

“Tuhindi Article” (“The Articles Were Yours”)

By *Aman**

Abstract: On 5 August 2019, a radical change was made to Article 370 in the Constitution of India. The provision had been popularly represented to safeguard the autonomy of Jammu & Kashmir. This change was also accompanied by what can best be described as a brutal “siege” – characterised by mass detentions, communication blackouts, press curbs, and curfews, to name a few. Around this time, a feminist collective came out with a version of “Bella Ciao,” clear in their distancing from the laws that were never theirs to begin with and their assertion of how they belonged to the Indian State. As they say, “*Tuhindi Article*” (“The Articles Were Yours”). Yet, all of this is said with a sense of loss and rage to mark this moment of “constitutional” change. This article is an attempt to take their articulation (and this paradox) more seriously than is conventionally taken in constitutional law scholarship – especially now that the Supreme Court of India has also upheld the validity of the changes made to Article 370 in 2019. Centring this voice, the article attempts to understand it. Through such interrogation, the piece urges us to problematise the use of the Indian constitutional framework in the engagement with Jammu & Kashmir and invites us to pay closer attention to ways that it becomes a tool that works and is worked towards striking at the heart of what the singers call “collective struggles” and “hopes”. More specifically, thinking through moments of the birth, life, and the purported demise of Article 370, this article hopes to demonstrate that the focus on Article 370 in conversations and legal practice has contributed to flattening text-book international (law) issues of contested sovereignties, and violently erases a long history and plurality attached to the self-determination driven struggles (and those expressing them). Besides advancing reasons for taking such articulations more seriously, the piece nudges towards the need to conceptualise roles where the use of the constitutional framework, will

* Associate Professor of Legal Practice at Jindal Global Law School, O.P. Jindal Global [Institute of Eminence Deemed to be] University. The piece marks a long journey through years of dealing with discomforts and distractions attached with my own training and conditioning. I am most grateful for the inception of such doubts and discomforts occasioned through conversations with and exposures through friends and colleagues, especially at the Jammu Kashmir Coalition of Civil Society, Srinagar – an organisation that faces immense repression and grave impediments to their work today. In more proximate history, I wish to thank Maxim Bönnemann and Tanja Herklotz for their suggestions on the shorter version of this piece that appeared as part of the *Verfassungsblog* Debate, “Casting Light on Kashmir.” In a similar vein, I thank the anonymous reviewer for their inputs on this longer piece. My gratitude also extends to the editors of the WCL, especially of this symposium for their patience and kindness.

not see past this and make space for questions of self-determination and contested sovereignties.

Keywords: Article 370; Self-Determination; Contested Sovereignties; Constitutional Performance

A. Introduction

Through what was described with war-time imageries of a “constitutional surgical strike”¹ and a “constitutional siege,”² in August 2019, a radical change was made to what appeared earlier in the Constitution of India as Article 370.³ This change, also referred to as an “abrogation” of Article 370,⁴ has been recently upheld by the Supreme Court of India (“SC”) after 4.5 years. The provision, as it stood before August 5, was popularly understood to be a basis for the extension of the Indian Constitution to Jammu and Kashmir (“J&K”). This change itself was accompanied by the creation of a “deep morass of uncertainty and chaos” by the State machinery and the mobilisation of extra troops (in the most militarised place in the world).⁵ Most crucially, what escorted the change was yet another brutal clampdown on the rights of the people, especially in the Kashmir valley, and was characterised by mass detentions,⁶ a communication blackout,⁷ press curbs⁸ and a curfew⁹ – to count a few things that could be given a name.¹⁰ Perhaps this accompaniment I refer to is also best called a

- 1 *Shrimoyee Nandini Ghosh*, One Nation? One Flag? One Constitution?, Raiot, <https://raiot.in/disma-ntling-370-in-kashmir-part-1/> (last accessed on 2 June 2023).
- 2 *Zaid Deva*, The Constitutional Siege on Article 370, *Verfassungsblog*, <https://verfassungsblog.de/the-constitutional-siege-on-article-370/> (last accessed on 2 June 2023).
- 3 Constitution (Application to Jammu and Kashmir) Order, 2019 (CO 272), 5 August 2019; Declaration under Article 370 (3) of the Constitution (CO 273), 6 August 2019.
- 4 Judgement by Justice (Dr.) Dhananjaya Y. Chandrachud, along with Justices Bhushan R. Gavai and Surya Kant (“Plurality”), In Re: Article 370 of the Constitution, Writ Petition (Civil) No. 1099 of 2019 and Others, 11 December 2023, para 2.
- 5 *Anuradha Bhasin*, A Dismantled State: The Untold Story of Kashmir After Article 370, Gurgaon 2023, pp. 14-15.
- 6 See, for example, Human Rights Watch, India: Free Kashmiris Arbitrarily Detained, <https://www.hrw.org/news/2019/09/16/india-free-kashmiris-arbitrarily-detained> (last accessed on 2 June 2023).
- 7 Jammu Kashmir Coalition of Civil Society (JKCCS), Kashmir’s Internet Siege, https://globalfreedomofexpression.columbia.edu/wp-content/uploads/2020/09/Kashmir_Internet_Siege.pdf (last accessed on 2 June 2023).
- 8 See, for example, *Hilal Mir*, A War against Words, *Adi Magazine* (2020), <https://adimagazine.com/articles/war-against-words/> (last accessed on 2 June 2023).
- 9 *Ather Zia*, *Haley Duschinski*, *Mona Bhan*, Politics of Annexation and Settler Colonialism in Kashmir, Association for Political and Legal Anthropology, <https://politicalandlegalanthro.org/2020/07/30/a-year-of-siege/> (last accessed on 2 June 2023).
- 10 For a detailed account of the circumstances, see *Bhasin*, note 5.

'siege' that permeated (and possibly still permeates for many)¹¹ all animate and inanimate aspects of the everyday.¹²

Naturally, in August 2019, J&K came back into the news in India and in the world outside. In India, seen as a part of a series of such spectacular changes brought about by the current government of India, it brought forth what scholars like Gowhar Fazili pointed out to be a "feeble outrage" at the purported death of Article 370.¹³ To him, most Indian scholars and activists, if they did express concerns, mainly referred to this being the "Kashmirisation of India", a "test bed model for internal colonialism", or, as I may add, even an attack on the "Constitution of India".¹⁴

Around the same time, borne out of an account that appears to be profoundly different from the one narrated in Delhi, a Kashmiri feminist collective came out with a Kashmiri version of *Bella Ciao*.¹⁵ As the creators say, "the song was written on an odd night, away from home, in the aftermath of Aug 5 by a few young Kashmiri women. It is in memory of our people, our collective struggles, and in hope of *Azadi* (freedom)." In this story, the Constitution and Articles like 370 were never theirs to begin with—they belonged to the Indian State, and their "client regimes" in J&K.¹⁶ It was a product of a decision made amongst the political elites without any semblance of consultation back then ["*Na pruchuv tyem wiz*" ("Neither were we asked then")] and nullified without any such consultation today ["*Na pruchuv aesi aaz*" ("Nor are you asking us now")]. Hence, addressing it to the Indian State, the women call the provisions of the Indian Constitution – "*Tuhindi article*" ("The Articles Were Yours").

