a letter from the Maharaja to the Governor-General of India, Lord Mountbatten, emphasizing that the Instrument was signed in a state of emergency created by

the Poonch rebellion and Pasthun incursions and explaining the process by which the Maharaja arrived at the decision to accede:[132]

> My Dear Lord Mountbatten,
>
> I have to inform Your Excellency that a grave emergency has arisen in my State and request immediate assistance of your Government.
>
> As Your Excellency is aware the State of Jammu and Kashmir has not acceded to either the Dominion of India or to Pakistan. Geographically my State is contiguous to both the Dominions. It has vital economically and cultural links with both of them. Besides my State has a common boundary with the Soviet Republic and China. In their external relations the Dominion of India and Pakistan cannot ignore this fact.
>
> I wanted to take time to decide to which Dominion I should accede, whether it is not in the best interest of both the Dominions and my State to stand independent, of course with friendly and cordial relations with both.
>
> I accordingly approached the Dominions of India and Pakistan to enter into a standstill agreement with my State. The Pakistan Government accepted this arrangement. The Dominion of India desired further discussion with representatives of my Government. I could not arrange this is view of the developments indicated below. In fact the Pakistan Government under the standstill agreement are operating Post and Telegraph system inside the State.
>
> Though we have got a standstill agreement with the Pakistan Government, that Government permitted steady and increasing strangulation of supplies like good, salt and petrol to my State.
>
> Afridis, Soldiers in plain clothes, and desperadoes, with *modern* weapons, have been allowed to infilter into the State at first in Poonch area, then in Sialkot and finally in mass in the area adjoining Hazara district on the Ramkote side. The result has been that the limited number of troops at the disposal of the State had to be dispersed and thus had to face the enemy at several points simultaneously that is has become difficult to stop the wanton destruction of life and property and looting. The Mahoora Power House which supplies the electric current to the whole of Srinagar has been burnt. The number of women who have been kidnapped and raped makes my heart bleed. The wild forces thus let loose on the State are marching on with the aim of capturing Srinagar, the Summer Capital of my Government, as a first step to overrunning the whole State.

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[132] "The Maharaja's Letter to the Governor-General of India, Lord Mountbatten, on 26 October 1947 and the Governor-General's Letter in Reply Dated 27 October 1947", in Noorani, *supra* note 10 at 41-43.

> The mass infiltration of tribesmen drawn from the distant areas of the N.-W.F. Province coming regularly in Motor Trucks using Mansehra-Muzaffarbad road and fully armed with up-to-date weapons cannot possibly be done without the knowledge of the Provincial Government of the N.-W.F. Province and the Government of Pakistan. In spite of repeated appeals made by my Government no attempt has been made to check these raiders or stop them from coming to my State. In fact both the Pakistan Radio and Press have reported these occurrences. The Pakistan Radio even put out a story that a Provisional Government has been set up in Kashmir. The people of my State both the Muslims and non-Muslims generally have taken no part at all.
>
> With the conditions obtaining at present in my State and the great emergency of the situation as it exists I have no option but to ask for help from the Indian Dominion. Naturally they cannot send the help asked for by me without my State acceding to the Dominion of India. I have accordingly decided to do so and I attach the Instrument of Accession for acceptance by your Government. The other alternative is to leave my State and my people to freebooters. On this basis no civilised Government can exist or be maintained. This alternative I will never allow to happen so long as I am the Ruler of the State and I have life to defend my country.
>
> I may also inform Your Excellency's Government that it is my intention at once to set up an Interim Government and ask Sheikh Abdulla to carry the responsibilities in this emergency with my Prime Minister.
>
> If my State has to be saved immediate assistance must be available at Srinagar. Mr. Menon [V.P. Menon, then Secretary to the Government of India in the Ministry of the States] is fully aware of the situation and he will explain to you if further explanation is needed.
>
> In haste and with kindest regards.
>
> Hari Singh

Lord Mountbatten accepted the Maharaja's Instrument of Accession on behalf of the Government of India by letter dated October 27, 1947. He referred to the "special circumstances" in Jammu and Kashmir, to the Maharaja's desire to form an interim government headed by Sheikh Abdullah, and crucially, to the Indian government's intention to have Jammu and Kashmir's accession to

India confirmed by reference to the will of its people, once law and order are restored and the soil cleared of "invaders": [133]

> My Dear Maharaja Sahib,
>
> Your Highness's letter, dated the 26th October has been delivered to me by Mr. V.P. Menon. In the special circumstances mentioned by Your Highness, my Government have decided to accept the accession of Kashmir State to the Dominion of India. Consistently with their policy that, in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government's wish that, as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the State's accession should be settled by a reference to the people. Meanwhile, in response to Your Highness's appeal for military aid, action has been taken today to send troops of the Indian Army to Kashmir to help your own forces to defend your territory and to protect the lives, property and honour of your people.
>
> My Government and I note with satisfaction that your Highness has decided to invite Sheikh Abdulla to form an Interim Government to work with your Prime Minister.
>
> Mountbatten of Burma

The End of the War

In January 1948, India brought the matter to the United Nations Security Council and requested the Council to prevent Pakistan's continued incursions into the newly acceded State. The Security Council passed Resolution 39, forming the United Nations Commission for India and Pakistan to investigate the complaints.[134] The Security Council adopted Resolution 47 in April 1948, giving the Commission the task of mediating the conflict and outlining steps towards its resolution, including: Pakistan's withdrawal of troops, India's reduction of troop presence to a minimum

[133] *Ibid* at 43.
[134] *The India-Pakistan Question*, SC Res 39, UNSCOR, 1948, UN Doc S/654, 1 at 2.

necessary to preserve law and order, and steps towards the implementation of a popular plebiscite to determine Jammu and Kashmir's future.[135] While both India and Pakistan objected to elements of the Resolution (e.g., India's objection to Pakistan's involvement in the plebiscite and Pakistan's objection to India's continued troop presence), they agreed to use the Commission as a mediating body. The Commission adopted a Resolution in August 1948 that built on Security Council Resolution 47 and dealt with terms of a ceasefire, a potential truce agreement, and steps to determine the future of the State. While the Resolution led to the agreed-upon ceasefire, the Commission failed in its attempts to achieve demilitarization of the region, with the Line of Control (LoC) – a militarized control area between India and Pakistan established on the ceasefire line – becoming the *de facto* border between the two nations.

By the end of the war, Pakistan controlled about a third of the former Princely State: Azad Kashmir (the portion of Jammu and Kashmir defended by the Poonch rebels) and the northern region of Gilgit-Baltistan.[136] The Indian government maintained the narrative that Pakistan began the war with the incursion of the Pashtun fighters organized by the Pakistani military, refusing to acknowledge the rebellion against the Maharaja.[137] The call for a plebiscite has never been fulfilled and remains fundamental to assertions of Kashmiri autonomy to this day.[138]

Conclusion

The following chapter discusses the period immediately following Jammu and Kashmir's accession to India, focusing on the State's emergency and interim governments headed by Sheikh Abdullah. As can be seen from the foregoing history and the communications between Maharaja

[135] *The India-Pakistan Question*, SC Res 47, UNSCOR, 1948, UN Doc S/726, 1 at 3.
[136] Lamb, *supra* note 127 at 148-155.
[137] Kaul, *supra* note 127 at 189.
[138] Lamb, *supra* note 127 at 164-165, 169, 173.

Hari Singh and Lord Mountbatten, the rebellions in Poonch and Mirpur leading to the First Indo-Pak War are crucial elements in the story of the Princely State's accession to India. The Maharaja's discursive framing of the war, as one driven by Pakistani aggression rather than domestic unrest, plays a fundamental role in justifying the new State's repressive policies, and in the negotiation and drafting of Article 370. While the Instrument of Accession limited India's legislative jurisdiction over Jammu and Kashmir to the areas of defence, external affairs, and communications, the "special circumstances" in which the Princely State acceded to India informed the manner in which the Indian constitution was applied to Jammu and Kashmir through Article 370.

The Indian State of Jammu and Kashmir: Articles 370, 35A, and 35(c)

This chapter explores the Indian State of Jammu and Kashmir's constitutional trajectory. It discusses the State's emergency and interim governments under Sheikh Abdullah and the negotiation and drafting of Article 370. It provides background to the Hindu nationalist organizations active in the State in the early 1950s and describes how, following the arrest and death of Hindu nationalist politician Syama Prasad Mukherjee, Sheikh Abdullah was arrested and removed from power. It then examines the first Presidential Orders issued pursuant to Article 370, focusing in particular on the Presidential Order of 1954, which created Articles 35A and 35(c) of the Indian constitution. It also discusses the creation of the Jammu and Kashmir Constituent Assembly, the passage of the *Jammu and Kashmir Preventive Detention Act, 1954*, and delves into the complex relationship between the State's preventive detention legislation, Articles 370 and 35(c), the 1954 Presidential Order, and the Fundamental Rights provisions of the Indian constitution. This chapter provides the necessary foundation for understanding the jurisprudence around Article 370, discussed in the following chapter. It also explores the competing views of Jammu and Kashmir's autonomy and sovereignty, the exceptional nature of the legal framework created through the 1954 Presidential Order, and the invocations of necessity through which this exceptional legal regime was justified.

Prime Minister Sheikh Abdullah: Emergency Administration to Interim Government

Having secured Jammu and Kashmir's accession to the Indian Union through the Instrument of Accession, Maharaja Hari Singh established an emergency administration on October 30, 1947, naming Sheikh Abdullah as Head of Administration "with power to deal with the emergency".[139]

[139] "The Maharaja's Emergency Administration Order on 30 October 1947 Appointing Sheikh Mohammad Abdullah as the Head of the Administration", in Noorani, *supra* note 10 at 45-47.

On March 5, 1948, Hari Singh issued a proclamation dissolving the emergency administration and replacing it with an interim government with Sheikh Abdullah as Prime Minister of the State at the head of a Council of Ministers. The proclamation included the Maharaja's "solemn assurance that all sections of [his] people will have opportunities of service, both civil and military, solely on the basis of their merits and irrespective of creed or community".[140] Despite ending the emergency administration, the Maharaja's proclamation shows he remained concerned with the existence a state of necessity and the need to return to a state of "normalcy". It charged the Council of Ministers to convene a National Assembly based on adult suffrage, "as soon as restoration of normal conditions has been completed".[141] The National Assembly would be tasked with framing the State's constitution – with safeguards for minorities and provisions guaranteeing freedom of conscience, speech, and assembly – which it would submit for the Maharaja's approval through the Council of Ministers.[142]

Sheikh Abdullah did not recognize the legitimacy of the Poonch rebellion or the creation of Azad Jammu & Kashmir in Pakistan, adopting the Indian framing of the conflict as an invasion by Pakistan-supported "raiders" and "marauders".[143] Haley Duschinski and Shrimoyee Nandini Ghosh explain that Sheikh Abdullah viewed pro-Pakistan political groups as internal enemies and his interim government sought to police pro-Pakistan sentiments "through constant surveillance and intelligence operations, political repression, policing, torture, and exile".[144] His administration, they write,

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[140] "The Maharaja's Proclamation on 5 March 1948 Appointing a Popular Interim Government", in Noorani, *supra* note 10 at 47-48.
[141] *Ibid*.
[142] *Ibid*.
[143] Haley Duschinski & Shrimoyee Nandini Ghosh, "Constituting the Occupation: Preventive Detention and Permanent Emergency in Kashmir" (2017) 49:3 Journal of Legal Pluralism and Unofficial Law 314 at 325.
[144] *Ibid*.

> became notorious for its authoritarian tactics, including widespread use of arbitrary arrests, informers, and intelligence officers; intolerance of public and even private expressions of pro-Pakistan sentiments, such as listening to Radio Pakistan; and criminalization of dissent or critique of the political dispensation – all framed by the Indian army's border maneuvers to push back refugees, marked as infiltrators, returning from the violence of war and partition.[145]

During his term as Prime Minister, Sheikh Abdullah enacted a number of economic reforms modelled on the National Conference's 1944 "New Economic Plan" and elaborated in its "New Kashmir" manifesto. As will be seen, these reforms provided one justification for the forms of exceptional rule that would be entrenched in Jammu and Kashmir through preventive detention laws and Orders issued under Article 370. The economic reforms were framed in particular around the principles of abolishing landlordism, cooperative association, and redistributing "land to the tiller". They included a number of debt relief schemes, protections for tenants from arbitrary eviction, and land reform measures, the most prominent of which was the 1950 *Big Landed Estates Abolition Act*.[146] The *Act* imposed a ceiling of 22 ¾ acres on landowners' holdings. Land in excess of this amount – excepting orchards, grass farms, and fuel and food reserves – would be transferred to its tiller without compensation to the previous owner. The land reforms included a number of loopholes, meant to maintain political and social stability and prevent the alienation of big landowners, including the Pandit and Dogra landowning populations. Means of evading the breakup of large estates included breaking up joint families (allowing each adult male to claim 22 ¾ acres) and converting agricultural lands such as cereal acreages to orchards.[147]

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[145] *Ibid*.
[146] *Jammu and Kashmir Big Landed Estates Abolition Act, 1950*, online (pdf): <prsindia.org/files/bills_acts/acts_states/jammu-and-kashmir/1950/1950J&K17.pdf>. Similar land reform laws were passed elsewhere in India, including the *Bihar Land Reforms Act, 1950* and the *Uttar Pradesh Zamindari Abolition and Land Reforms Act, 1950*.
[147] Rai, *Hindu Rulers, Muslim Subjects*, *supra* note 11 at 281-284.

Negotiating Article 370: Debating and Defining the "Government of the State"

Sheikh Abdullah and his associates in the Jammu and Kashmir government negotiated with Indian Prime Minister Jawaharlal Nehru's government regarding the State's constitutional relationship with India throughout 1949, through private meetings and letters, and in the Indian Constituent Assembly convened to draft the Indian constitution. Prime Minister Nehru, Deputy Prime Minister Vallabhbhai Patel, and Minister N. Gopalaswami Ayyangar were adamant that Jammu and Kashmir had acceded to the Indian Union but that, once conditions in Jammu and Kashmir had normalized, a plebiscite would be held to ascertain the will of the people of the State and determine if they wished to continue accession. It was also understood that by virtue of the Instrument of Accession, the Indian Parliament's legislative powers in relation to Jammu and Kashmir were confined to the realms of defence, foreign affairs, and communications. Sheikh Abdullah and members of his government were brought into the Indian Constituent Assembly as representatives of Jammu and Kashmir in June 1949.[148]

On June 9, 1949, Maharaja Hari Singh issued a proclamation stating that for health reasons, the Maharaja had decided to transfer his powers and functions to his son, Yuvaraj [crown prince/ heir apparent] Karan Singh. The Maharaja directed and declared that:

> [A]ll powers and functions, whether legislative, executive or judicial which are exercisable by me in relation to the State and its Government, including in particular my right and prerogative of making Laws, of issuing Proclamations, Orders and Ordinances, of remitting, commuting or reducing sentences and of pardoning offenders, shall during the period of my absence from the State be exercisable by Yuvaraj Shree Karan Singh Ji Bahadur.[149]

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[148] "Letter Dated 17 May 1949 by N. Gopalaswami Ayyangar to Vallabhbhai Patel Enclosing Jawaharlal Nehru's Draft Letter to Sheikh Abdullah for his Approval", in Noorani, *supra* note 10 at 50-52; "Amendments Proposed by the Ministry of States of the Government of India", in Noorani, *supra* note 10 at 53-54; "Revision of Rules for Admission of J&K's Representatives to the Constituent Assembly on 27 May 1949", in Noorani, *supra* note 10 at 54-56; "J&K's Representatives Join the Constituent Assembly on 16 June 1949", in Noorani, *supra* note 10 at 56.
[149] "Proclamation Entrusting Yuvaraj Karan Singh with all the Maharaja's Powers on 9 June 1949", in Noorani, *supra* note 10 at 48-49.

The Constituent Assembly unanimously adopted Article 370 (then draft Article 306A) of the Indian Constitution on October 17, 1949, with one amendment moved by Ayyangar. The Explanation appended to the draft article had previously provided that:

> For the purposes of this article, the Government of the State means 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 5th March 1948.[150]

Ayyangar's amendment replaced the word 'appointed' with the words 'for the time being in office'. [151] Sheikh Abdullah had opposed the change privately in conversation with Ayyangar and Minister Abul Kalam "Maulana" Azad, and was under the impression it would not be included in the final draft. He wrote to Ayyangar later that day, expressing his frustration and explaining that he was in the lobby outside the Assembly hall at the time the amendment was moved and did not realize the change had been made until afterwards when called in for the adoption of the Article.[152] While Ayyangar assured Sheikh Abdullah in a letter the following day that "the change of words does not constitute the slightest change in sense or substance"[153], Noorani argues that Sheikh Abdullah's removal from office in 1953 would not have been possible under the unamended version of the Article.[154]

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[150] "Final Agreed Draft of Article 306A", in Noorani, *supra* note 10 at 62-63.
[151] "Ayyangar's Detailed Exposition of Article 370 (306-A in the Draft) in the Constituent Assembly on 17 October 1949 (Extracts)", in Noorani, *supra* note 10 at 64-65.
[152] "Sheikh Abdullah's Letter to N. Gopalaswami Ayyangar on 17 October 1949 Complaining of Unilateral Alteration of Article 370", in Noorani, *supra* note 10 at 72-74.
[153] "Ayyangar's Reply to Abdullah on 18 October 1949", in Noorani, *supra* note 10 at 74-76.
[154] Noorani, *supra* note 10 at 4-5.

Article 370 of the Constitution of India

The Constitution of India was adopted by the Constituent Assembly on November 26, 1949 and came into effect on January 26, 1950. Article 370 fell under Part XXI of the Indian constitution, "Temporary and Transitional Provisions". It reads as follows[155]:

> Temporary provisions with respect to the State of Jammu and Kashmir.
>
> 370. (1) Notwithstanding anything in this Constitution, —
>
> (a) the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir;
>
> (b) the power of Parliament to make laws for the said State shall be limited to —
>
> (i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and
>
> (ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.
>
> Explanation. — For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;
>
> (c) the provisions of article 1 and of this article shall apply in relation to that State;
>
> (d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:
>
> Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

[155] *COI*, Art 370: "Temporary Provisions with Respect to the State of Jammu & Kashmir", cited in Noorani, *supra* note 10 at 79-80.

> Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

> Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

Article 370's Six Special Features

Noorani explains that Article 370 embodied six special features regarding Jammu and Kashmir's constitutional relationship with India[156]:

> First, it exempted the State from the provisions of the Constitution providing for the governance of all the states. Jammu and Kashmir was allowed to have its own Constitution.
>
> Second, Parliament's legislative power over the State was restricted to three subjects – defence, foreign affairs, and communications. The President could extend to the State other provisions of the Constitution so as to provide a federal constitutional framework if they related to the matters specified in the Instrument of Accession. For this, only 'consultation' with the State government was required since the State had already accepted them by the Instrument. But, thirdly, if other 'constitutional' provisions or other Union powers were to be extended to Kashmir, the prior 'concurrence' of the State government was required.
>
> The fourth feature is that this concurrence was strictly provisional. It had to be ratified by the State's Constituent Assembly. Article 370(2) says clearly: 'If the concurrence of the Government of the State … be given before the Constituent

[156] Noorani, *supra* note 10 at 5-6.

> Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.'
>
> The fifth feature is that the 'State Government's authority to give the 'concurrence' lasts only till the State's Constituent Assembly is 'convened'. It is an 'interim' power. Once the Constituent Assembly met, the State government could not give its own 'concurrence'; still less, after the Assembly met and dispersed. Moreover, the President cannot exercise his power to extend the Indian Constitution to Jammu and Kashmir indefinitely. The power has to stop at the point the State's Constituent Assembly drafted the State's Constitution and decided finally what additional subjects to confer on the Union, and what other provisions of the Constitution of India it should get extended to the State, rather than having their counterparts embodied in the State Constitution itself. Once the State's Constituent Assembly had finalized the scheme and dispersed, the President's extending powers ended completely.
>
> The sixth special feature, the last step in the process, is that Article 370(3) empowers the President to make an order abrogating or amending it. But for this also 'the recommendation' of the State's Constituent Assembly 'shall be necessary before the President issues such a notification'.

This sixth feature is significant because Article 370 could not be abrogated or amended by recourse to Article 368, which provides for the power and procedure for amending the Indian constitution and is applicable to all other states.[157]

The First Presidential Order under Article 370

On January 26, 1950, the same day the Constitution of India came into effect, the President of India issued the first Order under Article 370, extending certain provisions of the Indian constitution to Jammu and Kashmir. As Duschinski and Ghosh note, while the *Constitution (Application to Jammu and Kashmir) Order, 1950*

> […] ostensibly only dealt with subjects outlined in the Instrument of Accession and left all residuary powers with the state legislature, it actually extended India's legislative jurisdiction in J&K to 37 out of 100 subjects listed in the constitution, including those relating to the union executive, finance, elections,

[157] *Ibid* at 6.

> and interstate relations, and it made many provisions of the Indian Constitution applicable to the state by treating them as related to defense, foreign affairs, or communications. Preventive detention in relation to defense, foreign affairs, and the security of India was specifically included as a subject on which the Indian parliament could legislate.[158]

The Delhi Agreement, The Sadr-i-Riyasat, and the J&K Constituent Assembly

On May 1, 1951, Yuvaraj Karan Singh issued a proclamation directing that a Constituent Assembly be elected for the purpose of framing a constitution for the State of Jammu and Kashmir. The elected Assembly members first met on October 31, 1951.[159] While the Constituent Assembly began the work of framing the J&K State constitution, the governments of India and Jammu and Kashmir negotiated the details of the State's constitutional relationship to the Union. These negotiations resulted in what is now called the Delhi Agreement of 1952. The Agreement dealt with issues including presidential authority, emergency provisions, citizenship, fundamental rights, and Supreme Court jurisdiction, and increased the State's control over the distribution of its land.[160]

In discussions regarding the application of provisions in the Indian constitution relating to fundamental rights to Jammu and Kashmir, both governments agreed that fundamental rights could not be fully applied to residents of the State. This restriction was seen as necessary both to facilitate the implementation of the New Kashmir Plan, particularly Sheikh Abdullah's land redistribution laws, and to allow the State government to deal with potential infiltration, espionage, and sabotage from Pakistan in the aftermath of the war.[161] By August 1952, Nehru was of the view that nothing

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[158] Duschinski and Ghosh, *supra* note 143 at 326.
[159] Noorani, *supra* note 10 at 7-8; "Proclamation Dated 1 May 1951 Convening Jammu & Kashmir's Constituent Assembly", in Noorani, *supra* note 10 at 95-96.
[160] Duschinski and Ghosh, *supra* note 143 at 327; Lamb, *supra* note 127 at 197-198.
[161] "Nehru's Note Recording Discussions with Kashmir's Delegation on 20 July 1952", in Noorani, *supra* note 10 at 135; "Nehru's Statement in the Lok Sabha on 24 July 1952 on the Delhi Agreement", in Noorani, *supra* note 10 at 142-143.

would be accomplished through mediation with the United Nations. He wrote to Sheikh Abdullah, informing him of his view that the necessary conditions for holding a plebiscite would not arise and that he had ruled out the possibility of a plebiscite. The result of these considerations, he told Sheikh Abdullah, was that India's position in the State should be consolidated and that India's relationship with the State was a *fait accomplit*.[162]

Sheikh Abdullah pushed for a Presidential Order from the Centre amending the Explanation to Article 370, replacing the Maharaja as head of state with an elected 'Sadr-i-Riyasat' [State President]. President Rajendra Prasad was concerned about the legality of such an act. The President did not believe the power under clause (3) of Article 370 to modify Article 370's application to Jammu and Kashmir through Presidential Order could be exercised more than once. He wrote:[163]

> Judging by the language employed and by the very exceptional nature of the power conferred, I have little doubt myself that the intention is that the power is to be exercised only once, for then alone would it be possible to determine with precision which particular provisions should be excepted and which modified. The fact that President is also required to specify the date from which the notification is to take effect also tends to confirm this view. Although the phrase 'exceptions and modifications' is used, there can be no doubt that what is involved is really an amendment by executive order of the Constitution in relation to the State of Jammu and Kashmir. Parliament could never have intended that such an extraordinary power of amending the Constitution by executive order was to be enjoyed without any limitation as to the number of times on which it could be exercised or as to the period within which it was exercisable or as to the scope and extent of the modifications and exceptions that could be made. It cannot be seriously maintained that for all time to come the application of our Constitution to Jammu and Kashmir would derive its authority from Article 370, to the complete exclusion of Parliament. The marginal note to Article 370 itself describes the nature of the Article as 'Temporary Provisions with respect to the State of Jammu and Kashmir'. The conclusion, therefore, seems to me to be irresistible that clause (3) of Article 370 was not intended to

[162] "Nehru's Note for Sheikh Abdullah Written at Sonamarg, Kashmir, on 25 August 1952", in Noorani, *supra* note 10 at 198-205.
[163] "President Rajendra Prasad's Note to the Prime Minister on Article 370, Dated 6 September 1952, Enclosure" in Noorani, *supra* note 10 at 210.

> be used from time to time as occasion required. Nor was it intended to be used without any limit as to time. The correct view appears to be that recourse is to be had to this clause only when the Constituent Assembly of the State has been fully framed.

Nevertheless, under pressure from Nehru, on November 15, 1952, the President issued the *Constitution (Application to Jammu and Kashmir) Order No. 44*, which modified the Explanation to Article 370 by substituting:[164]

> For the purposes of this article, the Government of the State means the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office.

Differences between the positions of Nehru and Sheikh Abdullah regarding the future of the State became more entrenched following the Delhi Agreement. Both men sought finality. Nehru viewed the Delhi Agreement as a step towards cementing Jammu and Kashmir's integration with India. He sought to finalize the State's accession unilaterally through the Jammu and Kashmir Constituent Assembly. Sheikh Abdullah, conscious of the popular sentiments of his constituents, sought finality through an agreement between India and Pakistan. He wished for Jammu and Kashmir's temporary special semi-autonomous status under Article 370 to be made permanent, and while Nehru eventually made such an offer via Maulana Azad in July 1953, in Sheikh Abdullah's view the offer came too late, as his constituents had become concerned by events in India. Sheikh Abdullah established a committee made up of eight of his National Conference colleagues that met over the summer of 1953 to consider alternatives for resolving the dispute

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[164] *Constitution (Application to Jammu and Kashmir) Order 1952*, CO 44, cited in Noorani, *supra* note 10 at 225; Noorani, *supra* note 10 at 9.

between India and Pakistan, including, independence for Jammu and Kashmir and the holding of a plebiscite in which independence would be offered as a choice.[165]

Background: Hindu Nationalism in Jammu and Kashmir

I pause here to discuss the Hindu nationalist organizations agitating in Jammu Kashmir in the early 1950s. This context is critical for understanding both Sheikh Abdullah's removal from power in 1953, and the abrogation of Article 370 in August 2019 under the *Bharatiya Janata Party* ("BJP"), successor to the *Bharatiya Jana Sangh* discussed below. As discussed briefly in the context of the Princely State, the 19th century saw the proliferation of a number of Hindu reformist and revivalist movements motivated by concerns about religious demography, such as the Arya Samaj, formed in late 19th century Punjab. Like the Brahmo Samaj, formed in early 19th century Bengal, the Arya Samaj sought to reform Hinduism in the face of Christian missionary activity through a focus on the Vedas (the ancient religious texts of the Brahminical religion) and reorganization of the caste system in line with the *Varnas* (the 4-fold caste system of the Vedas). The Arya Samaj also advocated for an abandonment of idol worship and against the privileged position of the Brahmin caste as bridges between Hindus and the divine, bringing them into conflict with the orthodox, Brahmin-dominated *sanatan dharma* (eternal dharma) movement. The Arya Samaj's founder, Swami Dayananda Saraswati, was particularly concerned with the demographic inferiority of Hindus in Punjab, where Muslims made up 51% of the population and Sikhs made up 7.5%. The increasing conversion of Hindus from oppressed castes, including those deemed "untouchable", to Islam, Sikhism, and Christianity fuelled this concern. Saraswati drew inspiration from Christianity's conversion practices and reformed the Hindu practice of *shuddhi* – a form of ritual

[165] Noorani, *supra* note 10 at 9-10; "The National Conference Working Committee's 8-Member Committee on the Future of Kashmir", in Noorani, *supra* note 10 at 227-229.

"purification" whereby upper-caste Hindus who had been "polluted" could be cleansed and reintegrated into their castes – as a means to reconvert Hindus who had converted to other religions back to the Hindu fold.[166]

The *sanatan dharma* movement was prominent in the early 20th century United Provinces. In the mid-1910s, in reaction to Muslims in the state being granted a separate electorate, adherents of the *sanatan dharma* movement formed the Hindu Sabha of the United Provinces under the leadership of Madan Mohan Malaviya, who founded Benares Hindu University in 1916. The creation of Hindu Sabhas spread beyond the United Provinces and Punjab and regional branches sent delegates to establish a Hindu Mahasabha [All India Hindu Sabha] in Haridwar in 1915. The Mahasabha initially met with little success due to conflict between the *sanatan dharma* movement and the Arya Samaj but was revitalized in the 1920s in response to the Khilafat movement (which sought to recreate the Muslim caliphate after the fall of the Ottoman empire) and to communal rioting between Muslims and Hindus.[167]

Savarkar and Hindutva

The Mahasabha initially functioned as a subgroup and lobbying body within the Congress party but became a separate and more radically Hindu nationalist political party in the late 1930s under the leadership of Vinayak Damodar Savarkar. Savarkar had coined the term '*hindutva*' [Hinduness] in his text, *Hindutva: Who is a Hindu?* first published anonymously in 1923. Savarkar wrote *Hindutva* while imprisoned for participating in an assassination plot against an associate of the British Secretary of State.[168] *Hindutva* was partly a response to the Khilafat movement, as Savarkar

[166] Christophe Jaffrelot, ed, *Hindu Nationalism: A Reader* (Princeton: Princeton University Press, 2007) at 6-10.
[167] Jaffrelot, *supra* note 166 at 14-15.
[168] *Ibid* at 85.

had become convinced that Muslims, not the British, were the greatest enemy of the Hindu Rashtra [Hindu nation]. Hindutva was the identity Savarkar ascribed to the Hindu Rasthra. He argued for a racial, geographical, and cultural identity, unifying as Hindus all those claiming descent from the Aryans – whom he presented as benevolent settler-colonizers of the Indus Valley – or who claim descent from non-Aryans and see the territory of "Hindusthan" as their fatherland. This category could thus include Sikhs, Buddhists, and other groups whose cultural and religious beliefs were indigenous to the land between the Indus river and the seas. It could not include Muslims or Christians, even if they were recent converts with Hindu ancestry, because in addition to seeing Hindusthan as their fatherland, Hindus must also view it as their holy land. Savarkar argued those whose holy lands are in Mecca or Jerusalem will always have a greater allegiance to foreign powers and are potential fifth columnists in the Hindu Rashtra. This framing nevertheless allowed for Muslims and Christians descended of Hindus to re-enter the fold by paying allegiance to Hindu culture.[169]

Golwalkar and the RSS

After meeting the imprisoned Savarkar in the 1920s, Dr. Keshav Baliram Hedgewar founded the *Rashtriya Swayamsevak Sangh* [National Volunteer Corps] ("RSS") in Nagpur, Maharasthra in 1925. The RSS quickly grew to become the largest Hindu nationalist organization. It aimed to propagate the ideology of 'Hindutva' and build the physical strength of the Hindu community. It organized at the grassroots level, gathering young men for physical, martial, and ideological training. It sent its *swayamsevaks* [volunteers] throughout the country to expand its organization

[169] *Ibid* at 14-16, 85-87; Vinayak Damodar Savarkar, *Hindutva: Who is a Hindu?* (1923), cited in Jaffrelot, *supra* note 166 at 87-96.

network and by the time of India's independence the movement had about 600,000 such volunteers under the command of the organization's *pracharaks* [preachers].[170]

Hedgewar convinced Madhav Sadashiv Golwalkar, an instructor of zoology at Banaras Hindu University, to join the organization in 1931. Golwalkar would go on to establish the RSS's governing ideology in 1938 in his text *We or Our Nationhood Defined*, as well as later texts, and became the organization's leader in 1940. The RSS had inherited much of its ideology from Savarkar's *Hindutva* but Golwalkar centred it around a narrower conception of the Hindu Rashtra in *We or Our Nationhood Defined*. Inspired by Hitler, among others, Golwalkar foregrounded race in his conception of the Hindu nation above geographical location, rejecting the idea that peoples inhabiting a nation's territory are part of that nation.[171]

Drawing on European scholars, Golwalkar defined the idea of 'nation' as a compound of five "unities": geographical, racial, religious, cultural, and linguistic.[172] He wrote that race is "a population with a common origin under one culture" and "is by far the most important ingredient of a Nation".[173] He argued:

> Even if there be people of a foreign origin, they must have become assimilated into the body of the mother race and inextricably fused into it. They should have become one with the original national race not only in its economic and political life, but also in its religion, culture and language, for otherwise such foreign races may be considered, under certain circumstances at best members of a common state for political purposes; but they can never form part and parcel of the National body. If the mother race is destroyed either by destruction of the persons composing it or by loss of the principles of its existence, its religion and culture, the nation itself comes to an end.[174]

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[170] Jaffrelot, *supra* note 166 at 16.
[171] *Ibid* at 97-98.
[172] MS Golwalkar *We, or Our Nationhood Defined* (1939), cited in Jaffrelot, *supra* note 166 at 100.
[173] *Ibid* at 102.
[174] *Ibid*.

Religion and culture were intrinsically linked to Golwalkar, particularly in places like India, where religion was "an all-absorbing entity", unlike in most European nations, where "religion is a mere matter of form, or worse still, a toy luxury to play with".[175] Together, religion and culture become one, and their impact on the "Social mind" is to create and shape a nation's "Race spirit" or "Race consciousness".[176] Expanding on his assimilationist argument, Golwalkar described the place of those outside the "National Race", i.e., non-Hindus, in the Hindu nation:[177]

> If, as is indisputably proved, Hindusthan is the land of the Hindus and is the terra firma for the Hindu nation alone to flourish upon, what is to be the fate of all those, who, today, happen to live upon the land, though not belonging to the Hindu Race, Religion and culture? […]
>
> At the outset we must bear in mind that so far as 'nation' is concerned, all those, who fall outside the five-fold limits of that idea, can have no place in the national life, unless they abandon their differences, adopt the religion, culture and language of the Nation and completely merge themselves in the National Race. So long, however, as they maintain their racial, religious and cultural differences, they cannot but be only foreigners, who may be either friendly or inimical to the Nation. In all ancient Nations i. e. all those who had a well developed National life even before the Great War, this view is adopted. Though these Nations practise religious toleration, the strangers have to acknowledge the National religion as the state Religion and in every other respect, inseparably merge in the National community. Culturally, linguistically they must become one with the National race; they must adopt the past and entertain the aspirations for the future, of the National Race; in short, they must be '"Naturalized" in the country by being assimilated in the Nation wholly […]
>
> Emigrants have to get themselves naturally assimilated in the principal mass of population, the National Race, by adopting its culture and language and sharing in its aspirations, by losing all consciousness of their separate existence, forgetting their foreign origin. If they do not do so, they live merely as outsiders, bound by all the codes and conventions of the Nation, at the sufferance of the Nation and deserving of no special protection, far less any privilege or rights. There are only two courses open to the foreign elements, either to merge themselves in the national race and adopt its culture, or to live at its mercy so long as the national race may allow them to do so and to quit the country at the sweet will of the national race. That is the only sound view on the minorities'

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[175] *Ibid* at 102-103.
[176] *Ibid* at 102.
[177] MS Golwalkar, *We, or Our Nationhood Defined* (Nagpur: Bharat Publications, 1939) at 101-105, online (pdf): <https://sanjeev.sabhlokcity.com/Misc/We-or-Our-Nationhood-Defined-Shri-M-S-Golwalkar.pdf>.

> problem. That is the only logical and correct solution. That alone keeps the national life healthy and undisturbed. That alone keeps the Nation safe from the danger of a cancer developing into its body politic of the creation of a state within the state. Prom [*sic*] this standpoint, sanctioned by the experience of shrewd old nations, the foreign races in Hindusthan must either adopt the Hindu culture and language, must learn to respect and hold in reverence Hindu religion, must entertain no idea but those of the glorification of the Hindu race and culture, i.e., of the Hindu nation and must lose their separate existence to merge in the Hindu race, or may stay in the country, wholly subordinated to the Hindu Nation, claiming nothing, deserving no privileges, far less any preferential treatment - not even citizen's rights.