11 *Bhasin*, note 5, pp. 277-287.

12 I borrow this imagery of a "siege" from *Uzma Falak*, *The Smallest Unit of Time in Kashmir is a Siege*, *Adi Magazine* (2020), <https://adimagazine.com/articles/the-smallest-unit-of-time/> (last accessed on 2 June 2023).

13 *Gowhar Fazili*, *Liberal Silence on Kashmir and the Malleability of Ethics in India*, in: *Mona Bhan / Haley Duschinski / Deepti Misri* (eds.), *Routledge Handbook of Critical Kashmir Studies*, London 2022, pp. 278 -289.

14 See, for example, *Faizan Mustafa*, *Explained: What's Changed in Jammu and Kashmir?*, *Indian Express* (2019), <https://indianexpress.com/article/explained/explained-article-370-has-not-been-scrapped-but-kashmirs-special-status-has-gone-5880390/> (last accessed on 2 June 2023); *Arun Thiruvengadam*, *Making of the Indian Constitution: A focus on Process and Methods*, in *2020 History of Peace Conference Proceedings on the Idea of the Indian Constitution: Conference on Teaching History*, Calcutta 2020, p. 267.

15 *Zanaan Wanaan*, *Kashmiri Bella Ciao*, *Inverse Journal* (2020), <https://www.inversejournal.com/20/03/08/kashmiri-bella-ciao-by-zanaan-wanaan-lyrics-included/> (last accessed on 2 June 2023).

16 As they say, "Hari Singh was yours, Abdullahs are yours, Mufti's dreams were also yours". Also see, *Shahla Hussain*, *Kashmir in the Aftermath of Partition*, New Delhi 2021, pp. 132-183; *Hafsa Kanjwal*, *A Fate Written on Matchboxes: State Building in Kashmir Under India*, New Delhi 2023, pp. 1-31.

The song-writers also say:

*“On the 5th of August
You revealed your plans
The facade of your democracy was unveiled
Voiced in America, voiced in London
The UN echoed with your Nazi manoeuvres”.*

In a way, it was paradoxical to mark their resistance at a moment of a constitutional change while disowning Article 370 at the same time. Perhaps the August 2019 move, to them, was not necessarily about a “Kashmirisation of India”, or a “*test bed* model for *internal colonialism*,” or even an attack on the federal structure and the “*Constitution of India*”; and considering the nature and the circumstances of such a change, it was not uncommon to see this as an assault on the aspirations (and even the existence) of the people.”¹⁷

This article is an attempt to take this paradox (and, hence, this articulation) more seriously than is conventionally taken in constitutional law scholarship. Centring this voice and attempting to understand it, I also endeavour to show how this only encourages us to problematise the use of the Indian constitutional framework in the engagement with J&K and push towards the possibility of seeing the Constitution as yet another tool that works, and is worked towards striking at the heart of the collective struggles and the hopes that singers speak of. More specifically, thinking through moments of the birth, life, and now the purported demise of Article 370, this article hopes to demonstrate that the focus on Article 370 in conversations and legal practice, has contributed to flatten text-book international (law) issues of contested sovereignties, and also erase a long history and plurality attached to the self-determination driven struggle.¹⁸

It is important to clarify two things here. One, that these international law (“IL”) issues I speak of are not just restricted to the Indian administered territories.¹⁹ Two, even the legal imagination of Article 370 crosses armistice lines, and is envisioned to have had a legal force in the entirety of the erstwhile Princely State of J&K that is said to have acceded to

17 *Mona Bhan / Haley Duschinski*, From Incorporation to Elimination: Interlocution as an Apparatus of Occupation in Kashmir, in: Haley Duschinski / Mona Bhan / Robinson Cabeiri de Bergh (eds.), *The Palgrave Handbook of New Directions in Kashmir Studies*, Cham 2023, p. 140.

18 *Zanaan Wanaan*, note 15. The singers say: “Time is witness, our movement is not new-born, passed on to us by our ancestors. This struggle is moving and ongoing”.

19 The right of self-determination has also been recognised for all people of J&K divided by the “Line of Control”. As an example, see, *OHCHR*, 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, <https://www.ohchr.org/sites/default/files/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf> (last accessed on 3 July 2023).

India (which now includes Pakistani and Chinese administered territories of J&K as well).²⁰ However, considering the paper focuses on the role of Article 370 in flattening/erasing these issues, instances and palpable effects I focus on are (naturally) restricted to Indian administered areas only.

In attempting this exercise, relying on existing works of constitutional law and the history of Article 370, I wish to remind in Part C as to how little Article 370 offered in terms of material safeguards for those of us who have been concerned about its proverbial death. I (re)locate this not just in how it was operationalised as is conventionally discussed,²¹ but also in how it was originally conceptualised and deployed. Armed with this acknowledgment, it becomes all the more evident that there has to be more to the story of Article 370 that explains such an articulation. In Part D, I attempt to unpack this story centring the creators, and try to characterise the relation between "collective struggles", "hopes" and "Article 370". *One*, by showing how the under-acknowledged founding moment of Article 370 lays the foundation of what struck and continues to strike at the root of the self-determination claims; and *two*, how the change to Article 370 is a severe blow to these demands. In light of all this, Part E concludes the paper with nudges towards the need to conceptualise roles where the use of the constitutional framework can, despite its limitations for J&K, make space for questions of self-determination, and contested sovereignties.

Before I start, however, it is prudent to answer a prefatory question as to why I centre this account. To answer this, I will split this response into two parts: I) why I centre *this account*?; II) why *I* centre this account? I explain this in the immediately succeeding Part B of the article. Hopefully, this clarifies my approach and provides some tools to navigate the hesitations one may encounter while reading the article.

B. The Prefatory Questions

I. Why I Centre "this Account"?

As mentioned earlier, this article is premised on the fact that the issues in J&K, among other things, do not just involve, but occasionally revolve around text-book international (law) questions of contested and unceded sovereignties – and are often traced for contemporary (and especially the current) debates to the legality and legitimacy of the J&K's accession

- 20 While the text does not refer to this, in discussion in the Indian Constituent Assembly ("CA") on the accession, the part that acceded was the entire Princely State – even areas "in the hands of rebels and enemies." See Constituent Assembly Debates ("CAD"), Volume 10, 17 October 1949, <https://www.constitutionofindia.net/debates/17-oct-1949/> (last accessed on 7 June 2023). In fact, the legislative assembly still has seats reserved for areas under Pakistani administration.
- 21 See, for example, *Burhan Majid*, Constitutional Erosion in Kashmir: A Look Back at the Gradual Erosion of Autonomy before 2019, *Verfassungsblog* (2022), <https://verfassungsblog.de/constitutional-erosion-in-kashmir/> (last accessed on 7 June 2023).

to India (some discussed in Part D).²² This does not just involve three states (India, China and Pakistan) as the stakeholders, but the people of J&K who are said to not have “ceded sovereignty” through popular “collective will.”²³

Intrinsically connected to the issue of sovereignty, as the song suggests, there is also a long history attached to self-determination demands in J&K (sometimes referred to as ‘*azadi*’) and a struggle to throw out the tyrant (“*Zaalim chu kadun*”).²⁴ This happens to be the primary focus of the articulation around which this article is centred. The song, however, does not throw light on the specifics of such a demand, or carves out details of what it means to be “free.” Historically, there has been a plurality attached to these imaginations,²⁵ and we need not, for the purpose of this piece, privilege one view/meaning over the other.²⁶ Broadly understood, these self-determination demands: a) have often been translated in the language of IL;²⁷ b) pre-date the internationalisation of the issue by India and Pakistan at the United Nations Security Council (UNSC) – including articulations/actions directed in relation to the Dogra empire that acceded to India;²⁸ c) are often outside the scaffolding and binaries of the conventional portrayal of India-Pakistan (and China) being in an inter-state territorial dispute;²⁹ and d) sometimes are even beyond nationalistic or territorial framings

- 22 See, for example, *Fozia Nazir Lone* (“Lone”), *Historical Title, Self-Determination and the Kashmir Question: Changing Perspectives in International Law*, Leiden 2018; *Shrimoyee Nandini Ghosh*, *Internal? Bilateral? International?*, Raiot (2019), <https://raiot.in/dismantling-370-in-kashmir-part-2/> (last accessed on 7 June 2023).
- 23 *Goldie Osuri*, *The Forms and Practices of Indian Settler/Colonial Sovereignty in Kashmir*, in: *Routledge Handbook*, note 13, p. 342; *Prem Nath Bazaz*, *The History and Struggle for Freedom in Kashmir*, Srinagar 2023, p. 597.
- 24 See, *Hussain*, note 16; *Bazaz*, note 23; *Lone*, note 22; *Vanessa Chishti*, *Kashmir: The Long Descent*, *Catalyst*, 3:4, <https://catalyst-journal.com/2020/03/kashmir-the-long-descent> (last accessed on 2 June 2023); International Commission of Jurists, *Human Rights in Kashmir: Report of a Mission*, <https://www.icj.org/wp-content/uploads/1995/01/India-human-rightst-in-Kashmir-fact-finding-mission-report-1995-eng.pdf> (last accessed on 7 June 2023); *Ghosh*, note 22.
- 25 *Hussain*, note 16; Also see, *Bhasin*, note 5, who calls the aspirations of people “competitive” (p. xi) besides being “multiple and complex”, p. 295.
- 26 See, for example, *Karen Knop*, *Diversity and Self-Determination in International Law*, Cambridge 2004. Knop maintains how it is natural for there to be a diversity of meanings of self-determination among different groups, and how it’s desirable for law to be more accommodative of the same.
- 27 See, for example, *Lone*, note 22; *ICJ*, note 24, pp. 84-98; *Ghosh*, note 22.
- 28 See for example, *Bazaz*, note 23; *Hussain*, note 16, pp. 36-49.
- 29 *Haley Duschinski / Mona Bhan*, *Third World Imperialism and Kashmir’s Sovereignty Trap*, in: *Routledge Handbook*, note 13, pp. 323-340.

attached to the creation of an independent State, and include expressions on the themes of "political justice, human dignity, economic self-reliance."³⁰

Naturally, whatever the imagination, these demands implicate questions that can't just be wished away. Part D focuses on some of the ways arguments presented by the Indian State, and endorsed by Courts have attempted to "wish away" (and sometimes even blatantly ignore) the contestations on sovereignty and self-determination demands while, sometimes, "simultaneously invoking"³¹ the Dogra Monarch's (*Maharaja's*) right to legitimately cede the sovereignty of the Princely State of J&K and transfer it to India.³² More immediately, the decision of the SC on the legality of the August 2019 changes can also serve as a significant illustration of such an approach – *even if* one works within the narrow parameters that ignore evidence against the legality and legitimacy of the accession.

In the case, the SC recognised how the Princely State of J&K was not a part of "British India" that was directly under British control, and how, as a consequence of this, it had to formally accede to be a part of India.³³ On a related note, the Court also acknowledged how J&K was legally independent upon the lapse of British paramountcy pursuant to the application of the Indian Independence Act, 1947.³⁴ However, despite these affirmations, the SC concludes that the result of a) the accession, through an instrument between two traditionally-understood sovereigns (a likely candidate for being a traditionally-understood treaty),³⁵ and b) the subsequent acceptance of a new "constitutional relationship" (marking a shift from the previous relationship under the British) by the 18 year old Prince Regent, would be a domestic/internal relationship with India.³⁶ To the Court, this relationship meant that no possible vestige of sovereignty remained with J&K. It was to the SC a "full and final surrender of sovereignty". This was despite the Instrument itself noting how nothing in it would affect the continuance of the sovereignty of the Maharaja, and J&K's resultant unique status (as compared to the other fully absorbed Princely States) discussed in Part C below.³⁷ Ironically, this also goes against India's own treatment of how Sikkim

30 In the context of J&K, *Hussain* (note 16, 229, pp. 349-360) shows that: "Kashmiri imaginings have ...long spilled outside its territorial contours" and "challenging imposed notions of sovereignty." In J&K, such self-determination demands include, for instance, the erasure of borders guided by "a human problem that affected countless Kashmiris separated from their families." Such unification would have also reopened old trade routes and promoted economic self-sufficiency, pp. 353.

31 *Ghosh*, note 22.

32 See, for example, *Plurality*, note 4, paras. 271 and 272.

33 *Plurality*, note 4, paras. 103 and 117.

34 *Plurality*, note 4, paras. 117-118, 122, 231, 232.

35 *Ghosh*, note 22.