I reproduce the above passages because they are illustrative of Nasser Hussain's framing of racial difference as the "limit condition"[178] that designates the zone of *anomie* in which the state of exception operates. The loyalty of non-Hindus to the Indian state is inherently suspect and their legal status and rights are made conditional on their assimilation – or unification through domination[179] – with the Hindu majority. While not explicitly linked to religious difference, this dynamic of insiders and outsiders is also reflected in Sheikh Abdullah's repressive policies towards pro-Pakistan elements as head of Jammu and Kashmir's emergency and interim governments.[180]

Partition and Hindutva

Partition played a significant role in shaping this discursive treatment of Muslims as inherently suspect "foreigners" in India. It is at this time, Yasmin Khan writes, that right-wing Hindu nationalist organizations began to truly establish themselves as forces to be reckoned with. These organizations were born of the efforts of a Hindu elite – fearing the growing numerical strength and organizational unity of monotheistic religions like Christianity and Islam – to unite people

[178] Hussain, *supra* note 2 at 119.
[179] Constable, *supra* note 2 at 81-82
[180] Duschinski and Ghosh, *supra* note 143 at 325.

from various sects and castes as a united Hindu community. Drawing inspiration from European fascism, Hindu nationalist organizations – most notably, the Hindu Mahasabha and RSS – enunciated a vision of Hindu rule. These organizations recruited young men seeking direction in the chaos of partition, who roamed the streets using loudspeakers to spread stories of violence, both real and concocted, perpetrated by Muslims. They issued calls for the banning of cow-slaughter and provided aid to refugees of partition, using the platform this work provided to spread anti-Muslim rhetoric.[181]

For many supporters of right-wing Hindu nationalists and of the Indian National Congress, the image of the nation was closely tied to its territorial integrity. Khan describes a widespread fear that Partition could lead to endless smaller partitions and secessionist movements from groups seeking self-determination.[182] The partitioned subcontinent was personified in the image of *Bharat Mata* [Mother India] – a Hindu goddess being ripped apart limb by limb. Both Hindu supporters of the Congress and right-wing Hindu nationalists, such as those in the Mahasabha, protested and struck in the name of protecting their mother goddess.[183] Territorial integrity was equally important to the secular followers of Jawaharlal Nehru, and Nehru himself, for whom both partition and the resulting communal violence in Punjab were examples of the failure of the secular nation.[184] Related to the image of Bharat Mata is the concept of *Akhand Bharat* [greater India or undivided India]. The term was popularized in Hindu nationalist discourse as an expression of discontent about Partition calling for India's restoration as a single country encompassing "regions that are

[181] Yasmin Khan, *The Great Partition: The Making of India and Pakistan* (New Haven: Yale University Press, 2007) at 50-52, 78, 95.
[182] *Ibid* at 67.
[183] *Ibid* at 93-94.
[184] *Ibid* at 167.

culturally linked or influenced by a Sanskritic culture that forms the Indian subcontinent and extends to Southeast Asia and Central Asia".[185]

Partition allowed for a discursive division between 'insiders' and 'outsiders' that questioned Muslim loyalty to the new Indian nation.[186] Vazira Zamindar describes a common sentiment among non-Muslim Indians in Delhi: that Muslims, having the opportunity to join Pakistan – their "own" country – did not need or deserve their homes in India. This despite the fact that Pakistan largely refused to accept Muslims from areas other than Punjab and Bengal, due to the burden of hosting such great numbers of people.[187] Zamindar describes how Muslims in Delhi were put into camps, often by police, and were kept there under supervision with the purported aim of preserving law and order. Muslim inhabitants were referred to as inmates, the camp was run by a camp commandant, and loudspeakers were set up throughout the camps to project orders.[188] Zamindar discusses one high-ranking official who referred to the camps as "mini Pakistans" and held a belief common to many that the Muslims in the camps might serve as potential "fifth columnists" during a war with Pakistan.[189]

The Indian government determined that Hindu and Sikh refugees fleeing from what had become Pakistan deserved priority in housing, as Muslims had a nation of their own in Pakistan. Muslim homes were treated as "empty" and the state allowed Hindus and Sikhs to occupy them both legally and illegally.[190] Many Muslims who visited Pakistan even just briefly to visit family

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[185] Arkotong Longkumer, "Playing the Waiting Game: The BJP, Hindutva and the Northeast" in Angana P Chatterji, Thomas Blom Hansen & Christophe Jaffrelot, eds, *Majoritarian State: How Hindu Nationalism is Changing India* (London, UK: C Hurst & Co, 2019) 281 at 284, citing Christophe Jaffrelot, *The Hindu Nationalist Movement in India* (New York: Columbia University Press, 1996) at 108; *Ibid*, citing Sheldon Pollock, "The Cosmopolitan Vernacular" (1998) 57:1 *The Journal of Asian Studies* 6.
[186] Khan, *supra* note 181 at 151; Vazira Fazila-Yacoobali Zamindar, *The Long Partition and the Making of Modern South Asia: Refugees, Boundaries, Histories* (New York: Columbia University Press, 2007) at 11.
[187] Zamindar, *supra* note 186 at 26.
[188] *Ibid* at 29, 32-33, 35.
[189] *Ibid* at 92; Khan, *supra* note 181 at 178.
[190] Zamindar, *supra* note 186 at 31, 87-90.

were considered as having migrated and were unable to return to India. India instituted a permit system to regulate the cross-border travel of Muslims – justified by the suspicion that any Muslim could be a Pakistani spy – which led to Pakistan creating a permit system of its own in retaliation.[191] This suspicion provided justification for other forms of differentiated treatment. Muslims displaced from their homes were described as "evacuees", whose homes could be treated as permanently vacated, while Hindus and Sikhs were described as 'displaced persons'. Unlike Hindus and Sikhs, Muslims seeking to return to India were usually only given temporary permits.[192] Muslim civil servants working for the Indian government could be fired if their families lived in Pakistan and Muslims in India were often given passports of Pakistani Nationals, even if they had no documentation supporting such a claim.[193]

The BJS and the Praja Parishad

Sheikh Abdullah's government faced resistance from Hindus organized by the RSS. Golwalkar had initially wanted to keep the RSS out of the political realm. Following a temporary ban on the organization in 1948, however, Golwalkar recognized that the RSS required an affiliate body to represent its interests in the political field. He reluctantly allowed RSS leaders to begin discussions with Syama Prasad Mukherjee regarding the formation of a political party. Mukherjee had been vice-chancellor of Calcutta University from 1934-1938. In 1937 he joined the Hindu Mahasabha under Savarkar's leadership. He was elected to the Bengal Legislative Council on a Congress ticket in 1939 but resigned and was re-elected as an Independent when the Congress decided to boycott the Assembly. He became more active in the Mahasabha, working as the party's President from

[191] *Ibid* at 93-94.
[192] *Ibid* at 104, 120, 123.
[193] *Ibid* at 112, 133, 196-197, 200.

1943-1945. Mukherjee was considered relatively moderate within Hindu nationalist spaces and was a Minister in Nehru's first government from 1947-1950. He resigned from the Mahasabha in 1948, after failing to try and open the party up to non-Hindus, facing resistance from hardliners like Balakrishna Shivram Moonje, who had preceded Savarkar as President of the Mahasabha. He approached the RSS leaders to discuss the creation of a party in 1949 and successfully established the *Bharatiya Jana Sangh* (BJS) – predecessor of the modern BJP – in 1951, right before the first general elections.[194]

On August 7, 1952, Mukherjee gave a speech in the Lok Sabha opposing any special status for Jammu and Kashmir,[195] calling for a withdrawal from the United Nations mediation process,[196] and criticizing Nehru for being unwilling to use force against Pakistan to retake the portions of the former Princely State lost during the war:[197]

> The only matter regarding which the dispute still continues is about the one-third territory of Kashmir which is in the occupation of the enemy. The Prime Minister said today that portion is there. It is a matter for national humiliation. We say that Kashmir is a part of India. It is so. So, a part of India is today in the occupation of the enemy and we are peace-lovers, no doubt. But peace-lovers to what extent?—that we will even allow a portion of our territory to be occupied by the enemy? Of course the Prime Minister said: thus far and no further. If the raiders enter into any part of Kashmir, he held out a threat of war not in relation to Pakistan and Kashmir, but war on a bigger scale between India and Pakistan. Is there any possibility of our getting back this territory? We shall not get it through the efforts of the United Nations: we shall not get it through peaceful methods, by negotiating with Pakistan. That means we lose it, unless we use force and the Prime Minister is unwilling to do so.

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[194] Jaffrelot, *supra* note 166 at 16-17, 194-195.
[195] "Extract of a Speech by Shyama Prasad Mookerjee, in the Lok Sabha, on 7 August 1952", in Jaffrelot, *supra* note 166 at 197-207.
[196] *Ibid* at 195-196.
[197] *Ibid* at 196.

Alongside and loosely affiliated with the RSS and BJS, the Jammu Praja Parishad – a Hindu nationalist political party formed in 1947 – campaigned and agitated against Jammu and Kashmir's semi-autonomous status under Article 370, and against Sheikh Abdullah's land reforms. Together, Kashmiri autonomy and Sheikh Abdullah's land redistribution measures (which favoured the Muslim peasantry at the expense of Hindu landowners) were opposed as Muslim domination, encroaching communism, the central government's appeasement of minorities, and the further division of a united (Hindu) India.[198] The Praja Parishad campaigned under the slogan of "*Ek Vidhan, Ek Pradhan aur Ek Nishan*" [one constitution, one sovereign head and one flag], demanding Jammu and Kashmir's full integration with India through the abrogation of Article 370.[199]

Mukherjee's Death and Sheikh Abdullah's Arrest

In May 1953, Mukherjee entered Jammu and Kashmir without a permit – an act of protest against the State's policy requiring Indians not resident in Jammu and Kashmir to obtain a permit before entering the State. Mukherjee agitated in solidarity with the Praja Parishad for the full integration of Jammu and Kashmir with India, but was arrested shortly after entering the State, and soon fell ill. He was moved from jail in Srinagar to a cottage outside the city. On June 22, 1953 he was moved to a hospital. He died on June 23, 1953, officially of a heart attack, though controversy continues to surround the circumstances of his death. His death led to widespread protests by Hindus in the State.[200]

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[198] Lamb, *supra* note 127 at 197-198.
[199] Rai, "Kashmiris in the Hindu Rashtra", *supra* note 12 at 263.
[200] Jaffrelot, *supra* note 166 at 195; Lamb, *supra* note 127 at 199-202; "Shyama Prasad Mukherjee", *Hindustan Times* (9 September 2002), online: <www.hindustantimes.com>.

Under Nehru's advice, Sheikh Abdullah was removed from power by Jammu and Kashmir's Sadr-e-Riyasat, Karan Singh, on the ground of division within his Cabinet. He was replaced as Prime Minister by his Deputy Prime Minister Bakshi Ghulam Mohammad, who had supported Sheikh Abdullah publicly but privately opposed the greater independence for which he was advocating. Mohammad remained Prime Minister of the State until 1964.[201]

Sheikh Abdullah was detained under the *Public Security Act 1946* from 1953-1958. The *Public Security Act* – a predecessor of the 1978 *Jammu and Kashmir Public Safety Act* – had been passed under the Dogra regime to put down the Quit Kashmir movement. It was implemented by the British-backed Dogra Maharaja to suppress anti-Dogra assertions of Kashmiri nationalism, building on the British Raj's frequent use of preventive detention laws to crush anti-colonial agitations. The 1946 *Act* provided *inter alia* for indefinite preventive detention and bans on strikes and public gatherings in the interest of protecting state security and public order.[202] Sheikh Abdullah was released briefly released in 1958 and then promptly detained again that same year under the *Jammu and Kashmir Preventive Detention Act, 1954*, discussed below, which replaced the 1946 *Public Security Act*.[203]

Debating Fundamental Rights in Jammu and Kashmir

The Jammu and Kashmir Constituent Assembly met to debate the reports of its subcommittees regarding the framing of the State constitution and the finalization of the State's constitutional relationship with India throughout 1954. A recurring theme in the reports of the Basic Principles

[201] Lamb, *supra* note 127 at 199-204; Noorani, *supra* note 10 at 10-11; "Nehru's Note on Abdullah's Arrest Recorded by His Private Secretary M.O. Mathai on 31 July 1953", in Noorani, *supra* note 10 at 236-238; "Sadar-i-Riyasat's Letter to Sheikh Abdullah, 8 August 1953", in Noorani, *supra* note 10 at 238-239; "Sadar-i-Riyasat's Order of 8 August 1953 Dismissing Sheikh Abdullah as Prime Minister", in Noorani, *supra* note 10 at 239-240.
[202] Duschinski & Ghosh, *supra* note 143 at 319, 321, 323, 328; Rai, *Hindu Rulers, Muslim Subjects*, *supra* note 11 at 181, 227.
[203] Duschinski and Ghosh, *supra* note 143 at 328.

Committee and the Advisory Committee on Fundamental Rights and Citizenship, and later incorporated into the February 1954 report of the Drafting Committee of the State's Constituent Assembly, was how to tailor the provisions of the Indian constitution relating to fundamental rights to the political situation in Jammu and Kashmir. This concern was also tied in with the desire to create a protected category of 'permanent residents' from the older category of 'hereditary state subjects' established under the Maharaja's rule. The Committees recommended that a Presidential Order be issued to implement the terms of the Delhi Agreement and define the extent of Parliament's jurisdiction to legislate in matters relating to the State. They emphasized that while the Fundamental Rights provisions of the Indian constitution should be made applicable to the State, their application should not come in the way of the land reforms initiated under Sheikh Abdullah, or any future such land reforms. Further, the Fundamental Rights provisions should not be capable of invalidating State laws laying out the relative rights and privileges of permanent residents and non-residents in relation to the acquisition of property and employment in the State.[204] On February 15, 1954 the Constituent Assembly adopted the Drafting Committee's report with an amendment providing that for 5 years from the application of Article 19 of the Indian constitution – which establishes rights to freedom of speech, expression, and assembly, except for laws imposing reasonable restrictions in the interests of *inter alia* the sovereignty and integrity of India and public order and morality – to Jammu and Kashmir, "the security of the State" should be added as a reasonable restriction based on which laws could not be invalidated.[205]

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[204] "Report of the Basic Principles Committee Presented on 3 February 1954 Jammu and Kashmir Constituent Assembly Official Report Part I, Volume 1, pp. 711–25 (Extracts)", in Noorani, *supra* note 10 at 246-249; "Report of the Drafting Committee Presented on 11 February 1954", in Noorani, *supra* note 10 at 251-252, 255, 259.
[205] *COI*, Art 19; "The Constituent Assembly Adopts the Report on 15th February and Gives its Concurrence to the Application of the Constitution of India in the Manner Indicated in the Annexure to the Report", in Noorani, *supra* note 10 at 261-262.

Fundamental Rights and Preventive Detention in India

A brief overview of the Indian constitution's Fundamental Rights provisions, specifically those concerned with the Right to Freedom, and of India's experience with preventive detention laws is in order. This discussion provides context to the 1954 Presidential Order under Article 370, its creation of Article 35(c) of the Indian constitution, and the preventive detention legislation enacted by the Jammu and Kashmir legislature and protected from constitutional challenge for violating the Indian constitution's Fundamental Rights provisions.

The use of broad preventive detention measures with few limitations was not new in India or unique to Jammu and Kashmir. Colonial-era preventive detention measures included the *East India Company Act*, which in 1784 allowed detention of individuals suspected of activities or correspondence prejudicial to the peace of British settlements in India. Granville Austin notes that the oldest preventive detention statute in India was the *Bengal State Prisoners Regulation* of 1818, and that preventive detention was also authorized by the *Defence of India Acts* of 1915 and 1939, as well as the *Restriction and Detention Ordinance* of 1944.[206]

Austin notes that while Congress party governments repealed several preventive detention laws in the provinces of British India between 1937-1939, "from Independence until the Constitution's inauguration, Congress ministries in some dozen provinces enacted 'Public Order' and 'Public Safety' laws".[207] Most of these laws "empowered government to regulate a person's actions or movements to prevent any act 'prejudicial to the public safety or maintenance of public order'; to impose restrictions on a person's freedom of expression; to extern him from or require him to reside in an area and to report his movements to government".[208]

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[206] Granville Austin, *Working a Democratic Constitution: A History of the Indian Experience* (New Delhi: Oxford University Press, 2003) at 53, n 54.
[207] *Ibid* at 54-55.
[208] *Ibid* at 55, n 55, citing the *Madhya Bharat Maintenance of Public Order Act, 1949*.

The Right to Freedom in the Indian Constitution

The "Right to Freedom" is protected under Articles 19-22 of the Indian constitution, found in Part III: Fundamental Rights. Article 19, as originally enacted and as came into effect on January 26, 1950 provided[209]:

> 19. Protection of certain rights regarding freedom of speech, etc.
>
> (1) All citizens shall have the right –
>
> (a) to freedom of speech and expression;
>
> (b) to assemble peaceably and without arms;
>
> (c) to form associations or unions;
>
> (d) to move freely throughout the territory of India;
>
> (e) to reside and settle in any part of the territory of India;
>
> (f) to acquire, hold and dispose of property; and
>
> (g) to practise any profession, or to carry on any occupation, trade or business.
>
> (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law in so far as it relates to, or prevent the State from making any law relating to, libel, slander, defamation, contempt of court or any matter which offends against decency or morality or which undermines the security of, or tends to overthrow, the State.
>
> (3) Nothing in sub-clause (b) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order, reasonable restrictions on the exercise of the right conferred by the said sub-clause.
>
> (4) Nothing in sub-clause (c) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of public order or morality, reasonable restrictions on the exercise of the right conferred in the said sub-clause.
>
> (5) Nothing in sub-clauses (d), (e) and (f) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, reasonable restrictions on the exercise of any of the

[209] *COI*, Art 19, online: <loc.gov/resource/llscd.57026883/?sp=23&st=image&r=0.19,0.521,0.579,0.487,0>.

> rights conferred by the said sub-clauses either in the interests of the general public or for the protection of the interests of any Scheduled Tribe.
>
> (6) Nothing in sub-clause (g) of the said clause shall affect the operation of any existing law in so far as it imposes, or prevent the State from making any law imposing, in the interests of the general public reasonable restrictions on the exercise of the right conferred by the said sub-clause, and, in particular, nothing in the said sub-clause shall affect the operation of any existing law in so far as it prescribes or empowers any authority to prescribe, or prevent the State from making any law prescribing or empowering any authority to prescribe, the professional or technical qualifications necessary for practising any profession or carrying on any occupation, trade or business.

The *Constitution (First Amendment) Act, 1951* amended *inter alia* clause 19(2) as follows:[210]

> 19. (2) Nothing in sub-clause (a) of clause (1) shall affect the operation of any existing law, or prevent the State from making any law, in so far as such law imposes reasonable restrictions on the exercise of the right conferred by the said sub-clause in the interests of the security of the State, friendly relations with foreign States, public order, decency or morality, or in relation to contempt of court, defamation or incitement to an offence.

As discussed above, it is Article 19 that the J&K Constituent Assembly sought to modify in its application to the state, by adding "security of the State" as a reasonable restriction based on which laws could not be invalidated. While State security was already a ground of restriction under clause 19(2), the 1954 Presidential Order would also add it as a reasonable restriction under clauses (3)-(5). Article 20 is not particularly relevant for our purposes. It protects against 1) conviction for laws not in place at the time an offence was committed, 2) prosecution or punishment for the same offence more than once, and 3) being compelled to be a witness against oneself.[211]

Article 21 was the subject of much debate amongst the framers of the Indian constitution.