36 *Plurality*, note 4, paras. 105, 141, 259 and 272-277.

37 See, *The Instrument of Accession, 1947*, para. 8. Also see, note 79.

became a state “associated with the Union”³⁸ from being a “protectorate state”³⁹ (akin to paramountcy under the British)⁴⁰ outside of a constitutional relationship, before it finally became a “constituent unit of India” as a “full-fledged state” (i.e. federal unit within the republic) after a referendum.⁴¹

As Deva identifies, to arrive at the conclusion, the SC constructs and operates within a “monist”⁴² idea of Indian sovereignty built on an unexamined idea that sovereignty must be “indivisible,” and demands all political units to be in a “system of subordination” to its sole bearer.⁴³ In doing so, it refuses to recognise *even a possibility* of “sharing”⁴⁴ sovereignty (as had been claimed by the Kashmiri nationalists who supported the accession to India), and sanctifies the more extreme position of the Hindu Nationalists of: “One Nation, One Flag, One Constitution” invoked first in 1952.⁴⁵ In some ways, one may argue that such reasoning conflates jurisdiction and sovereignty; and, in doing so, yet again affirms the extension of the (contentious) jurisdiction of the Constitution of India to J&K by considering absolute sovereignty as the *only* basis for India’s legal authority.⁴⁶ This was (as it has always been) without an earnest attempt to clarify the nature of the relationship of J&K and India, and emboldens the presumption of a resolution of contested sovereignties and satisfaction of self-determination demands.⁴⁷

Such continued attempts at “wishing away” through the post-1950 history of India are all the more suspect when there have been formidable, yet creeping, attempts by the Indian State to domesticate these issues, and, thus, in a way also to push the interrogations on

38 The Constitution (Thirty-fifth Amendment) Act, 1974.

39 Sikkim became India’s protectorate pursuant to the Indo-Sikkim Treaty, 1950 and “enjoy[ed] autonomy in regard to its internal affairs” (Article II).

40 See, *James Crawford*, *The Creation of States in International Law*, New York 2007, pp. 321-322.

41 The Constitution (Thirty-Sixth Amendment) Act, 1975.

42 *Zaid Deva*, Article 370 Judgment is a Case of Constitutional Monism, *The Hindu*, <https://www.thehindu.com/opinion/op-ed/article-370-judgment-is-a-case-of-constitutional-monism/article67635313.ece> (last accessed on 17 December 2023).

43 Plurality, note 4, paras. 89-91, 159 and 161.

44 *Deva*, note 42.

45 See BJP, <https://twitter.com/BJP4India/status/1200626954010951680> (last accessed on 17 December 2023). For a historical account from the 1950s, see *Bazaz*, note 23, pp. 479-505.

46 See, *Zaid Deva*, Jammu and Kashmir’s Constitutional Status - Constitutional Bargain and ‘Erosion’ of Article 370, in: Ranita Nagar / Hiteshkumar Thakkar (eds.), *The Indian Yearbook of Law and Interdisciplinary Studies*, London 2022, pp. 39-52.

47 See *Shaunnagh Dorsett / Shaun McVeigh*, Conduct of Laws: Native Title, Responsibility and Some Limits of Jurisdictional Thinking, *Melbourne University Law Review* 36 (2012), pp. 471-493. The authors question how in Australia, courts use (unsettled) sovereignty as the basis of legal authority.

Kashmir to be relevant *only* within a "constitutional" framework.⁴⁸ Often, this domestication accompanies a violent erasure of demands for self-determination, and even the people expressing them.⁴⁹ In fact, some critical international law scholars would see all this as being an IL problem – as a phenomenon that is armed by limitations mainstream IL places on post-colonial self-determination;⁵⁰ and IL's "ideological operation"⁵¹ in preserving, among other things, the post-colonial state and state-centricity of its issues (such as preservation of boundaries, territorial integrity, sovereignty) at any costs.⁵²

Owing to a different burden I intend to discharge, these aspects are not something I wish to elaborate in this article. In fact, taking this as inescapable context, I see this article emphasise why accounts of constitutional law should not see past, but within this context. Some, like Thiruvengadam, of course acknowledge that the "legal, constitutional and international law issues relating to Kashmir are enormously complex."⁵³ However, unfortunately, there have not been attempts to move past this acknowledgement.

To me, the articulation by the singers serves as an emphasis for such a context and urging. It is important to also clarify here that the purpose of centring this articulation is not to exceptionalise or essentialise the experience of a person or a group from J&K, considering I mention that there are pluralities attached to the expressions and meanings of

48 *Shrimoyee Nandini Ghosh*, Crisis Constitutionalism, Permanent Emergency and the Amnesias of International Law in Jammu and Kashmir, TWAILR: Reflections, <https://twailr.com/crisis-constitutionalism-permanent-emergency-and-the-amnesias-of-international-law-in-jammu-and-kashmir/> (last accessed on 2 June 2023). Also see, *A.G. Noorani*, Is Kashmir A Domestic Or International Issue?, *The Wire*, <https://thewire.in/history/kashmir-domestic-international-history> (last accessed 8 June 2023); *Aman*, The Right Law of the Wronged People, *The Wire* (2020), <https://thewire.in/jammu-and-kashmir-international-law> (last accessed on 8 June 2023).

49 *Bhan / Duschinski*, note 17, p. 140. See, for example, *Mohd. Tahir Gaine*, Claiming the Streets: Political Resistance Among Kashmiri Youth, in: Routledge Handbook, note 13, pp. 97-114.

50 An example of this is how, in mainstream IL (as it stands today), there appears to be a preference for "internal self-determination" ("ISD") which safeguards rights of all people within the boundaries of existing "free" states; and now, past the period of decolonisation, it prevents from further ruptures of the territorial integrity of the post-colonial states. Enforceable human rights and free and fair elections are seen as markers of such right. However, as *Knop* (note 26, p. 50) says, visible interpretations of self-determination have historically marginalized the groups it had to benefit. Pushing for ISD, as some note, is a way of erasing the history and specificities of some contemporary movements, especially in post-colonial states. ISD, in fact, has been instrumental in reinforcing national building projects [*Balakrishnan Rajagopal*, *International Law from Below: Development, Social Movements and Third World Resistance*, New York 2003, pp. 189-194]. Many have also challenged such ISD framing in relation to J&K [*Lone*, note 22, esp. pp. 288-314; *ICJ*, note 24, pp. 90-91].

51 *Mohd. Shahabuddin*, Minorities and the Making of Postcolonial State in International Law, Cambridge 2022, pp. 89-138.

52 *Shahabuddin*, note 51; and *Rajagopal*, note 50, pp. 189-194. On the context of Kashmir, see *Rohini Sen*, Kashmir and the Battle for Borders of International Law, *NALSAR Student Law Review*, Volume XV (2021), pp. 92-126.

53 *Thiruvengadam*, note 14, p. 308.

self-determination. In fact, I also don't intend it to signal, in and of itself, a comprehensive bottom-up assessment of constitutional performance in J&K – which assuming it possible in the context, as Siddiqui suggests, needs to be “rigorous, empirical, and engaged with real lived experience... of marginalised groups.”⁵⁴ All I say here is something timid: that the distancing from the Constitution by the singers is material for law's appraisal, and must be taken *seriously* as a prompt. Or better phrased – only be taken *seriously enough* (for now) to warrant an examination of the statement to understand it – and, as I eventually show, to pave the way for an evaluation of the recourse to the Indian Constitution on these questions.

Written primarily as a provocation to an audience that *still* seeks to find possibilities of and in “constitutional patriotism”⁵⁵ as an avenue for resistance in J&K, I feel the success of such an approach also becomes an invitation for a future project to take this (and other similar sentiments) as being a legally significant expression(s) on the value of the Indian Constitution. And, in doing so, to find the strength of such evaluation and normativity in such expressions through an adoption of socio-legal approaches that are conscious of alternative norms (other than the ones that come from states) and normative authorities (other than the state).⁵⁶ This is particularly compelling for a context like J&K, especially the Valley, that is ruptured by deep militarisation, a permanent emergency form of governance guided by counterinsurgency principles, an ever-lasting armed conflict, and even an occupation.⁵⁷ Also, as critical legal approaches demonstrate, such articulation also works as a symbol or a story – that operates as a counter-narrative to the generality, misconceptions and the dominance of constitutional law discourse, and gives necessary attention to “neglected evidence”⁵⁸, like the one the song presents. Most importantly, in some contexts, like Kashmir, taking these seriously may possibly be one of the only few accessible ways to explore constitutional performance – considering it is not just militaristically but also epistemically walled off.⁵⁹ With such a view, such an articulation that questions the Constitution cannot be ignored even for its singularity – which is evidently not the case here.⁶⁰

54 Faizan Jawed Siddiqui, Re-thinking Constitutional Resilience from Below, in: Swati Jhaveri / Tarunabh Khaitan / Dinesha Samararatne (eds.), *Constitutional Resilience in South Asia*, Oxford 2023, p. 401.

55 See, for example, Sidra Yousaf / Paul Diefelberg, *Constitutional Patriotism for the Marginalized: The Case of the Indian Constitution and Kashmir*, *Verfassungsblog* (2022), <https://verfassungsblog.de/constitutional-patriotism-for-the-marginalized/> (last accessed on 27 June 2023).

56 On Kashmir specifically, see Bruce Hoffman / Haley Duschinski, *Contestations Over Law, Power and Representation in Kashmir Valley*, *Interventions* 16 (2014), pp. 501-530.

57 Ghosh, note 22; Ghosh, note 48.

58 Rachel López, *Participatory Law Scholarship*, pp. 19–28, SSRN, <https://ssrn.com/abstract= or http://dx.doi.org/10.2139/ssrn.4335644> (last accessed on 8 January 2024).

59 Mohamad Junaid, Deepti Misri, and Ather Zia, *Kashmiri Futures: A Beginning*, *English Language Notes* (2023), <https://read.dukeupress.edu/english-language-notes/article/61/2/1/382831/Kashmiri-FuturesA-Beginning> (last accessed on 18 December 2023).

60 See, Bhan / Duschinski, note 17.

II. Why "I" Centre this Account?

It would be indeed counter-intuitive for a study that hopes to de-centre the statist imagination (of constitutional fidelity) and hopes to foreground the singers – to advance it with the plan that "[s]omething must be done...but from outside the local setting" owing to the "failure, inadequacy, passivity, fatalism, and inevitability" within.⁶¹ I also find persuasion in exercising brakes to a political project that solely aims to amplify this voice, and provide grounds for solidarity (which, as Mushtaq and Amin say, could be "conceited")⁶², or empathy (which may often, in the words of Namwali Serpell, be "banal")⁶³ with the singers.

To me then, this articulation is a provocation to a scholar of law to *do* constitutional law consciously – careful and cognizant of the limits and possibilities. A pronounced need for the same arises in cases like mine, as I bear witness to not just an erasure of history of such demands over the decades, but also an 'erasure' of the people⁶⁴ – often by deploying the Constitution which "we the people of India"⁶⁵ have given to ourselves.⁶⁶ My hope, through such centring, is to find persuasions to take these articulations seriously, and provide reasons for placing similar demands on many others placed in like manner.

C. The Immaterial Death

As mentioned earlier, it is widely understood that Article 370 as it stood on 5 August 2019 offered very little in terms of material safeguards or promises. To explain this, though significant in its own right, most conversations have usually expressed concerns on how this was *largely* because of its operationalisation that Article 370 was hollowed out by 2019. However, Deva reminds us that "terming this abuse as merely 'erosion of Article 370' is misleading since it masks what actually is happening underneath, i.e., aggrandisement of the Indian legal authority at the cost of J&K's legal authority."⁶⁷ Driven by a similar

61 Arthur Kleinman / Joan Kleinman, *The Appeal of Experience; The Dismay of Images: Cultural Appropriations of Suffering in Our Times*, *Social Suffering* 125 (1996), p. 7.

62 Mudasir Amin / Samreen Mushtaq, *On Solidarity: Reading Love, Loss, and Longing in Kashmir, Identities* 27 (2020). They argue that solidarity by many Indians is often conceited and is "based on self-interest" and often centring "the settler states of feeling – guilt, anxiety, certainty, and challenges to identity among them".

63 Namwali Serpell, *The Banality of Empathy*, *The New York Review* (2019), <https://www.nybooks.com/online/2019/03/02/the-banality-of-empathy/> (last accessed on 27 June 2023). To Serpell, empathy does not have a co-relation to "sparking good deeds."

64 X (anonymous), *From Domicile to Dominion: India's Settler Colonial Agenda in Kashmir*, *Harvard Law Review* 134 (2021), <https://harvardlawreview.org/print/vol-134/from-domicile-to-dominion-indias-settler-colonial-agenda-in-kashmir/> (last accessed on 7 June 2023).

65 Preamble to the Constitution of India.

66 See, for example, *Plurality*, note 4, paras. 92-95.

67 Deva, note 46, p. 52.

motivation to understand this aggrandisement but different direction and location from Deva's, I intend to show signs of how the textual design and circumstances attached to its conceptualisation by the political elites offered very little to begin with. However, this by no means is a novel argument; and as I said earlier, this Part serves as a reminder to work previously done.