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[210] *COI, 1950*, Art 19, as amended by *The Constitution (First Amendment) Act, 1951*, online (pdf): <legislative.gov.in/sites/default/files/COI.pdf> at 27-28; Austin, *supra* note 206 at 40-50.
[211] *COI*, Art 20.

Article 21 provides:[212]

> 21. Protection of life and personal liberty.—
>
> (1) No person shall be deprived of his life or personal liberty except according to procedure established by law.

As in Jammu and Kashmir, many of the framers of the Indian constitution saw preventive detention and other restrictions on civil liberties as necessary to deal with a number of threats to independent India, including combatting foreign aggression, suppressing domestic insurrection, and protecting land reforms. In 1947, Sir Benegal Narsing Rau, Constitutional Advisor to the Constituent Assembly of India and later India's representative to the United Nations Security Council, met with a number of American judges, including US Supreme Court Justice Felix Frankfurter. Justice Frankfurter advised Rau to remove the words 'due process of law' from the Indian constitution. Fearing that the words "due process of law" would allow courts to invalidate social welfare legislation, as had occurred during the *Lochner* era in the United States, the framers of the Indian Constitution replaced "due process of law" with "procedure established by law" in Article 21. The word "liberty" was also qualified as "personal liberty". As a concession to those who had opposed the removal of "due process", Article 22 was inserted into the Indian constitution as a protection against arbitrary arrest and detention.[213] Article 22, as initially enacted, provided as follows:[214]

> 22. Protection against arrest and detention in certain cases.—
>
> (1) No person who is arrested shall be detained in custody without being informed, as soon as may be, of the grounds for such arrest nor shall he be denied the right to consult, and to be defended by, a legal practitioner of his choice.

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[212] *COI*, Art 21.
[213] Abhinav Chandrachud, "Part VII Rights–Substance and Content, Ch. 43: Due Process" in Sujit Choudhry, Madhav Khosla & Pratap Bhanu Mehta, eds, *The Oxford Handbook of the Indian Constitution* (Oxford: Oxford University Press, 2016) 777 at 777-781.
[214] *COI*, Art 22.

(2) Every person who is arrested and detained in custody shall be produced before the nearest magistrate within a period of twenty-four hours of such arrest excluding the time necessary for the journey from the place of arrest to the court of the magistrate and no such person shall be detained in custody beyond the said period without the authority of a magistrate.

(3) Nothing in clauses (1) and (2) shall apply—

(a) to any person who for the time being is an enemy alien; or

(b) to any person who is arrested or detained under any law providing for preventive detention.

(4) No law providing for preventive detention shall authorise the detention of a person for a longer period than three months unless—

(a) an Advisory Board consisting of persons who are, or have been, or are qualified to be appointed as, Judges of a High Court has reported before the expiration of the said period of three months that there is in its opinion sufficient cause for such detention:

Provided that nothing in this sub-clause shall authorise the detention of any person beyond the maximum period prescribed by any law made by Parliament under sub-clause (b) of clause (7); or

(b) such person is detained in accordance with the provisions of any law made by Parliament under sub-clauses (a) and (b) of clause (7).

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, as soon as may be, communicate to such person the grounds on which the order has been made and shall afford him the earliest opportunity of making a representation against the order.

(6) Nothing in clause (5) shall require the authority making any such order as is referred to in that clause to disclose facts which such authority considers to be against the public interest to disclose.

(7) Parliament may by law prescribe—

(a) the circumstances under which, and the class or classes of cases in which, a person may be detained for a period longer than three months under any law providing for preventive detention without obtaining the opinion of an Advisory Board in accordance with the provisions of sub-clause (a) of clause (4);

(b) the maximum period for which any person may in any class or classes of cases be detained under any law providing for preventive detention; and

> (c) the procedure to be followed by an Advisory Board in an inquiry under sub-clause (a) of clause (4).

The protections Article 22 offered were limited. Clauses (1) and (2) provided that detainees had the right to be informed of the grounds of their detention, to be represented by counsel of their choice, and to be produced before a magistrate within 24 hours of their arrest (excluding travel time). Clause (3), however, provided that clauses (1) and (2) would not apply to an "enemy alien" or to anyone detained under any law providing for preventive detention. While clause (4) limited preventive detention to a period of 3 months, unless an Advisory Board of High Court judges, or persons qualified to be appointed as such, report before the 3 month period expires that there are reasons for the detention to continue, clause (7) granted Parliament (and the 1954 Presidential Order granted J&K State Legislature) the power to prescribe circumstances and classes of cases in which individuals could be detained for longer than 3 months. Further, while clause (5) provided for detainees' rights to be informed of the grounds for their detention and to make representations against their detention order at the earliest opportunity, clause (6) provided that the detaining authority would not need to provide detainees the grounds of their detention if the authority considers it against the public interest to disclose those grounds.[215]

The Preventive Detention Act, 1950

A number of preventive detention laws lapsed when the Constitution of India came into force on January 26, 1950 and others were vulnerable to being overturned for violating the Indian constitution's Fundamental Rights provisions. The President thus issued the *Preventive Detention (Extension of Duration) Order* that same day. The Order was declared unconstitutional by 4 high

[215] *COI*, Art 22; See also, Austin, *supra* note 206 at 55.

courts over the next month and challenges were brought in a number of high courts to states' preventive detention laws. 500 communists detained in Calcutta were to be released on February 26, 1950, as their detentions had not been reviewed by an Advisory Board within 3 months, and all the states that had passed laws providing for preventive detention (except Bengal) lacked advisory boards. Home Secretary H.V.R. Iengar urged the cabinet to enact Central government preventive detention legislation. The bill for the *Preventive Detention Act, 1950* was passed unanimously in a special Saturday session of Parliament on February 25, 1950 – the day before the Calcutta communists were set to be released.[216] Austin describes the powers available under the Central government's *PDA, 1950* as follows:

> The Act authorized detention of persons acting prejudicially toward the defence and security of India, relations with foreign powers, and the maintenance of public order and essential supplies and services. Detenus were to be given the grounds for the order, unless it was against the public interest to disclose them; and the grounds and any representations by the detenu were to be placed before an advisory board (two high court judges or persons qualified to be such), which was to give its opinion whether there had been sufficient cause for the detention. *Except*, that for detentions relating to the defence and security of India, relations with foreign powers, the security of 'a state', and the maintenance of public order, persons could be detained for up to a year without obtaining an advisory board's view. Disclosure to a court of the grounds for the detention and any representation by a detenu was prohibited by section 14 of the bill.[217]

The 1950 *PDA* was challenged in *AK Gopalan v State of Madras*, AIR 1950 SC 27, the first Fundamental Rights case to reach the Supreme Court. The petitioner, A.K. Gopalan, petitioned the Court for a writ of *habeas corpus* and challenged the constitutional validity of his detention under Articles 19(1)(a), (d), and 21 of the constitution, for violating his rights to freedom of speech and expression, freedom to travel freely in India, and for depriving him of his liberty without a

[216] Austin, *supra* note 206 at 55-57.
[217] *Ibid* at 57-58 [emphasis in original].

procedure established by law. Further, he argued his detention under Article 22 of the constitution was in bad faith. A majority of the Court (4/6 judges) upheld the detention itself but the judges of the Court unanimously struck down Section 14 of the 1950 *PDA*, which prohibited the disclosure to the Court of the grounds for a detention, as violating Article 22(5). Parliament extended the *PDA, 1950* for a year in 1951 and it was replaced by subsequent *Preventive Detention Acts* in 1952, 1954, 1957, and 1960.[218]

The Constitution (Application to Jammu and Kashmir) Order, 1954

Relying on the Jammu and Kashmir Constituent Assembly's recommendation, in May 1954 the President of India, under the power of Article 370, issued the *Constitution (Application to Jammu and Kashmir) Order, 1954*. Noorani writes that this Order is regarded to this day as the "basic order" under Article 370.[219]

Article 35A of the Constitution of India

The 1954 Order added Article 35A to the Indian Constitution. It read as follows[220]:

> 35A. Saving of laws with respect to permanent residents and their rights. —
>
> Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State, —

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[218] *Ibid* at 57-61; *AK Gopalan v State of Madras*, AIR 1950 SC 27, 1950 SCR 88 (Indian Kanoon), online: <indiankanoon.org/doc/1857950/> [*AK Gopalan*].
[219] Noorani, *supra* note 10 at 12.
[220] *COI*, Appendix 1: *Constitution (Application to Jammu and Kashmir) Order 1954*, CO 48, online (pdf): <iitk.ac.in/wc/data/coi-4March2016.pdf> at 366-367; see also, *Constitution (Application to Jammu and Kashmir) Order 1954*, CO 48, cited in Noorani, *supra* note 10 at 268.

> (a) defining the classes or persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or
>
> (b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions
>
> as respects—
>
> (i) employment under the State Government;
>
> (ii) acquisition of immovable property in the State;
>
> (iii) settlement in the State; or
>
> (iv) right to scholarships and such other forms of aid as the State Government may provide,
>
> shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this Part.

Article 35A cemented the rights of those formerly designated "hereditary state subjects" under the Dogra regime, prior to Jammu and Kashmir's accession. It is one of the constitutional provisions abrogated in 2019, and its protections denuded of content through executive orders and legislative amendments that removed the category of "permanent resident" from Jammu and Kashmir's legislation.

Immunity of J&K Preventive Detention Laws on Grounds of State Security

The 1954 Presidential Order extended a number of provisions of the Indian constitution to the State, including Article 19, with the provision recommended by the Drafting Committee providing for the protection of laws restricting freedom of assembly and association in the interests of State security from invalidation for a period of 5 years.[221] The 1954 Order, at paragraph 2(4)(d), amended Article 19 in its application to Jammu and Kashmir as follows:[222]

> (d) In article 19, for a period of five years[223] from the commencement of this Order:-
>
> > (i) in clauses (3) and (4), after the words "in the interests of", the words "the security of the State or" shall be inserted;
> >
> > (ii) in clause (5), for the words "or for the protection of the interests of any Scheduled Tribe", the words "or in the interests of the security of the State" shall be substituted; and
> >
> > (iii) the following new clause shall be added, namely:-
> >
> > '(7) The words "reasonable restrictions" occurring in clauses (2), (3), (4) and (5) shall be construed as meaning such restrictions as the appropriate Legislature deems reasonable.'.

Section 2(4)(e) of the 1954 Order modified Article 22 in its application to Jammu and Kashmir as follows:[224]

> (e) In clauses (4) and (7) of article 22, for the word "Parliament", the words "the Legislature of the State" shall be substituted.

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[221] *Constitution (Application to Jammu and Kashmir) Order 1954*, CO 48, cited in Noorani, *supra* note 10 at 266.
[222] *Constitution (Application to Jammu and Kashmir) Order 1954*, CO 48, s 2(4)(d).
[223] This five year period was subsequently extended for further five-year periods to a total of twenty-five years through later Presidential Orders issued under Article 370: see Duschinski and Ghosh, *supra* note 143 at 328-329.
[224] *Constitution (Application to Jammu and Kashmir) Order 1954*, CO 48, s 2(4)(e).

The 1954 Order also added a provision to Article 35 of the Indian constitution, which provides for Parliament's exclusive jurisdiction to enact legislation in relation to the fundamental rights in Articles 16(3), 32(3), 33, and 34. The new clause (c) granted preventive detention laws passed by the Jammu and Kashmir legislature immunity from challenge under the provisions of Part III of the Indian constitution relating to Fundamental Rights, stating:[225]

> no law with respect to preventive detention made by the Legislature of the State of Jammu and Kashmir, whether before or after commencement of the Constitution (Application to Jammu and Kashmir) Order 1954, shall be void on the ground that it is inconsistent with any of the provisions of this part, but any such law shall, to the extent of such inconsistency, cease to have effect on the expiration of five years from the commencement of the said Order, except as respects things done or omitted to be done before the expiration thereof.

Taken together, the modifications to Articles 19, 22, and 35 in their application to Jammu and Kashmir granted the J&K State Legislature the power to enact preventive detention laws and laws infringing Article 19 through reasonable restrictions (as determined by the State Legislature) justified in the interests of the security of the State. Such laws would be immune to judicial scrutiny or legal challenge on the basis of any infringement of the constitution's Fundamental Rights provisions for a period of 5 years (to be subsequently extended every 5 years for a total period of 25 years).[226]

The Jammu and Kashmir Preventive Detention Act, 1954

The Jammu and Kashmir State Legislature replaced the *J&K Public Security Act 1946*, created initially to suppress the Quit Kashmir movement and under which Sheikh Abdullah was arrested,

[225] *Ibid* at 267-268.
[226] Duschinski and Ghosh, *supra* note 143 at 328-329.

with the *Jammu and Kashmir Preventive Detention Act, 1954* ("*J&K PDA, 1954*"). The *J&K PDA, 1954* was designed to expire after a period of five years, but was repeatedly replaced shortly before its expiration by *inter alia* the *Preventive Detention Amendment Act, 1958*, the *Preventive Detention Act, 1964* and the *Preventive Detention (Amendment) Act, 1967*. It would eventually be replaced by its modern iteration, the *Jammu and Kashmir Public Safety Act, 1978* ("*PSA*"). As a result of Article 35(c) and the modifications to the application of Articles 19 and 22, all preventive detention legislation passed by the State Legislature, including the various iterations of the *J&K PDA*, were immune to judicial scrutiny for violation of Fundamental Rights prior to the passage of the *PSA* in 1978.[227] Duschinski and Ghosh argue that the J&K High Court and Indian Supreme Court's refusal to consider challenges to the *J&K PDA* based on fundamental rights violations led to "a virtual suspension of the *habeas corpus* right to challenge arbitrary and unlawful detentions" in Jammu and Kashmir.[228]

This chapter has introduced Article 370, the provision through which the Indian constitution was applied to the newly acceded State of Jammu and Kashmir. The text of Article 370 contained a number of protections restricting the Centre's ability to unilaterally extend the Indian constitution to Jammu and Kashmir. However, differences of opinion regarding Article 370's purpose and effect quickly arose, as seen in the debates around the 1952 Delhi Agreement between Nehru and Sheikh Abdullah. These differences of opinion, combined with the fallout around Mukherjee's arrest and death, culminated in Sheikh Abdullah's removal from power and detention under the 1946 *Public Security Act*, a Dogra-era law meant to put down resistance to the British-backed princely state, and a predecessor to the *J&K PDA, 1954*.

[227] *Ibid* at 319-320, 329.
[228] *Ibid* at 330.

Article 370 quickly became a vessel through which the rights of the State's residents could be restricted. Relying on states of necessity linked to the new State's land reform measures and the fallout of the First Indo-Pak War, the State, with a Prime Minister and Legislature more favourable to integration with India, enacted preventive detention legislation to protect against threats to the security of the State. Through Article 370's power and particularly the 1954 Presidential Order, this preventive detention legislation was made immune to challenge for violating the Fundamental Rights provisions of the Indian constitution.

The following chapter will examine the jurisprudence around Articles 370 and 35(c), showing how the judiciary's interpretation of these Articles, and of the 1954 Presidential Order, facilitated the exceptional state of affairs in which the rights of Jammu and Kashmir's residents were made meaningless by the mere invocation of State security. It will apply the theoretical framework of the state of exception laid out earlier to the legal-constitutional regime in Jammu and Kashmir, arguing that Article 370 itself creates the gap where law in the State – the protection of fundamental rights in particular – is suspended through the operation of the law itself.

The Jurisprudence: Article 370, the Presidential Orders, and the *J&K PDA*

This chapter examines the jurisprudence around Article 370, the 1954 Presidential Order, Article 35(c), and the *J&K PDA*(s). It also describes two competing interpretations of Article 370 articulated in the 1960s. The first is the view of Prime Minister Nehru and his allies, which framed Article 370 as a tool to finalize Jammu and Kashmir's full integration with India and treated the State's accession as final and irrevocable. The second is the view of the Jammu and Kashmir Plebiscite Front, articulated in its White Paper, that Jammu and Kashmir's accession to India was temporary and revocable. The chapter will discuss how invocations of State security, linked to contemporary conditions in the State and conditions at the time of accession, were deployed to justify restrictions on the fundamental rights of the State's residents and the erosion of the State's autonomy, both through the vessel of Presidential Orders under Article 370.

I examine six cases in particular: the Indian Supreme Court's three major decisions interpreting Article 370, as well as cases on Article 35(c) and the *J&K PDA*s. The underlying thread is that Article 370, structured as a protection against the Centre's legislative power, has through its own paradoxical operation, exposed the inhabitants of Jammu and Kashmir to the coercive power of the state – referring to both the State and India. Through Presidential Orders eroding Jammu and Kashmir's autonomy and immunizing preventive detention measures from constitutional scrutiny, justified by the invocation of State security, Article 370 as interpreted by the judiciary, has through its own application suspended the rights of those it was meant to protect.

The first case I discuss is the J&K High Court's decision in *Ghulam Ahmad Ashai v State of J&K*. While this decision does not touch on Article 370 or 35(c) directly, it is the first legal challenge to the *J&K PDA, 1954* and to a detention order issued under the *PDA* on the grounds of maintaining public safety and peace. I then discuss the Indian Supreme Court's decision in *P L*

Lakhanpal v The State of Jammu and Kashmir, the leading case on Article 35(c). The petitioner in that case challenged his detention under the *J&K PDA, 1954*, as well as a provision of the *J&K PDA* preventing the petitioner from knowing the grounds of his detention justified on the basis of State security. The Court upheld the *J&K PDA* and the detention order, including the decision not to communicate the grounds of detention, on the basis of Article 35(c).

Next, I discuss the first of the Supreme Court's three major decisions on Article 370: *Prem Nath Kaul v State of J&K*. While the decision is focused on the plenary powers of the Maharaja to enact the *Big Landed Estates Abolition Act*, it is noteworthy for the Court's holding that the form the 'Government of the State' should take was left to the J&K Constituent Assembly to decide, and that the constitutional relationship between the State and India was governed by the Instrument of Accession until the Constituent Assembly reached a decision in that regard. Importantly, this holding was overlooked in the Supreme Court's later decisions on Article 370, which allowed the Indian constitution's application to the State to be modified through Presidential Orders despite the dissolution of the State's Constituent Assembly.

After pausing briefly to describe the competing views of Nehru and his allies, and the Plebiscite Front, regarding the extent and finality of Jammu and Kashmir's accession to India, I discuss the Indian Supreme Court's decision in *Puranlal Lakhanpal v President of India and Ors.* This case involved a challenge to the 1954 Presidential Order's modification of the voting rules in the State. The Court held the President had broad powers under Article 370 to modify the Indian constitution's application to Jammu and Kashmir. This broad interpretation of the President's powers under Article 370 was confirmed in the last two major decisions of the Supreme Court on Article 370.

In *Sampat Prakash v State of J&K and Anr*, the Court discussed in detail the relationship between the *J&K PDA*(s), Article 35(c), and Article 370, upholding the validity of Presidential Orders extending the moratorium on constitutional challenges to preventive detention legislation. The Court found this power to extend the moratorium through Presidential Orders was supported by the broad powers of the President under Article 370 to modify the Indian constitution's application to the State, and by the continuing exceptional state of affairs in Jammu and Kashmir. The Court again dismissed the petitioner's challenge to his detention based on the application of Article 35(c).

Finally, I discuss the last of the Supreme Court's major decisions on Article 370: *Mohd. Maqbool Damnoo v State of Jammu and Kashmir*. The Court again dismissed challenges to a detention order and the decision not to communicate the grounds of detention to the petitioner under the *J&K PDA* based on grounds of State security and the operation of Article 35(c). The significance of the case, however, is in the Supreme Court's interpretation of the 'Government of the State' in the Explanation to Article 370. The Court held the President had the power to modify the meaning of that expression because of the broad modificatory powers Article 370 provided.

Ghulam Ahmad Ashai v State of J&K (J&K PDA, 1954)

The first challenge to the *J&K PDA, 1954* was heard by the Jammu & Kashmir High Court in *Ghulam Ahmad Ashai v State of J&K*, 1954 CriLJ 1811. The petitioner, Ghulam Ahmad Ashai, was arrested and detained in August 1953, under the same 1946 *Public Security Act* through which Sheikh Abdullah was detained. The detention order, issued by the Deputy Inspector General ("DIG") of Police in Kashmir, justified the detention on the basis that the DIG was satisfied "that

it is necessary to detain the said Mr. G. A. Ashai with a view to prevent him from acting in any manner prejudicial to the maintenance of public safety and peace".[229]

The detention was supposed to expire after two months but was extended for further two-month periods several times through subsequent orders of Durga Prasad Dhar, then Jammu and Kashmir's Deputy Minister in charge of Law and Order. On April 4, 1954, the Jammu and Kashmir Government revoked the previous detention order and passed a fresh detention order under the *Public Security Act*. Ashai brought the petition at issue in response to the April 4 order but also sought to challenge the previous detention and extension orders, as well as orders transferring him between jails. While the High Court expressed some dissatisfaction with the earlier orders, it held that the validity of the detention would be adjudicated on the basis of the April 4 order.[230] The April 4 detention order provided that "the Government are satisfied with respect to Ghulam Ahmad Ashai… that with a view to prevent him from acting in any manner prejudicial to the maintenance of public safety and peace; it is necessary to make the following order… directing that the said Ghulam Ahmad Ashai be detained in subsidiary jail, Kud, with effect from this day, the 4th of April 1954".[231]

In addition to challenging the detention itself on numerous grounds, Ashai challenged the constitutional validity of section 19 of the *J&K PDA, 1954*. The 1954 *PDA* was passed to replace the *Public Security Act* while Ashai was imprisoned. Section 19 of the *J&K PDA, 1954* repealed the *Public Security Act* but validated any detention orders purported to have been passed under it.

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[229] *Ghulam Ahmad Ashai v State of J&K*, 1954 CriLJ 1811 (Indian Kanoon), online: <indiankanoon.org/doc/1648233/> at para 2 [*Ashai*].
[230] *Ibid* at paras 1-6.
[231] *Ibid* at para 6.

Further, it directed that a person detained under the *Public Security Act* should continue to be detained for a further 6 months from the date of the commencement of the *J&K PDA, 1954*.[232]

Ashai argued that section 19 was *ultra vires* the Indian constitution in that it was not in accordance with the "spirit of the Constitution". The Court dismissed this argument, finding legislative provisions could not be invalidated by the "spirit" of the constitution, only by its express provisions.[233] Ashai also challenged section 19 of the *J&K PDA* as *ex post facto* law framed to govern detentions ordered under earlier laws that were now repealed and for which remedies were thus no longer available. He argued, referring by analogy to Article 20 of the Indian constitution, that the validity of detentions should be determined with reference to the law in place when the detention was ordered. The Court noted Article 20 provides that a person should be tried and sentenced according to the law in force at the time of the offence and forbids the trial and conviction of a person pursuant to a law not in force when the offence was committed. The Court dismissed Ashai's argument based on analogy, finding proceedings under the *J&K PDA, 1954* were not judicial proceedings and that preventive detention is not a conviction or sentence of imprisonment. Article 20 was thus not available to Ashai as a means to invalidate the law. The Court ultimately found that Ashai's detention was valid as, even if the original detention order was problematic, the detention order issued on April 4 under the *Public Security Act* was valid.[234]

I note this decision not for its legal significance in relation to Article 370, but to illustrate the transition from the *Public Security Act* to the *PDA*. Other than confirming that Article 20 of the Indian constitution was not available as relief against preventive detention even absent the application of Article 35(c), what is noteworthy about this case is that the State government's

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[232] *Ibid* at para 10; Duschinski and Ghosh, *supra* note 143 at 330.
[233] *Ashai*, *supra* note 229 at paras 9-10, citing *Asiatic Engineering Co v Achhru Ram and Ors.*, AIR 1951 All 746 (Indian Kanoon), online: <indiankanoon.org/doc/760527/>; *AK Gopalan*, *supra* note 218.
[234] *Ashai*, *supra* note 229 at paras 11-13; Duschinski and Ghosh, *supra* note 143 at 330.

determination that it was necessary to detain the petitioner in the interests of public safety and peace was never questioned. The Court does not delve into the question of whether or how the State government justified its finding that the petitioner was a threat to public safety or peace. This pattern is repeated in the cases discussed below; the mere invocation of a state of necessity – a threat to peace, safety, or security – is sufficient to establish an exceptional state of affairs where an individual's right to be free from the coercive power of the state is made meaningless and the individual is left without legal recourse.

P L Lakhanpal v The State of Jammu and Kashmir (Article 35(c) of the Indian Constitution)

The leading case on Article 35(c) of the Indian constitution – the provision which immunized preventive detention legislation passed by the Jammu and Kashmir legislature from constitutional challenge for violating Fundamental Rights – is the Supreme Court of India's decision in *P L Lakhanpal v The State of Jammu and Kashmir*, 1956 AIR 197, 1955 SCR (2)1101. The petitioner, Puranlal Lakhanpal claimed in his petition to have been involved in political activism in Jammu and Kashmir since 1946, when he was closely associated with the "Quit Kashmir" movement as the General Secretary of the Congress Socialist Party, Lahore. He claimed to be the Chairman of the End Kashmir Dispute Committee and General Secretary of the World Democratic Peace Congress. He had been publicly critical of Bakshi Ghulam Mohammad's government, the Jammu and Kashmir Constituent Assembly, India's policies towards Jammu and Kashmir, and of Sheikh Abdullah's detention. He characterized the Jammu and Kashmir Constituent Assembly as having forfeited the confidence of the people and described Mohammad's Cabinet as corrupt, tyrannical, dominated by communists, and the most hated government Jammu and Kashmir had ever seen. He

had sent telegrams expressing similar views to the President and Prime Minister of India and to Sadr-i-Riyasat Karan Singh.[235]

Lakhanpal visited Jammu and Kashmir in September, 1955 and met with a number of Kashmiris in Srinagar, including newspaper editors and members of the Legislative Assembly. He claimed that after a few days, he travelled from Srinagar to Anantnag along with Mirza Afzal Beg, Sheikh Abdullah's former right-hand man who was arrested with him in 1953. Beg founded the All Jammu and Kashmir Plebiscite Front ("Plebiscite Front") in August 1955 and was its President. The party stood opposed to Mohammad's government and would later become the principal opposition party.[236] As its name suggests, the party called for Jammu and Kashmir's sovereignty to be determined through a popular plebiscite.[237] Lakhanpal claimed to have stayed with Beg in Anantnag for a few days, listening to locals' "harrowing tales of woe" and speaking to an informal meeting of Plebiscite Front workers.[238] In early October, he travelled to Sopore and made a similar address to a gathering of a few hundred workers, before returning to Srinagar where he made several attempts to contact and set up an interview with Sheikh Abdullah, who was imprisoned in Kud jail.[239] On October 4, Lakhanpal held a press conference and "made a written statement" complaining of the State government's "legalized lawless [*sic*], disorder, corruption and nepotism".[240]

On the morning of October 5, Lakhanpal was detained by the Superintendent of Police, Srinagar under a detention order passed by the State government's Cabinet and signed by Bakshi

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[235] *PL Lakhanpal v The State of Jammu and Kashmir*, 1956 AIR 197, 1955 SCR (2)1101 (Indian Kanoon), online: <indiankanoon.org/doc/1572596/> at 1102-1105 [*Lakhanpal v J&K*]; Duschinski and Ghosh, *supra* note 143 at 330.
[236] *Ibid* at 1103-1105.
[237] Duschinski and Ghosh, *supra* note 143 at 319-320, citing Sumantra Bose, *Contested Lands: Israel-Palestine, Kashmir, Cyprus, Bosnia, Cyprus, and Sri Lanka* (Cambridge, US: Harvard University Press, 2007) at 171, 173.
[238] *Lakhanpal v J&K*, *supra* note 235 at 1104-1105.
[239] *Ibid* at 1105.
[240] *Ibid*.

Ghulam Mohammad. The detention order dated October 4, 1955 and issued under s. 3(1)(a)(i) of the *J&K PDA, 1954* was aimed at preventing Lakhanpal from acting in a manner prejudicial to State security:[241]

> The Government having considered the facts stated in the memo of the Minister Incharge, Law and Order are satisfied that it is necessary to detain P. L. Lakhanpal, Chairman, End Kashmir Dispute Committee at present residing in Kashmir Guest House, Lal Chowk, Amira Kadal, Srinagar, with a view to preventing him from acting in any manner prejudicial to the security of the State. Accordingly the Government hereby accord sanction to the Order annexed hereto and authorize the Chief Secretary to Government to issue the same over his signature.

The order actually served on Lakhanpal was annexed to the above order and was signed by the Chief Secretary to the Jammu and Kashmir government. It also referred to the necessity of detaining Lakhanpal in order to protect State security:[242]

> Whereas the Government are satisfied with respect to P. L. Lakhanpal, Chairman, End Kashmir Dispute Committee, at present residing in Kashmir Guest House, Lal Chowk, Amirakadal, Srinagar that with a view to preventing him from acting in a manner prejudicial to the security of the State it is necessary to make an order directing that the said P. L. Lakhanpal be detained:
>
> Now, therefore in exercise of the powers conferred by sub- section (1) of section 3 of the Jammu and Kashmir Preventive Detention Act, 2011[243], the Government are pleased to order that the said P. L.
>
> Lakhanpal be detained in sub-jail, Kothibagh, Srinagar; Notice of this Order shall be given to the said P. L. Lakhanpal by reading over the same to him. By order of Government.

Lakhanpal challenged the latter detention order, as well as the provisions of the *J&K PDA, 1954* under which it was made, as violating his right to personal liberty under Article 21 of the Indian

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[241] *Ibid* at 1105-1106.
[242] *Ibid* at 1106-1107.
[243] 2011 here refers to the Hindu *Vikram Samvat* calendar and equates to 1954 in the Gregorian calendar.

constitution as extended to Jammu and Kashmir. His challenge was also based on his right to know the grounds of his detention – which were never provided to him despite numerous requests – under Article 22(5), as extended to Jammu and Kashmir through the *Constitution (Application to Jammu and Kashmir) Order, 1954*. The State filed an affidavit in response to Lakhanpal's petition, stating that Lakhanpal "actually engaged him-self in activities prejudicial to the security of the State" and that the Jammu and Kashmir government was "satisfied that it is not in the public interest to communicate to the petitioner the grounds of the said detention order".[244]

The Court reviewed the impugned provisions of the *J&K PDA, 1954*. Section 3 provided:[245]

> (1) The Government may–
>
> > (a) if satisfied with respect to any person that with a view to preventing him from acting in any manner prejudicial to–
> >
> > (i) the security of the State; or..... it is necessary so to do, make an order directing that such person be detained".

Section 8 dealt with communication of grounds of detention as follows:[246]

> (1) When a person is detained in pursuance of a detention order, the authority making the order shall, as soon as may be, communicate to him the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order to the Government;
>
> Provided that nothing contained in this sub-section shall apply to the case of any person detained with a view to preventing him from acting in any manner prejudicial to the security of the State if the Government by order issued in this behalf declares that it would be against the public interest to communicate to him the grounds on which the detention order has been made.
>
> (2) Nothing in sub-section (1) shall require the authority to disclose facts which it considers to be against the public interest to disclose.

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[244] *Ibid* at 1107.
[245] *Ibid* at 1108.
[246] *Ibid* at 1108-1109.

The Court noted that a person detained under s. 3(a)(i) with the aim of preventing them from acting prejudicially to state security falls outside the terms of s. 8(1) of the *J&K PDA* where the government has declared that communicating the grounds of detention would be against the public interest. The Court noted the petitioner had not argued the detention was not justified under the above provisions, rather:[247]

> it has been argued by the learned counsel for the petitioner that the terms of the section are unconstitutional inasmuch as they are inconsistent with the provisions of articles 21 and 22 of the Constitution and are therefore to the extent of such in consistency void in view of the provisions of article 13 of the Constitution.[248]

The Court reasoned, however, that these constitutional protections were not available to him, noting:

> This argument presupposes that the petitioner can invoke the aid of those articles. It has not been contended on behalf of the petitioner that apart from the provisions of Part III [Fundamental Rights] of the Constitution the petitioner has any fundamental rights guaranteed to him, Therefore, if articles 21 and 22 are out of the way, as will presently appear, the argument is without any force.[249]

The Court noted that the 1954 Presidential Order, through its modification of Article 22 in its application to Jammu and Kashmir, empowered the Jammu and Kashmir Legislature to legislate with respect to preventive detention. It noted further that the 1954 Presidential Order created Article 35(c) of the Indian constitution, which imposed a 5-year moratorium on

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[247] *Ibid* at 1109.
[248] Article 13 provides that laws inconsistent with the Fundamental Rights provisions of the Indian Constitution shall, to the extent of the inconsistency, be void.
[249] *Ibid*.

challenges to preventive detention legislation passed by the State Legislature. The Court discussed the effect of Article 35(c) in relation to the *J&K PDA, 1954*, finding *J&K PDA*'s provisions were coextensive with the 5-year moratorium on constitutional challenges and were immune from constitutional challenge:[250]

> The effect of this modification in article 35 of the Constitution is that such of the provisions of the Act as are inconsistent with Part III of the Constitution shall be valid until the expiration of five years from the commencement of the Order. This is an exception which has been engrafted on the Constitution in respect of fundamental rights relating to personal liberty for the limited period of five years. The Act itself has a limited life of five years. Thus the exception aforesaid is co-extensive with the life of the Act itself. Hence, so long as the Act continues in force in its present form, the provisions of articles 21 and 22 in so far as they are inconsistent with the Act are out of the way of the respondent and the petitioner cannot take advantage of those provisions. Therefore, there is no question of the provisions of section 8 of the Act being unconstitutional by reason of their being inconsistent with articles 21 and 22 of the Constitution; and consequently article 13 is of no assistance to the petitioner.

The Court briefly considered, then dismissed, arguments by Lakhanpal that the President was not authorized to create Article 35(c) through the 1954 Presidential Order, noting that Article 370(1)(c) and (d) authorized the President to specify the exceptions and modifications to the provisions of the Indian constitution subject to which the constitution shall apply to Jammu and Kashmir. The Court concluded because Article 35(c) was only added to the constitution with respect to Jammu and Kashmir and section 8 of the *J&K PDA* was consistent with Article 35(c), Lakhanpal was not entitled to know the grounds of his detention beyond what was disclosed in the order itself. Lakhanpal's petition to the Court was dismissed in its entirety.[251]

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[250] *Ibid* at 1110-1111.
[251] *Lakhanpal v J&K*, *supra* note 235 at 1113.

Discussion: The Discourse of State Security

The discourse of State security suffuses this decision. Lakhanpal was detained because of activities allegedly prejudicial to State security. He was denied the chance to know the grounds of his detention because he was detained in the interest of State security and communicating those grounds would be against the public interest. The petitioner's right to know his grounds of detention under Article 22(5) is nullified because the Article was extended to Jammu and Kashmir through the 1954 Presidential Order with a carve-out for preventive detention legislation aimed at protecting State security. The Court notes the petitioner did not challenge the validity of the detention itself but does not acknowledge that he had no basis to do so; without knowing the grounds of his detention he could not know the case to make. Moreover, the petitioner had no avenue to challenge the constitutionality of the detention, as the Court confirms when finding Article 35(c)'s moratorium on constitutional challenges is co-extensive with the *J&K PDA, 1954*'s five-year application. The right to freedom in the Indian constitution was not available to Lakhanpal because the 1954 Presidential Order under Article 370 nullified its application to preventive detention laws on the basis of State security.

In the next section, we will see the Court discuss in greater detail the power of the President to modify the Indian constitution's application in Jammu and Kashmir, specifically when there is no longer any Constituent Assembly available to confirm such modifications. Before delving into the Court's decision in *Prem Nath Kaul v State of J&K*, however, I pause to discuss the adoption of the J&K State constitution, the dissolution of the J&K Constituent Assembly, and the significance of these events in relation to Article 370's future interpretation and application.

The Jammu and Kashmir State Constitution and the Constituent Assembly's Dissolution

The Jammu and Kashmir Constituent Assembly adopted the State's draft constitution on November 17, 1956. The same day, the Assembly adopted a resolution that it would stand dissolved from January 26, 1957.[252] Noorani notes that with the Assembly's dissolution, "the sole ratificatory authority to the extension of the Centre's powers over the State on the extension of additional provisions of the Constitution of India was gone. The State Government's 'concurrence', valid only till the Assembly first met on 31 October 1951, and then also subject to the Constituent Assembly's ratification, was no substitute for the Assembly's ratification."[253] The executive's usurpation of the legislature's role is particularly troubling in Noorani's view, as the State's "executive had come to power through one rigged poll after another".[254] He quotes Braj Kumar Nehru, Governor of Jammu and Kashmir from 1981-1984:[255]

> 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.