In this Part, I emphasise on the peculiar design of Article 370 in Section II. To lay ground for dispelling some of the promises attached to its conception, I also present a very quick, but necessary statist understanding of the provision in Section I as a preface to the peculiarities. By 'statist' here (and subsequently), I signal (to some degree) the understanding of the nationalist government of J&K that comes to power with a certain vision of autonomy (within the Indian Republic), an idea as per some, that was "generously" accepted by the Constituent Assembly ("CA") of India.⁶⁸ Section III brings us closer to understand the paradox we set out to unpack.

A disclaimer is necessary here – most discussions in the subsequent sections significantly depart from the Judgment of the SC on the August 2019 changes. The decision has been widely said to be replete with "historical distortions, selective amnesia and logic-less interpretation;"⁶⁹ in clear "disregard of constitutional principles" (not even a "signal[ed] an engagement" like its predecessors); "yet another manifestation of the Court's consistent deference" to the Executive;⁷⁰ and, naturally, yet another "let down" (for the people of J&K).⁷¹ In fact, as Rashid puts it, in Kashmir most people remained unfazed on pronouncement of the decision. To her, one of the reasons for that has been how people had little hopes attached to the decision and "showed no shock" on its deliverance.⁷² With such background, unless absolutely imperative or serving the (limited) objective of the section

68 *Bazaz*, note 23, pp. 410, 602.

69 *Anuradha Bhasin*, *The Supreme Court's Verdict on Article 370 brushes aside both Legality and History*, *Supreme Court Observer* (2023), <https://www.scobserver.in/journal/the-supreme-courts-verdict-on-article-370-brushes-aside-both-legality-and-history/> (last accessed on 18 December 2023); On logical inconsistencies see *Kieran Correia*, *The Supreme Court's Article 370 Judgment – Unilateral Declarations and Self-Concurrence as Constitutional Practice*, *Indian Constitutional Law and Philosophy ("ICLP")* (2023), <https://indconlawphil.wordpress.com/2023/12/12/guest-post-the-supreme-courts-article-370-judgment-unilateral-declarations-and-self-concurrence-as-constitutional-practice/> (last accessed on 18 December 2023).

70 *Burhan Majid*, *Article 370: Supreme Court Ruling Prefers Rhetoric Over Constitutional Principle*, *The Quint* (2023), <https://www.thequint.com/opinion/supreme-court-article-370-abrogation-supreme-court-ruling-verdict-jammu-and-kashmir#read-more> (last accessed on 18 December 2023).

71 *Anuradha Bhasin*, *The Supreme Court Has Let Down The People Of J&K By Giving Its Seal To The Loss Of Special Privileges*, Interview with Samar Halarnkar, *Article 14*, <https://article-14.com/post/-the-supreme-court-has-let-down-the-people-of-j-k-by-giving-its-seal-to-the-loss-of-special-privileges--6576d6421a0dd> (last accessed on 18 December 2023).

72 *Toufiq Rashid*, *Why There Is Silence in Kashmir Over The Supreme Court's Verdict*, *The Wire* (2023), <https://thewire.in/rights/why-there-is-silence-in-kashmir-over-the-supreme-courts-verdict> (last accessed on 18 December 2023).

(or the piece), the subsequent sections do not intend to ennoble the Judgement with a more serious engagement.

I. 370: A Quick Background

As any sincere attempt of recording, the constitutional history of Article 370 in statist terms must (at least)⁷³ start with the forceful accession of the Princely State to the Indian State.⁷⁴ As we explore in the subsequent Parts, the legitimacy and legality of such an accession has been deeply contested,⁷⁵ but served as the foundation, and an inextricable link for a subsequent constitutional relationship.⁷⁶ Contrary to how the SC "pick[ed] and ch[o]se"⁷⁷ history, a sincere story should also tell how, unlike the other Indian Princely States under the "suzerainty"⁷⁸ of the British Crown that were fully absorbed into the Indian Union, the former Princely State of J&K was brought within the Union after a unique, negotiated accession.⁷⁹ However, in such accession, the sovereignty of J&K was not entirely relinquished, and potentially shared.⁸⁰ It was also, as Noorani demonstrates, an incomplete accession to India signed by the *Maharaja* — conditional on a plebiscite promised to the people and meant to ascertain the wishes of the people on the state of accession.⁸¹

73 Deva [note 46, pp. 39-40 and 43-46] reminds us how with 370 on spotlight, the relation between previous constitutions of India and J&K are overlooked that, in fact, sets stage for the constitutional relationship post 1950.

74 Maharaja Hari Singh's Letter to the Governor-General of India on 26 October 1947, in *A.G. Noorani*, Article 370: A Constitutional History of Jammu and Kashmir, Delhi 2011, pp. 41-43. Singh says, how he had "no option" but to ask for help from India in the wake of a "great emergency" and how India "cannot send...help" without his accession. On "forceful" association, also see *A.G. Noorani*, ("Noorani 2"), *The Kashmir Dispute 1947-2012 (Volume 1)*, New Delhi 2013, pp. 7-28.

75 Lone, note 22, pp. 171-238.

76 *Zaid Deva*, Basic without Structure? The Presidential Order of 1954 and the Indo-Jammu & Kashmir constitutional Relationship, *Indian Law Review* 4 (2020), pp. 11-14.

77 *Majid*, note 70.

78 A *sui generis* arrangement of a dominant with a dependant state – complicated by the diverse forms of relationships the British had with different native Indian states that were not a part of "British India". Each such dependent had a differing level of 'independence' but was not considered a 'state' in the Westphalian sense, see, *Crawford*, note 40, pp. 321-323.

The arrangement with respect to J&K is documented in the Treaty of Amritsar, 1846, under Articles 6 to 10. Among the Princely states, Kashmir was said to be one of the more independent ones. On this, see *Christopher Snedden*, *Understanding Kashmir and Kashmiris*, London 2015, pp. 69-89; Lone, note 22, pp. 173-188.

79 Interestingly, even the Plurality (note 4) notes at several places that the Princely State of J&K was unique (paras. 128-148; 247-254, 310). Despite this, the Judgment attempts to advance how J&K was no different from other fully absorbed states with no vestige of sovereignty (para. 259).

80 *Deva*, note 76, pp. 5-11.

81 *Noorani*, note 74, pp. 29-49.