The next case discussed below, *Prem Nath Kaul v State of J&K*, does not explicitly confirm Noorani's view that the State government lost the ability to concur with Presidential Orders under Article 370 once the Constituent Assembly was convened. It does confirm, however, that the form the government of the State was to take was left to the Constituent Assembly and that until the Constituent Assembly made such a determination, the relationship of the State with India was

[252] Noorani, *supra* note 10 at 13, 286.
[253] *Ibid* at 13.
[254] *Ibid*.
[255] *Ibid* at 13, citing BK Nehru, *Nice Guys Finish Second* (New Delhi: Viking, 1997) at 614–615.

governed by the Instrument of Accession and could not be modified through Orders under Article 370.

Prem Nath Kaul v State of J&K

The significance of the Constituent Assembly's ratificatory role in relation to the extension of the Indian Constitution to Jammu and Kashmir through Article 370 arose in *Prem Nath Kaul v State of J&K*, 1959 AIR 749, 1959 SCR Supl. (2) 270 – the first of the Indian Supreme Court's three major decisions interpreting Article 370. The case concerned an appeal from a decision of the Jammu and Kashmir High Court. The appellant sought a declaration that the *Big Landed Estates Abolition Act, 1950* was void, inoperative and *ultra vires* of Yuvaraj Karan Singh when he enacted it. He sought a further declaration that he was entitled to retain peaceful possession of his lands.[256] The appellant argued that Karan Singh lacked the authority to promulgate the Act, because when Maharaja Hari Singh transferred his sovereign powers to the Yuvaraj through his June 1949 proclamation, the Maharaja himself was merely a constitutional monarch. The appellant submitted that the Maharaja's sovereign authority had been diminished by either the Jammu and Kashmir Constitution Act 14 issued by the Maharaja in 1939, by the terms of the Instrument of Accession in 1947, or by the Maharaja's March 1948 proclamation replacing Jammu and Kashmir's emergency administration with a popular interim government headed by Sheikh Abdullah.[257] Through the 1948 proclamation, the appellant argued, the Maharaja introduced a popular democratic government in Jammu and Kashmir, surrendered his sovereign rights, and became a constitutional monarch.[258]

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[256] *Prem Nath Kaul v State of J&K*, 1959 AIR 749, 1959 SCR Supl. (2) 270 (Indian Kanoon), online: <indiankanoon.org/doc/816126/> at 272 [*Prem Nath Kaul*].
[257] *Ibid* at 288; see also Bhattacharyya, *supra* note 120 regarding the 1939 State constitution.
[258] *Prem Nath Kaul*, *supra* note 256 at 283-288.

The Court disagreed, finding that the Maharaja had ruled as an absolute monarch and that neither the 1939 Constitution Act, the Instrument of Accession, nor the 1948 proclamation affected the Maharaja's legislative, executive, judicial, or prerogative powers with regard to the internal administration and governance of the State.[259] The Court then considered the Maharaja's competence to confer his sovereign powers on his son, Yuvaraj Karan Singh, through his June 1949 proclamation. The Court concluded that, "[s]ince the Maharaja was himself an absolute monarch, there was no fetter or limitation on his power to appoint somebody else to exercise all or any of his powers. There was no authority or tribunal in the State which could question his right or power to adopt such a course."[260]

The appellant's main argument was that by the extension of provisions of the Indian constitution to Jammu and Kashmir, particularly Article 370, the Yuvaraj had ceased to hold plenary legislative powers in relation to the State. The appellant relied on the text of Article 370 itself and in considering his argument, the Court analyzed the provisions of Article 370 in detail. Article 370(1)(b) restricted Parliament's power to legislate in relation to Jammu and Kashmir by requiring either the consultation (for matters specified in the Instrument of Accession) or concurrence (for other matters in the Union and Concurrent lists of the Indian constitution) of the Jammu and Kashmir State government. The Explanation appended to Article 370(1) clarified that for the purpose of the Article, "the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948". Sub-clauses (c) and (d) of clause (1) were similarly made subject to consultation or concurrence with the State government. Article 370(2) provided that if the State

[259] *Ibid* at 285-289.
[260] *Ibid* at 289.

government gave its concurrence to any extension of the Indian constitution's provisions to Jammu and Kashmir under Article 370(1) before the Jammu and Kashmir Constituent Assembly was convened, the concurrence would be placed before the Assembly for any decision it may take thereon. Article 370(3) provided that the President could end or modify the operation of Article 370 to Jammu and Kashmir but only on the Constituent Assembly's recommendation.[261] The Court summarized the appellant's argument as follows:[262]

> The appellant contends that the scheme of this Article clearly shows that the person who would be recognised by the President as the Maharaja of Jammu & Kashmir was treated as no more than a constitutional Ruler of the State. In regard to matters covered by this Article he could not function or decide by himself and in his own discretion. The consultation contemplated by this Article had to be with the Maharaja acting on the advice of the Council of Ministers and the concurrence prescribed by it had to be similarly obtained and given, and that brings out the limitations on the powers of the Maharaja. It is also urged that the final decision in these matters has been deliberately left to the Constituent Assembly which was going to be convened for the framing of the Constitution of the State, and that again emphasises the limitations imposed on the powers of the Maharaja.

The Court held that the effect of Article 370 on the Maharaja's plenary powers in relation to the State's governance had to be considered in relation to its object and to the context of Jammu and Kashmir's constitutional relationship with India:

> The Constitution-makers were obviously anxious that the said relationship should be finally determined by the Constituent Assembly of the State itself; that is the main basis for, and purport of, the temporary provisions made by the present Article ; and so the effect of its provisions must be confined to its subject-matter. It would not be permissible or legitimate to hold that, by implication, this Article sought to impose limitations on the plenary legislative powers of the Maharaja. These powers had been recognised and specifically provided by the Constitution Act of the State itself; and it was not, and could not have been, within the contemplation, or competence of the Constitution-makers to impinge even indirectly on the said powers. It would be recalled that by the Instrument

[261] *Ibid* at 291-295; *COI*, Art 370.
[262] *Prem Nath Kaul*, *supra* note 256 at 295.

> of Accession these powers have been expressly recognised and preserved and neither the subsequent proclamation issued by Yuvaraj Karan Singh adopting, as far as it was applicable, the proposed Constitution of India, nor the Constitution Order subsequently issued by the President, purported to impose any limitations on the said legislative powers of the Ruler. *What form of government the State should adopt was a matter which had to be, and naturally was left to be, decided by the Constituent Assembly of the State. Until the Constituent Assembly reached its decision in that behalf, the constitutional relationship between the State and India continued to be governed basically by the Instrument of Accession. It would therefore be unreasonable to assume that the application of Art. 370 could have affected, or was intended to affect, the plenary powers of the Maharaja in the matter of the governance of the State.* In our opinion, the appellant's contention based on this Article must therefore be rejected.[263]

It is worth emphasizing the Court's finding that the Indian constitution's framers intended the relationship between Indian and Jammu and Kashmir to *finally determined* by the Constituent Assembly of the State. This appears to support Noorani's argument that no changes could be made to that relationship under Article 370 once the Constituent Assembly dissolved itself. In the next section, I discuss how the proponents and opponents of Jammu and Kashmir's integration with India understood the finality of this relationship. Nehru and his Ministers argued that accession with India was final, notwithstanding earlier promises of a plebiscite. Yet they also argued that Article 370 needed to be kept in place in order to continue extending the Indian constitution's application to the State, suggesting that integration had not yet been fully finalized. The Plebiscite Front argued accession could not be final, both due to the absence of the plebiscite and to Article 370's temporary and transitional nature. Both sides made reference to the history of the State's accession with India but as we have seen from the *Prem Nath Kaul* case, there were many possible interpretations of Article 370's purpose and effect.

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[263] *Ibid* at 296 [emphasis added].

Accession: Temporary or Irrevocable?

Jammu and Kashmir's accession to and integration with India remained a fraught question into the 1960s. Sheikh Abdullah was briefly released from prison on January 6, 1958 and renewed his calls for a UN-administered plebiscite, only to be detained again on April 29, 1958 under the *J&K PDA*. On October 23, 1958 he was belatedly implicated in a pro-Pakistan conspiracy case filed on May 17, 1958. He remained imprisoned until his release in April 8, 1964 when the conspiracy case was withdrawn.[264]

To Prime Minister Nehru and his allies, Article 370 was the vessel through which Jammu and Kashmir's full integration with India would be achieved. In November 1963, in a debate in the Lok Sabha regarding the repeal of Article 370, Nehru noted Article 370 was "a part of certain transitional provisional arrangements", not a permanent part of the constitution.[265] He argued that in fact, Article 370 had been eroded over the years and there was no doubt Jammu and Kashmir was fully integrated with the Union of India.[266] When a member of the Lok Sabha quipped, "[n]ot fully", the Prime Minister repeated that the State was fully integrated. He noted the restrictions on non-permanent residents purchasing land in the State provided by Article 35A remained in place but argued this was a valuable rule that should continue, otherwise "moneyed people" would buy up all the land, driving up prices and causes the State's inhabitants to suffer.[267] Nehru stated the process of Article 370's erosion was ongoing, noted some "fresh steps" would be taken in the following months in that regard, and argued the initiative for finally putting an end to Article 370 should come from the people of the State and the J&K State government.[268]

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[264] Duschinski and Ghosh, *supra* note 143 at 328; Lamb, *supra* note 127 at 203-204; Noorani, *supra* note 10 at 11.
[265] "Jawaharlal Nehru on the 'Erosion' of Article 370, Lok Sabha, 27 November 1963", in Noorani, *supra* note 10 at 304.
[266] *Ibid*.
[267] *Ibid* at 305.
[268] *Ibid*.

The Tunnel of Article 370

Similarly, in a 1964 Lok Sabha debate regarding a Bill to amend the Constitution of India by removing Article 370, Minister of Home Affairs G. L. Nanda remarked that Article 370 could not be altered by relying on Article 368, the provision that normally governs constitutional amendments. Article 368 contained a proviso specifying that in its application to Jammu and Kashmir, "no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under clause (1) of article 370".[269] Nanda noted that to bring forward such an amendment, the moving member would have to "take shelter under article 370 itself". He went on to add that,[270]

> apart from this, if the operation which the Bill visualises, namely, the removal of article 370, is carried out, we are left with a complete void as far as any improvement in the administrative relation with Jammu and Kashmir is concerned hereafter. There will be a total block in the way of any such further change as we might be intending to make. […]
>
> [A]ny further change on the lines of the extension of the Constitution to Jammu and Kashmir with which we are familiar now, cannot be carried out if we take away article 370. […]
>
> The impediments in the way of uniformity are not created by article 370. These impediments are strewn through the pages of the Constitution. In a hundred places, there are those provisions which take away the force of application of the Constitution to Jammu and Kashmir. What will happen to them? Remove 370. They remain.

Nanda then explained the necessity of Article 370 for finalizing Jammu and Kashmir's integration with India. He argued that Article 370 was not a "wall" blocking this integration; it was a "tunnel":[271]

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[269] *COI*, Art 368; "Union Home Minister G.L. Nanda on Abrogation of Article 370, Lok Sabha, 4 December 1964", in Noorani, *supra* note 10 at 307.
[270] "Union Home Minister G.L. Nanda on Abrogation of Article 370, Lok Sabha, 4 December 1964", in Noorani, *supra* note 10 at 307-308.
[271] *Ibid* at 308-309.

> While the rest of the contents of the Constitution […] negate the application of the provisions of the Constitution to Jammu and Kashmir—some of them by extension, others directly— the only avenue of taking the Constitution into Jammu and Kashmir is through the application of the provisions of article 370 […]
>
> An hon. Member said that article 370 is a wall between Jammu and Kashmir and the rest of India. With reference to that, another hon. Member, Shri D.C. Sharma, said, it is not a question of a wall, it is a big mountain. At the same time, he happened to mentioned the Banihal tunnel also. May I submit to him and the other friends that article 370 is neither a wall nor a mountain, but that it is a tunnel? It is through this tunnel that a good deal of traffic has already passed and more will.

Nanda argued that Article 370 had already been serving its purpose – assimilating Jammu and Kashmir and eroding its autonomy. Through this process, Article 370 had been emptied of its contents and remained a mere shell:[272]

> The proof of it, the evidence that what I am saying has great substance, is that in the past years article 370 has been so used, has been availed of, for this purpose. Hon. Members are quite familiar with that process. This article has not remained static. It is through a dynamic process, year after year, that the provision in Jammu and Kashmir has been assimilated in these matters with the rest of India, and this policy, the policy of steady, progressive erosion, has been reiterated here several times. This has been the policy, this was the policy laid before the House several times before by the late Prime Minister and others, and this policy, apart from other considerations which attach to it, does not suffer from any kind of inherent limitation, because it can unfold itself completely. What happens is that only the shell is there. Article 370, whether you keep it or not, has been completely emptied of its contents. Nothing has been left in it. We can regulate it, we can do it in one day, in ten days, ten months. That is entirely for us to consider.

He gave some examples of the types of measures that had been taken or were being contemplated through Presidential Orders under Article 370, including Orders applying India's constitutional provisions regarding "welfare of labour, legal, medical and other professions, trade and commerce in and the production, supply, and distribution of commodities, price control, gold control,

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[272] *Ibid* at 312.

enquiries and statistics, regulation of labour and safety in mines, vital statistics including registration of births and deaths, vocational and technical training, and newspapers, books and printing presses".[273] He noted a Bill for changing the nomenclature of the Sadar-i-Riyasat and Prime Minister of the State had been referred to a select committee, informed the Lok Sabha of the Centre's decision to apply the provisions of Articles 356 and 357 of the Indian constitution to the State, and noted "[e]ntries 43 and 78 of the Union List and Entries 33 and 34 of the Concurrence List are also being made applicable".[274]

The views of Nehru and Nanda would prove correct. Through Presidential Orders issued under Article 370 between 1954 and 1994, "[i]n all, ninety-four of the ninety- seven entries in the Union List were extended to Jammu and Kashmir as were 260 of the 395 Articles of the Constitution."[275] Referring to Presidential Orders issued under Article 370 in the 1960s, Noorani describes how the Jammu and Kashmir State constitution was overridden and its basic structure was altered:

> The head of state elected by the State legislature was replaced by a Governor nominated by the Centre. Article 356 (imposition of President's rule) was applied despite a provision in the State's Constitution for Governor's rule (Section 92). This was done on 21 November 1964. On 24 November 1966, the Governor replaced the Sadar-i-Riyasat after the State's Constitution had been amended on 10 April 1965 by the Sixth Amendment in violation of Section 147 of the Constitution. Section 147 makes itself immune to amendment. It referred to the Sadar-i-Riyasat and required his assent to constitutional amendments. He was elected by the Assembly (Section 27[2]). To replace him by the Centre's nominee was unconstitutionally to alter the basic structure of the Constitution[276]

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[273] *Ibid* at 314.
[274] *Ibid*.
[275] Noorani, *supra* note 10 at 13-14.
[276] *Ibid* at 14.

The Plebiscite Front: Accession as Temporary and Revocable

The Plebiscite Front, founded by Mirza Afzal Beg, took a similar view to Nehru and Nanda regarding Article 370's role in integrating Jammu and Kashmir with India, but a substantially different view of the finality of Jammu and Kashmir's accession. Its White Paper on India's constitutional relationship with Jammu and Kashmir, dated June 23, 1964 opened by explaining its aim – examining the legal possibility of Jammu and Kashmir's secession from India:[277]

> It has been, of late, contended in certain quarters that the accession of the State of Jammu and Kashmir to the Union of India is 'complete, final and irrevocable,' and, for that reason, it is not permissible to claim secession from the Union, which is not even within the power of Parliament to grant. Having regard to these assertions, the Working Committee of the Plebiscite Front resolved that the entire legal position be reviewed and a White Paper issued as a result thereof.

The White Paper concluded that assertions regarding the finality of Jammu and Kashmir's accession were without foundation. It laid out the contentious history of the State's accession, discussing the legal situation governing the accession of princely states at independence; resistance to the Dogra regime, including the Poonch rebellion; and Nehru's promise of a plebiscite once law and order was restored.[278]

It argued, however, that the holding of a plebiscite was a legal prerequisite to finalizing the State's accession, in part because the Maharaja's authority to accede to India had been repudiated when the State's inhabitants rose in rebellion against him: [279]

> [I]t would appear that the then Dominion of India had expressly made a counter-proposal to the offer initially made by the Maharaja to accede to the Dominion of India, postulating therein in very clear and un-ambiguous terms that the accession of the State to the then Dominion of India would be subject to

[277] "The Plebiscite Front's White Paper on Constitutional Relationship of Kashmir with India, 1964", in Noorani, *supra* note 10 at 317.
[278] *Ibid* at 317-321.
[279] *Ibid* at 321-322.

> ratification by the will of the people freely and fully exercised by them, and this condition had been accepted both by Sheikh Mohammad Abdullah, as the acknowledged leader of the then largest political organisation in the State and the Maharaja himself. The accession, therefore, that thus emerged, was an accession which could not be regarded as unqualified and un-conditional but was governed by this one stipulation of ratification of the accession by the ascertainment of the will of the people of the State; and the gentleman who made this offer of accession of the State to the Union of India had altogether lost his authority over the State, even before he had signed the Instrument of Accession and who was, soon after, extended from the State with the consent of the Government of India and later completely ousted from it as a result of his hereditary office of the Maharaja having been abolished in the State. The accession was thus effected by a lame-duck Ruler who had been deprived of the capacity and the means to exercise his free will and volition and whose power to bind the State by any of his acts had vanished by reason of his authority and suzerainty over the State having been effectively repudiated by his subjects even before he had offered to accede to the Dominion of India and by his ceasing completely to possess any such authority thereafter.

The Plebiscite Front agreed, in the White Paper, with Nehru and Nanda's position that Article 370 was essential for extending the Indian constitution's provisions to Jammu and Kashmir as, "but for article 370 of the Constitution of India there is no provision contained in the Constitution of India which applies per se to the State of Jammu and Kashmir".[280]

The White Paper emphasized Article 370's "temporary and transitional" nature and argued, with reference to the promised plebiscite and to Article 1 of the Indian constitution, that the abrogation of Article 370 would end Jammu and Kashmir's accession to India entirely:[281]

> Article 1 deals with the name and territory of the Union of India, and states that India shall be a Union of States and shall comprise of the territories of the States and by virtue of Article 370 the State of Jammu and Kashmir becomes a part of the Union of India within the meaning of Article 1 of the Constitution of India. The legal position, therefore, is that if Article 370 is abrogated, the State of Jammu and Kashmir will cease to be a part of the Union of India even temporarily under Article 1 of the Constitution of India […]

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[280] *Ibid* at 322.
[281] *Ibid* at 323.

> Article 1 of the Constitution of India could not provide for a permanent accession of the State of Jammu and Kashmir to the Union of India, as at the time when that provision was adopted, India continued to declare publicly that she was bound morally, legally, constitutionally and internationally by her commitment to hold a plebiscite in the State of Jammu and Kashmir to determine the will of the people on the question of accession, and since the Constitution of India could be made applicable to the State of Jammu and Kashmir by virtue of the Instrument of Accession alone. Article 1 of the constitution of India could not and did not provide for a permanent accession of this State to the Union of India.