Article 370 eventually gets housed in the part on “Temporary, Transitional and Special” provisions, and lays down “Temporary provisions with respect to the State of Jammu and Kashmir.” Despite being borne out of a complex history, Article 370 never provided much textual hint around the reasons and conditions for specialty and temporality. Nor did it attempt to give great clarity to the relationship between the acceding state and India. In fact, it was only a ‘procedural provision.’⁸² Besides recognising Article 1 of the Indian Constitution being applicable to J&K,⁸³ the provision spelt three processes:

- a. The process of extending the law-making powers of the Union Parliament over J&K outside the subject matter covered in the Instrument of Accession (IoA);
- b. The process of extending the provisions (with exceptions and modifications) of the Indian Constitution to J&K; and
- c. The process to abrogate or change the aforesaid processes.

II. The “Peculiar and Exceptional” Provision

In effect, Article 370 simply provided a tiered, bilateral process (only involving centres of power in Srinagar and Delhi)⁸⁴ to extend the Indian Constitution (with exceptions and modifications!), and expand the law making powers of the Indian Union. As a safeguard for the brokered autonomy until the question of integration was definitively decided, 370 stood as the only route for an extension of the Indian Government’s laws and governance beyond the matters that were already negotiated by the political elite of the former Princely State during accession.⁸⁵ However, as is shown by Noorani and Deva, it makes way for a re-authoring of the Constitution when applied to the J&K with the widest powers to the Indian Government to extend the Constitution with not just exceptions and modifications, but also with “insertions, omissions, substitutions, differing constructions and additions.”⁸⁶ Suffice it to say, it was conceived as an amendment procedure that could be easily expected to run wild. As India’s first President, Rajendra Prasad, said: it was a provision of “peculiar and exceptional nature” for “amendment of the constitution by an Executive ... as distinguished

82 *Deva*, note 77, pp.2 & 23.

83 Article 1 of the Indian Constitution provides the names and constituents of the Indian Union.

84 *Deva* [note 46, p.41] reminds us how the interests of Nehru “in integrating J&K in India were shared by many (the means differed though),” and “Sheikh’s interests in J&K’s accession to India were restricted to himself and his close aides in the National Conference.” To these ends, the two parties he uses in describing as centres of constitutional bargaining “are not India and J&K, but Nehru and Sheikh”. The results of such a bargain was Article 370, which also provided a processes for consultation and ratification by the political elite greatly driven by their own interests. The elite here comprised of members of a dubious CA [See, A.G. Noorani, A Dubious Constitution, *Frontline* (2019), <https://frontline.thehindu.com/the-nation/article26003923.ece>] and client regimes of the Indian State (as discussed in Section D).

85 On negotiations, see *Hussain*, note 16, p.99-104.

86 *Noorani*, note 74, pp. 14-28, 303-330; *Deva*, note 76, pp. 19-20. The government lawyers also acknowledged that 370 had an “expansive width of power”: See, *Plurality*, note 4, para. 42.

from Parliament", and that such unbridled power of constitutional amendment should be exercised sparingly (perhaps "only once"?).⁸⁷

In fact, in 1964, in a not-so-legal-looking earlier attempt to abrogate Article 370,⁸⁸ India's then Home Minister, Gulzari Lal Nanda, assured the ones who tabled the proposal that the process under Article 370 was a "*beautifully conceived*" and "*simple*" process to secure integration with India without having to go through a "stringent process" that accompanies an analogous power of constitutional amendments.⁸⁹ To Nanda, ironically, Article 370 had parallels with the famous Banihal tunnel/Jawahar tunnel which was one of the firsts in 1956 to make the valley of Kashmir more accessible to India all year round, which Radhakrishnan (then Vice President of India) himself declared to be a "permanent and lasting physical link between the Kashmir valley and the rest of the country" at its inauguration.⁹⁰ Put into operation amidst crises (both created and catalysed by the Indian political elite as we discuss below), and sanctified several times even by the SC,⁹¹ it was through repeated use of this 370 "tunnel", as Nanda said in 1964, that "a good deal of traffic [had] already passed and [more would]".⁹² In other words, as Nehru described in 1963, the provision had such a design that "made the relationship of Kashmir with the Union of India very close," even making Kashmir "fully integrated."⁹³ Much like the Banihal, it was an attempt to make the integration a "concrete reality."⁹⁴

The effect of such a provision was felt rather soon. Prominent Kashmiri leader Prem Nath Bazaz, notes from the early years of Article 370 (in "Freedom or Fascism") how the "grant of autonomy" to "nationalist rulers" (like Sheikh Abdullah and Bakshi Ghulam Mohammad, some of the most prominent leaders of the popular Quit Kashmir movement against the Dogra Monarchy) was "paradoxically" opposed by many who didn't support the accession as it was "instrumental in strengthening the fascist set up" in J&K.⁹⁵ To Bazaz: "[S]ince the people have not acceded to India by their free will and they want to throw the present imposed regime, *this autonomy has been of the greatest assistance to the Nationalist leaders in supressing the public opinion.*" [Emphasis added] How this happens, is discussed in some detail in Part D.

87 Noorani, note 74, pp. 206-210.

88 Lok Sabha Debates, 10th Session, 20 November 1964, Third Series, Volume XXXV, No.4, pp. 771-848.

89 Lok Sabha Debates, 10th Session, 4 December 1964, Third Series, Volume XXXVI, No.15, pp. 3455-3456.

90 Kanjwal, note 16, p. 150.

91 Noorani, note 74, pp. 14- 18.

92 On the exercise of this power, see Plurality, note 4, paras. 433-465.

93 Lok Sabha Debates, 6th Session, 27 November 1963, Third Series, Volume XXII, No. 8, p. 1632.

94 Kanjwal, note 16, p. 150.

95 Bazaz, note 23, p. 410.

With time, the tiered process is also weakened after the dissolution of the J&K CA in 1957. The role of ‘ratification’⁹⁶ the Assembly had over some matters was no longer available. Despite this, Article 370 was permitted to “continue[...] in force and remain[...] effective.”⁹⁷ Constitutional scholars like Noorani have demonstrated how the use of the Article 370-process was highly questionable—especially after the dissolution of the (“dubious”⁹⁸ and “unrepresentative”⁹⁹) CA of J&K in 1957 that provided this additional tier as a safeguard.¹⁰⁰ To Noorani and others, such extensions of the Indian Constitution past this go beyond what was imagined by the Indian CA.¹⁰¹

Seen as such, the “special status” of J&K through Article 370 was an “irony.”¹⁰² With such conceptualisation and operation, it did not “signify an exalted or privileged status” but was “asymmetrical[ly federal] in the opposite sense” the statist/nationalists intended.¹⁰³ Designed seemingly to be a constitutional framework to respect the “sovereignty and self-determination” claims of the people of J&K, scholars point out how it soon becomes a mechanism for colonialism and occupation.¹⁰⁴

III. *The Essence of this Reminder*

Most charitably then, through the provision of specious safeguards, Article 370 essentially provided a gatekeeper to the gates of the “tunnel”. However, owing to such an easy “wreck”¹⁰⁵ of the ‘safeguards’ it could, and did create, the gatekeeper, as Mir Suhail draws,¹⁰⁶ turned out to be long-dead one. The long-dead gatekeeper does not become the martyr, and its death in 2019 does not really evoke the song (or reactions generally). What was, in fact, struck in August 2019 was perhaps behind the gate that the gatekeeper guarded.