After an analysis of the texts of Article 370, the Instrument of Accession, the 1954 Presidential Order, and the Jammu and Kashmir State constitution,[282] the White Paper concluded that, "the accession of the State of Jammu and Kashmir to the Union of India is purely temporary in character and is not complete, final or irrevocable".[283] The Plebiscite Front's position did not win the day, however, and as Nanda predicted, the erosion of Jammu and Kashmir's autonomy through the tunnel of Article 370 continued, plebiscite or no.

Puranlal Lakhanpal v President of India and Ors.

In fact, the Indian Supreme Court had already expressed its view on the broad powers available to the President under Article 370 in 1961, when Puranlal Lakhanpal found himself once again before the Court, in *Puranlal Lakhanpal v President of India and Ors*, 1961 AIR 1519, 1962 SCR (1) 688. Jammu and Kashmir was ordinarily allotted 6 seats in the Lok Sabha, to be elected directly pursuant to Article 81(1) of the Indian constitution. However, the 1954 Presidential Order modified Article 81(1) in its application to Jammu and Kashmir to the effect that the 6 representatives would be appointed to the Lok Sabha by the President on the recommendation of the J&K State

[282] *Ibid* at 324-329.
[283] *Ibid* at 330.

Legislature. Lakhanpal petitioned the Supreme Court, challenging the modification as exceeding the President's powers and arguing that the modification of Article 81(1) was a radical alteration or amendment that was not justified under Article 370(1). The Court dismissed the challenge, holding that the President's power to modify the Indian constitution in its application to Jammu and Kashmir had to be considered wide enough to include amendment.[284] The Court found that if the President, under Article 370,

> could efface a particular provision of the Constitution altogether in its application to the State of Jammu and Kashmir, we see no reason to think that the Constitution did not intend that he should have the power to amend a particular provision in its application to the State of Jammu and Kashmir. It seems to us that when the Constitution used the word "modification" in Art. 370(l) the intention was that the President would have the power to amend the provisions of the Constitution if he so thought fit in their application to the State of Jammu and Kashmir.[285]

The Court considered the meaning of the word 'modification' and concluded that "when Art. 370(l) says that the President may apply the provisions of the Constitution to the State of Jammu and Kashmir with such modifications as he may by order specify it means that he may vary (i.e., amend) the provisions of the Constitution in its application to the State of Jammu and Kashmir."[286] The Court was thus of the opinion that "in the context of the Constitution we must give the widest effect to the meaning of the word 'modification" used in Art. 370(l) and in that sense it includes an amendment."[287]

The Court's interpretation of the word 'modification' would be picked up *Sampat Prakash v State of J&K & Anr*. Referring to the exceptional situation in Jammu and Kashmir both at the

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[284] *Puranlal Lakhanpal v President of India and Ors*, 1961 AIR 1519, 1962 SCR (1) 688 (Indian Kanoon), online: <indiankanoon.org/doc/1157611/> at 689-692 [*Lakhanpal v POI*].
[285] *Ibid* at 692.
[286] *Ibid* at 693.
[287] *Ibid*.

time of the State's accession and contemporary with the Court's decisions, the Court in *Sampat Prakash* upheld the extension of the 5-year moratorium on constitutional challenges to preventive detention laws and orders for a period of 15 years.

Sampat Prakash v State of J&K and Anr.

Sampat Prakash v State of J&K & Anr, 1970 AIR 1118, 1970 SCR (2) 365[288] was the second of the Supreme Court's three major decisions on Article 370. Government employees and teachers in Jammu Province held mass meetings and carried out a number of strikes through November and early December 1967, demanding improved rates for their dearness allowances – payments paid to government employees to supplement their salaries in order to mitigate effects of inflation. The petitioner, Sampat Prakash, was the General Secretary of the All Jammu & Kashmir Low-Paid Government Servants Federation. He spoke at one of the mass meetings on December 5. On December 11, workers in other industries went on strike in solidarity with the government employees and that day, the petitioner was dismissed from government service. He attended and addressed another mass meeting the following day, December 12.[289] Based on his activities and the continuance of the situation, on March 16 1968 the District Magistrate of Jammu made an order of detention against Prakash under section 3 of the *Jammu and Kashmir Preventive Detention Act No. 13* of 1964 [*J&K PDA, 1964*] and on March 18 he was detained. He was provided the grounds of his detention on March 26 and on April 8 the Jammu and Kashmir State government approved his detention order. The State government, acting under section 13A of the

[288] *Sampat Prakash v State of J&K & Anr*, 1970 AIR 1118, 1970 SCR (2) 365 (Indian Kanoon), online: <indiankanoon.org/doc/1573666/> [*Sampat Prakash*].
[289] *Ibid* at 367.

J&K PDA, 1964 decided to continue Prakash's detention without referring it to an Advisory Board.[290]

During the preliminary hearing, Prakash argued section 13A was *ultra vires* the Indian constitution for violating Article 22. The question was heard by a Constitution bench of the Supreme Court, then referred to a larger bench, and then heard by the Full Court. The Court held the question was answered by the application of Article 35(c) to Jammu and Kashmir. With the reference question answered, Prakash argued the 1954 Presidential Order only applied Article 35(c) for a period of 5 years, which had expired in 1959, and that the *J&K PDA, 1964*, which was passed in 1964, could not benefit from the immunity granted by Article 35(c). The Court noted, however, that Article 35(c)'s effect had been extended through subsequent Presidential Orders under Article 370:

> for the words "five years" in Art. 35(c), the words "ten years" were substituted by the Constitution (Application to Jammu & Kashmir) Second Amendment Order, 1959 (C.O. 59), which was passed before the expiry of those five years and, subsequently, for the words "ten years" so introduced, the words "fifteen years" were substituted by the Constitution (Application to Jammu and Kashmir) Amendment Order, 1964 (C.O. 69). This modification was also made before the expiry of the period of ten years from the date on which the Constitution (Application to Jammu and Kashmir) Order, 1954 was passed.[291]

Prakash argued the modifications made by Presidential Orders in 1959 and 1964, extending the immunity period to "ten" and then "fifteen" years, were void as they could not be validly issued by the President under Article 370(1) in 1959 or 1964.[292] In his view, Article 370's temporary provisions ceased to be operative when the J&K Constituent Assembly finished framing the State constitution. He relied on Article 370's legislative history and particularly Minister Ayyangar's

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[290] *Ibid* at 368.
[291] *Ibid* at 368-369.
[292] *Ibid* at 369.

speech in the Indian Constituent Assembly when he moved to pass Article 370 (then draft Article 306A) in 1949. Ayyangar had argued the special circumstances in Jammu and Kashmir required special treatment. The Court summarized the special circumstances identified by Ayyangar as follows:

> (1) that there had been a war going on within the limits of Jammu & Kashmir State;
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> (2) that there was a cease-fire agreed to at the beginning of the year and that cease-fire was still on;
>
> (3) that the conditions in the State were still unusual and abnormal and had not settled down;
>
> (4) that part of the State was still in the hands of rebels and enemies;
>
> (5) that our country was entangled with the United Nations in regard to Jammu & Kashmir and it was not possible to say when we would be free from this entanglement;
>
> (6) that the Government of India had committed themselves to the people of Kashmir in certain respects which commitments included an undertaking that an opportunity be given to the people of the State to decide for themselves whether they would remain with the Republic or wish to go out of it; and
>
> (7) that the will of the people expressed through the Instrument of a Constituent Assembly would determine the Constitution of the State as well as the sphere of Union Jurisdiction over the State.[293]

Relying on this historical background, as well as the text of Article 370's provisions, Prakash argued 1) Article 370 could only have been intended to remain effective until the Jammu and Kashmir State constitution came into force on January 26, 1956; and 2) any Presidential Order under Article 370 had to be made before the J&K Constituent Assembly's dissolution. All Presidential Orders under Article 370 modifying the Indian constitution's application to Jammu and Kashmir after the date the State constitution came into force were void. Alternatively, any

[293] *Ibid* at 370-371.

such modification required the J&K Constituent Assembly's concurrence and thus no such modification could be made after the Assembly dissolved itself.[294]

The Court disagreed with both arguments. With regard to the historical context, the Court agreed with the respondent Attorney-General that "the provisions of Art. 370 should be held to be continuing in force, because *the situation that existed when this article was incorporated in the Constitution had not materially altered, and the purpose of introducing this article was to empower the President to exercise his discretion in applying the Indian Constitution while that situation remained unchanged*".[295]

The Court also disagreed with Prakash's interpretation of Article 370. Clause (2) of the Article made no mention of the Constituent Assembly completing its work or dissolving. Clause (3) provided that Article 370's application to Jammu and Kashmir could only be modified by a Presidential Order issued on the Constituent Assembly's recommendation. Since the Constituent Assembly did not recommend, and the President did not order, that Article 370 should cease to be operative, it must remain operative. In fact, the Constituent Assembly had recommended the President issue the 1952 Presidential Order modifying the 'Explanation' to clause (1) of Article 370.[296] In the Court's view, "[t]his makes it very clear that the Constituent Assembly of the State did not desire that this article should cease to be operative and, in fact, expressed its agreement to the continued operation of this article by making a recommendation that it should be operative with this modification only".[297]

Prakash then argued the power to make modifications through Article 370 had been exhausted for two reasons: 1) Article 370(1)(d) empowered the President to make Orders for the

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[294] *Ibid* at 371-372.
[295] *Ibid* at 372 [emphasis added].
[296] *Ibid* at 372-373.
[297] *Ibid* at 373.

purpose of applying provisions of the Indian constitution to Jammu and Kashmir, not for amending the constitution in its application to the State. 2) Article 368 of the Indian constitution, which provides for constitutional amendments, was applied to Jammu and Kashmir with the proviso that no amendment made to the Indian constitution under Article 368 would apply to Jammu and Kashmir unless applied through a Presidential Order under Article 370(1). Since amendments made under Article 368, which exists for that purpose, could now be applied to Jammu and Kashmir, Article 370 should no longer be interpreted as capable of amending or modifying the Indian constitution's provisions as applied to Jammu and Kashmir.[298]

The Court dismissed the first argument based on section 21 of the *General Clauses Act, 1897*, which provided:

> Where, by any Central Act or Regulation, a power to issue notifications, orders, rules, or by-laws is conferred, then that power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.[299]

In response to Prakash's argument that the above provision should not apply to constitutional provisions in the same way as to regular law, the Court found:

> If, for the interpretation of these provisions, section 21 of the General Clauses Act is not applied, the result would be that the rules once made by the President or a Governor would become inflexible and the allocation of the business among the Ministers would for ever remain as laid down in the first rules. Clearly, the power of amending these rules from time to time to suit changing situations must be held to exist and that power can only be found in these articles by applying section 21 of the General Clauses Act.[300]

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[298] *Ibid* at 373-376.
[299] *Ibid* at 374-375, citing *General Clauses Act, 1897*, s 21.
[300] *Sampat Prakash*, *supra* note 288 at 375.

The Court found this interpretation was supported by Article 370's legislative history and specifically, the "special situation" in Jammu and Kashmir when the provision was being drafted:

> It was because of the special situation existing in Jammu & Kashmir that the Constituent Assembly framing the Constitution decided that the Constitution should not become applicable to Jammu & Kashmir under Art. 394, under which it came into effect in the rest of India, and preferred to confer on the President the power to apply the various provisions of the Constitution with exceptions and modifications. It was envisaged that the President would have to take into account the situation existing in the State when applying a provision of the Constitution and such situations could arise from time to time. There was clearly the possibility that, when applying a particular provision, the situation might demand an exception or modification of the provision applied; but subsequent changes in the situation might justify the rescinding of those modifications or exceptions.[301]

The Court disagreed with Prakash's argument relying on Article 368, as:

> Art. 368 has been applied to Jammu & Kashmir primarily with the object that amendments made by the Parliament in the Constitution of India as applicable in the whole of the country should also take effect in the State of Jammu & Kashmir. The proviso, when applying this article, serves the purpose that those amendments made should be made applicable to the State of Jammu & Kashmir only with the concurrence of the State Government and, after such concurrence is available, these amendments should take effect when an order is made under Art. 370 of the Constitution. Thus, Art. 368 is not primarily intended for amending the Constitution as applicable in Jammu & Kashmir, but is for the purpose of carrying the amendments made in the Constitution for the rest of India into the Constitution as applied in the State of Jammu & Kashmir. Even, in this process, the powers of the President under Art. 370 have to be exercised and, consequently, it cannot be held that the applicability of this article would necessarily curtail the power of the President under Art. 370.[302]

Next, Prakash argued the power to make modifications under Article 370(1)(d) should be restricted to minor modifications and should not be used to practically abrogate an article of the Indian

[301] *Ibid*.
[302] *Ibid* at 376.

constitution in its application to Jammu and Kashmir – referring to Article 35(c) and its nullification of the Fundamental Rights provisions of the constitution. The Court noted that a challenge to Article 35(c) on this ground was already dismissed in *Lakhanpal v State of J&K* and that the Court had considered the power to make 'modification' under Article 370 in *Lakhanpal v POI*. The Court adopted the holding from the latter case – that the President's power of 'modification' had to be interpreted broadly – as binding precedent and dismissed Prakash's argument on that basis.[303]

Finally, Prakash argued that the modifications made to Article 35(c), extending its application for 10 and then 15 years, through Presidential Orders issued under Article 370 in 1959 and 1964, infringed State residents' rights under Article 22 and other Fundamental Rights provisions of the Indian constitution. The Court first summarized the effects of the impugned modifications to Article 35(c):

> Article 35(c) as originally introduced in the Constitution as applied to Jammu & Kashmir laid down that no law with respect to preventive detention made by the Legislature of that State could be declared void on the ground of inconsistency with any of the provisions of Part III, with the qualification that such a law to the extent of the inconsistency was to cease to have effect after a period of five years. This means that, under clause (c) of Article 35, immunity was granted to the preventive laws made by the State Legislature completely, though the life of the inconsistent provisions was limited to a period of five years. The extension of that life from five to ten years and ten to fifteen years cannot, in these circumstances, be held to be an abridgement of any fundamental right, as the fundamental rights were already made inapplicable to the preventive detention law. On the other hand, if the substance of this provision is examined, the proper interpretation would be to hold that, as a result of Art. 35(c), the applicability of the provisions of Part III for the purpose of judging the validity of a law relating to preventive detention made by the State Legislature was postponed for a period of five years, during which the law could not be declared void.[304]

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[303] *Ibid* at 376-377, citing *Lakhanpal v J&K*, *supra* note 235, and citing *Lakhanpal v POI*, *supra* note 284 at 692-693.
[304] *Sampat Prakash*, *supra* note 288 at 378.

The Court dismissed Prakash's argument, relying on the validity of the 1954 Presidential Order and the President's broad 'modification' power under Article 370(1)(d):

> It was not disputed that the President's Order of 1954, by which immunity for a period of five years was given to the State's preventive detention law from challenge on the ground of its being inconsistent with Part III of the Constitution was validly made under, and in conformity with clause (d) of Art. 370(1). We have already held that the power to modify in clause (d) also includes the power to subsequently vary, alter, add to or rescind such an order by reason of the applicability of the rule of interpretation laid down in section 21 of the General Clauses Act. If the Order of 1954 is not invalid on the ground of infringement or abridgement of fundamental rights under Part III, it is difficult to appreciate how extension of period of immunity made by subsequent amendments can be said to be invalid as constituting an infringement or 'abridgement of any of the provisions of Part III. The object of the subsequent Orders of 1959 and 1964 was to extend the period of protection to the preventive detention law and not to infringe or abridge the fundamental rights, though the result of the extension is that a detenu cannot, during the period of protection, challenge the law on the ground of its being inconsistent with Art. 22.[305]

The Court bolstered this position, finding that "[s]uch extension is justified prima facie by the *exceptional state of affairs which continue to exist as before*", and concluding that Article 35(c) made the *J&K PDA, 1964* immune to challenge under Article 22 of the Indian constitution.[306]

Noorani notes that the Court in *Sampat Prakash* makes no mention of its previous holding in *Prem Nath Kaul*, which had placed great importance on the final approval of the Jammu and Kashmir Constituent Assembly with regard to any powers conferred on or exercised by the President or Parliament under Article 370, and with regard to India's constitutional relationship with Jammu and Kashmir.[307] Noorani identifies four major flaws in the *Sampat Prakash* decision:[308]

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[305] *Ibid* at 378-379.
[306] *Ibid* at 379 [emphasis added].
[307] Noorani, *supra* note 10 at 14-15.
[308] *Ibid* at 15-16.

> First, the Attorney General cited Ayyangar's speech only on the India-Pakistan war of 1947, the entanglement with the United Nations, and the conditions in the State. On the basis, the court said, in 1968, that 'the situation that existed when this article was incorporated in the Constitution has not materially altered,' twenty-one years later. It ignored completely Ayyangar's exposition of Article 370 itself; fundamentally, that the Constituent Assembly to Kashmir alone had the final say.
>
> Secondly, it brushed aside Article 370(2) which lays down this condition, and said that it spoke of 'concurrence given by the Government of State before the Constituent Assembly was convened and makes no mention at all of the completion' of its work or its dissolution.
>
> The supreme power of the State's Constituent Assembly to ratify any change, or refuse to do so, was clearly indicated. Clause (3) on the cessation of Article 370 makes it clearer still. But the Court picked on this clause to hold that since the Assembly had made no recommendation that Article 370 be abrogated, it should continue. It, surely, does not follow that after that body dispersed the Union acquired the power to amass powers by invoking Article 370 when the decisive ratifying body was gone.
>
> Thirdly, the Supreme Court totally overlooked the fact that on its interpretation, Article 370 can be abused by collusive State and Central governments to reduce Article 370 to a nought. Lastly, the Court misconstrued the State Constituent Assembly's recommendation of 17 November 1952, which merely defined in an Explanation 'the Government of the State'. To the Supreme Court this meant that the Assembly had 'expressed its agreement to the continued operation of this Article by making a recommendation that it should be operative with this modification only.' It had made no such recommendation. The Explanation said no more than that 'for the purposes of this Article, the Government of the State means …' It does not, and indeed, cannot, remove the limitations on the State government's power of concurrence imposed by Clause (2); namely, ratification by the Constituent Assembly.

Finally, Noorani takes issue with the broad interpretation the Court gave to the word 'modification' and writes that the decision's net result "was to give a *carte blanche* to the Government of India to extend to Jammu and Kashmir such of the provisions of the Constitution of India as it pleased".[309]

[309] *Ibid* at 16.

The Court's broad interpretation of the President's modificatory powers under Article 370 was picked up in *Mohd. Maqbool Damnoo v State of Jammu and Kashmir*. This decision also involved a detention under the *J&K PDA*, but the Court's analysis of that issue was minimal, as it had already determined the operation of Article 35(c) rendered the constitutional right to freedom unavailable to those detained under preventive detention legislation aimed at protecting State security. The majority of the Court's analysis focused on the Explanation in Article 370 regarding the meaning of the 'Government of the State'. Reaching essentially the opposite conclusion from the decision in *Prem Nath Kaul*, the Court upheld the President's replacement, through Presidential Order under Article 370, of the Sadar-i-Riyasat by an unelected Governor.

Mohd. Maqbool Damnoo v State of Jammu and Kashmir

The last of the three major Supreme Court cases Article 370 gave rise to was *Mohd. Maqbool Damnoo v State of Jammu and Kashmir*, 1972 AIR 693, 1972 SCR (2)1014.[310] The case dealt with a preventive detention order but a major focus of the parties' submissions and the Supreme Court's analysis was the *Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965*. On April 10, 1965, the legislation passed by the J&K Legislative Assembly received the assent of Karan Singh, who had been re-elected Sadar-i-Riyasat for the third time on October 31, 1962. The Act amended the J&K State constitution by replacing references to the 'Prime Minister' of Jammu and Kashmir with 'Chief Minister', and by replacing 'Sadar-i-Riyasat' with 'Governor'. Further, while the Sadar-i-Riyasat had been a position elected by the J&K Legislative Assembly, the Governor of Jammu and Kashmir would be appointed by the President of India.[311]

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[310] *Mohd. Maqbool Damnoo v State of Jammu and Kashmir*, 1972 AIR 693, 1972 SCR (2)1014 [*Damnoo*]; Noorani, *supra* note 10 at 16.

[311] *Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965*, ss 1-6, cited in Noorani, *supra* note 10 at 331-332.

The petitioner, Mohammad Maqbool Damnoo, had been detained under the *J&K PDA, 1964*. The detention order issued by the District Magistrate of Baramulla on June 24, 1970 read as follows:[312]

> OFFICE OF THE DISTRICT MAGISTRATE, BARAMULLA No. PDA/IMB/81 Dated 24-6-1970 ORDER Whereas I, S. S. Rizvi, District Magistrate, Baramula, am satisfied that with a view to preventing Mohammad Maqbool Damnoo S/s Ghulam Mohi-ud-Din Damnoo alias Madha Joo r/o Sangrampora from acting in any manner prejudicial to the security of the State, it is necessary so to do;
>
> Now, therefore, in exercise of the powers conferred by Section 3 (2) read with section 5 of the Jammu and Kashmir Preventive Detention Act, 1964, I, S. S. Rizvi, District Magistrate, Baramulla hereby direct that the said Mohammad Maqbool Damnoo be detained in the Central jail Srinagar, subject to such conditions as to maintenance, discipline and punishment for breaches of discipline as have been specified in the J & K Detenus General Order, 1968.
>
> Sd/-
>
> District Magistrate, Baramulla.
>
> No. Con/826-30 Dated 24-6-1970 Copy forwarded :-
>
> 1.Shri Abdul Majid Lone, Dy. S.P. Sopore in duplicate for execution of the order as provided by section 4 of the J&K Preventive Detention Act, 1964. Notice of the order shall be given to Mohammad Maqbool Damnoo by reading over the same to him and one copy duly executed, returned to this office.

The same day, the District Magistrate issued an order pursuant to sections 8 and 13-A of the *J&K PDA, 1964* directing that Damnoo be informed "it was against the public interest to disclose to him the grounds on which his detention was based".[313] The State government approved the detention order on July 11, 1970.

The *J&K PDA, 1964* had been amended by the *Jammu and Kashmir Preventive Detention (Amendment) Act, 1967* (the "1967 Amending Act"). The amendment added a proviso to section

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[312] *Damnoo*, *supra* note 310 at para 2.
[313] *Ibid* at para 3.

8 of the *J&K PDA, 1967*, empowering the detaining authority to direct that a detenu may be informed that it would be against the public interest to communicate to the said detenu the grounds on which the detention order was made.[314] Damnoo challenged his detention on 6 grounds:[315]

1) The 1967 Amending Act was invalid because it did not receive the Sadar-i-Riyasat's assent;

2) The proviso inserted in section 8 of the *J&K PDA, 1964* by the 1967 Amending Act suffered from excessive delegation;

3) Damnoo's rights under Articles 21 and 22 of the Indian constitution had been violated;

4) The proviso conflicted with section 103 of the J&K State constitution, which provided for the High Court's power to issue orders, directions, and writs including *habeas corpus*;

5) The detaining authority had not applied its mind to the facts of the case; and

6) The detention order was not served or executed in accordance with law.

The Court dismissed arguments 2) – 6) with little analysis. Argument 2) failed because the Court found the power to direct that a detenu be informed it was against the public interest to tell him the grounds of detention was an executive power, not a legislative power. With regard to argument 3) the Court found it was "not necessary to dwell on the third point, namely, violation of Articles 21 and 22 of the Constitution because it is clear that they are excluded by Article 35(c) of the Constitution".[316] The Court dismissed argument 4) because while it was true that a detenu had no way of satisfying the Court that the detention was unlawful without being provided the grounds of his detention, the Court still retained jurisdiction under the amended *J&K PDA* and the new proviso to call upon the State to produce before it the grounds of detention and other materials to satisfy the Court of the detention's lawfulness.[317] Argument 5) was dismissed because the Court, having

[314] *Ibid* at para 31.
[315] *Ibid* at para 6.
[316] *Ibid* at paras 31-32.
[317] *Ibid* at para 35.

examined the record before it, was satisfied the grounds of detention had relevance to the security of the State. The Court found there was no force in the contention in argument 6) that the detention order was not served or executed in accordance with law.[318]

The Court's analysis was largely centered on argument 1) regarding the validity of the 1967 Amending Act in the absence of the Sadar-i-Riyasat's assent. Damnoo argued that under Article 370, the only authority recognized as the 'Government of the State' was the Sadar-i-Riyasat, whom the Article contemplated would be the head of the State. Section 147 of the Jammu and Kashmir State constitution also contemplated that the Sadar-i-Riyasat would exist and be the head of the State. In Damnoo's view, the only way of removing the position of Sadar-i-Riyasat would be to amend the Indian constitution as applied to Jammu and Kashmir.[319] Counsel for the State of Jammu and Kashmir, as well as the Attorney General appearing for the government of India, submitted that the *Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965*, which replaced the Sadar-i-Riyasat with a Governor appointed by the President, had received the Sadar-i-Riyasat's assent. As such, the Governor who had validly replaced the Sadar-i-Riyasat was competent to give assent to the 1967 Amending Act. The 1967 Amending Act was thus valid.[320]

The Court reviewed the constitutional history of Jammu and Kashmir from accession in 1947, to the Sadar-i-Riyasat's assenting to the *Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965* on April 10, 1965. The Court also noted that on November 24, 1965, the President, exercising his power under Article 370(1), had issued the *Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1965*, amending Article 367(4) of the Indian

[318] *Ibid* at paras 33, 36.
[319] *Ibid* at para 7.
[320] *Ibid* at para 9.

constitution to the effect that references to the Sadar-i-Riyasat in respect of any time after April 10, 1965 would be construed as references to the Governor of Jammu and Kashmir.[321]

The main disagreement between the parties concerned the Explanation in Article 370(1), which had formerly defined the 'Government of the State' as "the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office". Damnoo argued that neither the J&K Legislative Assembly nor the President were competent to impair the functioning of the Sadar-i-Riyasat. In Damnoo's view, the replacement of the Sadar-i-Riyasat by a Governor through an amendment to the State constitution was effectively a back-door amendment of the Explanation under Article 370(1). As such, it required a proper constitutional amendment under Article 368 of the Indian constitution or the convening of a new Indian Constituent Assembly. Damnoo disagreed with the Attorney General that the Explanation was "a mere definition inserted for the purpose of the article in accordance with the constitutional conditions prevailing at that time", arguing instead that the Explanation was "the king-pin of the whole relationship between the Union of India and the State of Jammu and Kashmir".[322]

The Court disagreed with Damnoo, reasoning that "[w]hat the State Government is at a particular time has to be determined in the context of the Constitution of Jammu and Kashmir. The Explanation did no more than recognise the constitutional position as it existed on that date and the Explanation, as substituted from November 17, 1952, also did no more than recognise the constitutional position in the State".[323] Damnoo cited *Sampat Prakash* for the position that the only

[321] *Ibid* at paras 10-19.
[322] *Ibid* at paras 21, 27-28.
[323] *Ibid* at para 22.

way of modifying Article 370 was through a Presidential Order under Article 370(3). The Court found there was no amendment to Article 370 at issue; if there was no Sadar-i-Riyasat in existence, the Explanation had to be interpreted as referring to the Governor:

> We are now not concerned with an amendment of Article 370(1). We are concerned with the situation where the explanation ceased to operate. It had ceased to operate because there is no longer any Sadar-i-Riyasat of Jammu and Kashmir. If the definition contained in the Explanation cannot apply to the words "government of the State" then the meaning given in Article 367(4), as amended, will have to be given to it. If this meaning is given, it is quite clear that the Governor is competent to give the concurrence stipulated in Article 370 and perform other functions laid down by the Jammu and Kashmir Constitution.[324]

Damnoo also argued that the 1967 Amending Act impermissibly altered the basic structure or framework of the State constitution, citing *Golaknath v State of Punjab & Anrs*, 1967 AIR 1643, 1967 SCR (2) 762. The Court dismissed this argument as:

> the amendment impugned by him, in the light of what we have already stated about the nature of the explanation to Article 370 of our Constitution, does not bring about any alteration either in the framework or the fundamentals of the Jammu and Kashmir Constitution. The State Governor still continues to be the head of the Government aided by a council of ministers, and the only change affected is in his designation and the mode of his appointment. It is not as if the State Government, by such a change, is made irresponsible to the State Legislature, or its fundamental character as a responsible Government is altered. Just as a change in the designation of the head of that Government was earlier brought about by the introduction of the office of Sadar-i-Riyasat, so too a change had been brought about in his designation from that of Sadar-i-Riyasat to the Governor. That was necessitated by reason of the Governor having been substituted in place of Sadar-i-Riyasat. There is no question of such a change being one in the character of that Government from a democratic to a non-democratic system.[325]

The petition was thus dismissed in its entirety.

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[324] *Ibid* at para 24.
[325] *Ibid* at para 27.

2015 HC Decision on Sadar-i-Riyasat Change and Subsequent Stay

In 2015, a single-judge bench of the J&K High Court consisting of Justice Hasnain Masoodi, issued an order directing the State government to hoist the Jammu and Kashmir State flag on all official buildings and vehicles of constitutional authorities. In the same judgment he remarked that the removal of the Sadr-i-Riyasat through the *Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965* had been unconstitutional because the elective nature of the head of the State had formed part of the State constitution's basic framework. The replacement of the elected Sadar-i-Riyasat with the appointed Governor was *ultra vires* the J&K Legislature's amending power. In the absence of a legal challenge to the *Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965*, however, he directed the State Legislature to take the required steps to uphold the State constitution. The judgment was stayed by a two-judge division bench of the J&K High Court in response to an appeal filed by Farooq Khan, a former Inspector-General of Police who became the national secretary of the BJP in 2015. Khan was also involved in creating, and was the first head of the Jammu and Kashmir Police (JKP) Special Task Force (STF) – which would later be renamed the Special Operations Group (SOG) – the state's elite counter-insurgency police force.[326]

[326] Bashaarat Masood, "Changing Sadr-e-Riyasat to Governor goes against J&K constitution, says J&K HC", *The Indian Express* (29 December 2015), online: <indianexpress.com>; Naseer Ganai, "High Court stays hoisting of state flag order in Jammu and Kashmir", *India Today* (2 January 2016), online: <indiatoday.in>.

Conclusion

The *Damnoo* decision effectively confirmed the power of the Centre, through the President of India, to determine which provisions of the Indian constitution applied or did not apply to Jammu and Kashmir. Further, it allowed the President to amend the Indian constitution in its application to the State without resort to the constitution's amendment provisions. While consultation or concurrence with the State government were still required by Article 370, that State government now consisted of a Governor appointed by the President.[327] The importance of referring to the democratic will of the State's inhabitants or their representatives stressed at the time of accession and the drafting of Article 370 was gone, replaced by the broad modificatory powers of the President under Article 370.

I have argued that Article 370 was an exceptional legal provision. It allowed for the suspension of constitutional rights through Presidential Orders issued under the Indian constitution. Like the Instrument of Accession on which it was based, Article 370 reflected the special circumstances – a state of necessity characterized by rebellion and war – in which the State acceded to India. 20 years after the Indian constitution came into force, the Court in *Sampat Prakash* referred to those circumstances and found they had not materially altered. To the Court, Article 370's purpose was to grant the President broad discretion in applying the Indian constitution to the State, so long as those circumstances did not change.[328]

Sovereign discretion is a constant consideration in the jurisprudence around Article 370, from the discretion of the President to modify the Indian constitution's application to the State discussed in *Damnoo* and *Sampat Prakash*, to the power of the Maharaja as absolute monarch at

[327] *Damnoo*, *supra* note 310 at paras 24, 27.
[328] *Sampat Prakash*, *supra* note 288 at 372.

the time of accession, confirmed by the Court in *Prem Nath Kaul*.[329] This reflects Carl Schmitt's view of the sovereign as "he who decides on the state of exception".[330] It also reflects my view of Article 370 as the "authoritative mark"[331] through which the Centre, personified in the President, acknowledges[332] the autonomy of Jammu and Kashmir. This acknowledgement occurs through the "will"[333] of the President, manifested in Presidential Orders that allow for some protections, such as in Article 35A, and remove other protections, as through Article 35(c) of the Indian constitution. Through these exercises of the Centre's will through the authoritative mark of Article 370, the inhabitants of the State are unified with the rest of India under the authority of the Indian constitution.[334] This occurred quite literally in August 2019, when the President ordered the abrogation of Article 370 through a Presidential Order issued under the authority of Article 370 itself.

If Article 370 creates the state of exception, Article 35(c), and the accompanying restrictions on the application of Articles 19 and 22 to the State with regard to its preventive detention legislation, represent the zone of indifference or *anomie* in which the state of exception operates.[335] The Indian constitution was applied to Jammu and Kashmir but its Fundamental Rights provisions were unavailable to the State's inhabitants as a means of challenging the legality of their detention for 25 years. As the Court noted in *Lakhanpal v J&K*, reliance on those rights presupposes their availability to those challenging their detention.[336] Where those rights are unavailable, the detenu is left with no recourse. This liminal state, where law operates to suspend

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[329] *Prem Nath Kaul*, *supra* note 256 at 285-289.
[330] Agamben, *supra* note 2 at 1.
[331] Hart, *supra* note 67 at 92-93.
[332] Constable, *supra* note 2 at 80-82.
[333] *Ibid* at 83.
[334] *Ibid*.
[335] Agamben, *supra* note 2 at 23.
[336] *Lakhanpal v J&K*, *supra* note 235 at 1109.

itself, is justified by the need to save the State. The ever-present emergency situation, one that never needs to be factually confirmed before the Court, requires the suspension of legal rights in order to preserve the security of the State.[337]

In reviewing the jurisprudence around Article 370, and the earlier invocations of exceptional powers, by the Maharaja in the lead-up to the Poonch rebellion, and in Sheikh Abdullah's emergency and interim administrations, we have seen that the state of exception responds to situations of protest, resistance, and dissent. As Hussain notes, the function of emergency powers is not simply to punish, but to punish with the aim of restoring a general condition – the authority of the state.[338] Where that authority is threatened, the state responds with violent force, just as William the Conqueror attained and maintained his monopoly on legal authority through force.[339] In this sense, 'security of the State' is merely an ideological vessel, the deployment of which provides an ever-ready state of necessity to justify the use of exceptional legal or extralegal violence.[340]

In the years following the *Damnoo* decision Jammu and Kashmir has been subjected to many more explicit forms of emergency rule, including the *AFSPA* and the invocation of President's Rule. Moreover, as we have seen, Article 370 posed no significant impediment to state violence in Jammu and Kashmir; if anything it facilitated it. What then was the purpose of abrogating Article 370 in 2019? While a full answer to that question is beyond the scope of this dissertation, there are two important points I would like to discuss.

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[337] Agamben, *supra* note 2 at 31.
[338] Hussain, *supra* note 2 at 125, 127, 128.
[339] Constable, *supra* note 2 at 83-84.
[340] Bannerji, *supra* note 3 at 24-30.

First, as Hussain notes, ascribed difference is the limit condition to which the state of exception responds.[341] The assimilation of Jammu and Kashmir with India and the subordination of its Muslim population, and of Muslims in India generally, are fundamental to the Hindutva ideology of the BJP and RSS.[342] Second, and relatedly, the goal of creating a Hindu Rashtra is fundamentally tied to control over land.[343] Similarly, the ability to purchase and develop land in the erstwhile State, facilitated by the removal of Article 35A's protections for permanent residents, and by the various changes to Jammu and Kashmir's land laws made under the Reorganisation Act and its Orders, are valuable to the BJP's economic allies.[344] Thus when considering how the deployment of 'State security' as an ideological vessel in Jammu and Kashmir obscures its production by and for a ruling class, laying claim to universal applicability,[345] I am reminded in particular of the recent changes to the *Jammu and Kashmir Development Act*, discussed in the introduction to this dissertation. Specifically, I note the changes to the Act allowing for the creation and designation of "development zones" exempted from land use restrictions; "strategic areas" for military training and operations; and an Industrial Development Corporation with the power to buy, develop, lease or sell land in the State.[346] After all, William's violent conquest – his destruction of the 'other' through their domination and assimilation – did not simply provide him a monopoly on legal authority or coercive force; rather, he used force to centralize his authority and control over the conquered people's land.[347]

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[341] Hussain, *supra* note 2 at 119.
[342] Bhan, Duschinski & Zia, *supra* note 12 at 8, 14, 16-17, 24-25, 27-28; Rai, "Kashmiris in the Hindu Rashtra", *supra* note 12 at 259, 261-271, 276-277.
[343] Khan, *supra* note 181 at 93-94; Longkumer, *supra* note 185 at 284.
[344] See e.g., "Mukesh Ambani promises investment in Jammu & Kashmir, says Reliance will set up special team", *India Today* (12 August 2019), online: <www.indiatoday.in>, *supra* note 28.
[345] Bannerji, *supra* note 3 at 24-30, 33-34, 38.
[346] Zargar, *supra* note 28; Iqbal, *supra* note 28; Saqib Khan, *supra* note 32.
[347] Constable, *supra* note 2 at 78, 80-82.

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