This realisation brings us one step closer to understanding the paradox better and suggests that there has to be more to the story of Article 370 than the death of the procedural

96 See unamended Article 370 (2) of the Constitution of India.

97 *Sampat Prakash v. The State of Jammu and Kashmir and Ors.*, [1969] 2 SCR 365, paras. 5-8.

98 *Noorani*, note 84.

99 *Bazaz*, note 23, p. 603.

100 *Noorani*, note 84, p. 15.

101 Noorani demonstrates this through the exposition by N. Gopalaswami Ayyangar, one of the most prominent architects of Article 370. See CAD, note 20.

102 *Junaid / Misri / Zia*, note 59, p. 3.

103 *Ibid.*, *Haley Duschinski / Shrimoyee Nandini Ghosh*, *Constituting the Occupation: Preventive Detention and Permanent Emergency in Kashmir*, *The Journal of Legal Pluralism and Unofficial Law*, 49 (2017), p. 4

104 *Duschinski / Ghosh*, note 103; *Kanjwal*, note 16, pp. 13-20.

105 *Noorani*, note 74, pp. 303-330.

106 *Mir Suhail*<https://twitter.com/mirsuhail/status/633819614586142720>

text. It also helps us take a step towards writing and understanding the story of Article 370 — locating it not just in its operation but also in its founding moment.

D. Locating the Material Injury

This Part serves as an attempt to understand the paradox and take the singers more seriously. As mentioned in Part A, it aims to do so in two steps.

The *first* step is to show how the founding moment of Article 370 lays the foundation of what struck and continues to strike at the root of the self-determination claims (Section I). Such approaches of “showing” I endeavour are not new. For instance, Deva explains how scholarship on Kashmir will gain if we are more attentive to the “constitutional realities” of Kashmir.¹⁰⁷ He does not always attempt to find such “realities” *within* Article 370 but outside — especially in the political bargaining between Nehru and Sheikh Abdullah, and their successors. To him, such bargaining loses essence, and converts into a project of Indian “aggrandisement” where one sovereign legal order impinges on another sovereign legal order. In this Section, I want to expand the *possibility* of such a landscape for the inquiry into “realities” outside of Article 370, de-centre the J&K nationalists I refer to above, and push for the inclusion of more actors in an attempt to understand the singers. I largely do this by brushing dust off untouched bibliography in constitutional law scholarship, which currently only seems preoccupied with limited actors and events.

Naturally, this cannot be an exhaustive account. Considering space constraints, I only take a closer look at the founding moments of Article 370. However, this is not only to serve as an example to demonstrate the broad claim I intend to advance around the constitution making around J&K (based on the linkages scholars have drawn between the larger political domain, exercise of sovereignty, the constituted power to make a constitution and the end product influenced by all of this),¹⁰⁸ but also acts as evidence of the genesis of continuing concern that remains unacknowledged and unaddressed, and give us a good sense of the possibilities of operationalising the “procedural” provision. In any case, the importance of such history needs little defence, as we cannot just “get away from the baggage of history while dealing with [J&K]’s core issues, comprising the aspirations of the people of J&K.”¹⁰⁹

107 Deva, note 46, p. 39.

108 See, for example, *Ayesha Wijayalath*, Sovereignty and Constituent Power: Reimagining the Process of Constituent Power through the Politico-Legal Matrix of Sovereignty, *Journal of Legal Philosophy* 48 (2023), pp. 73-76.

109 See the Report of the Group of Interlocutors for Jammu and Kashmir in 2012, <https://www.mha.gov.in/sites/default/files/2022-08/J%26K-InterlocutorsRpt-0512%5B1%5D.pdf> (last accessed on 20 December 2023) on how it tried to “get away” from the baggage. The much-criticised group was appointed by the Central Government in 2010 after the widespread, popular anti-India protests in J&K, which Kak (*Sanjay Kak* (ed), *Until My Freedom Has Come: The New Intifada in Kashmir*, New Delhi 2011) refers to as the “new intifada.” Noorani (*Noorani* 2, note 74) discusses the concerns around the creation and operation of the Group (pp. 76-104).

Moving away from understanding the disassociation from the Constitution, in Section II, we take the *second* step to understand the rage, resistance, and lament around August 5. I suggest that one way to do so is to go past “impo[sed]...ontologies”¹¹⁰ and misleading terminologies in constitutional law to understand the nature of the injuries – and see it as an assault on such expressions of self-determination and as a big move in Indian aggrandisement.

I. Conscience of our Colonialism?

1. What Struck?

As mentioned earlier, there is an inextricable link between Article 370 and the IoA, and naturally, the accession becomes part of the story of the founding moments. In such an accession, the Kashmiri representatives who signed and supported it, operated in a situation where their leadership was much in question.¹¹¹ It was most visibly shaken by the loss of effective control (and people’s support) and the loss of legitimacy as a result of the mutiny in the North (Gilgit);¹¹² an uprising in the West that led to a creation of a “still born” Provisional Azad (Free) Government in areas freed from the *Maharaja*;¹¹³ and forebodings of a mass massacre of Muslims led by the *Maharaja*’s paramilitaries (which, in turn, lead to a significant demographic change of the region).¹¹⁴

Even if one were to go beyond these circumstances around the accession, like some scholars who do see this period representing a “constitutional clean slate,”¹¹⁵ it is hard to say so about the “blown-up promises”¹¹⁶ of the plebiscite by the political elites in India and J&K. Some such promises are, in fact, made in the Indian CA and several times at the UNSC!¹¹⁷ Interestingly, though not without concerns, India also applied a seemingly “different yardstick” in relation to Junagadh (another Princely State), whose ruler had

110 *Junaid / Misri / Zia*, note 59, p. 4.

111 *Hussain*, note 16, pp. 77-131.

112 *Martin Sökefeld*, *Locating Gilgit Baltistan*, in: *Palgrave Handbook*, note 17, pp. 60-67.

113 *Bazaz*, note 23, p. 529; *Christopher Snedden*, *Kashmir: The Unwritten History*, Noida 2013, pp. 37-63.

114 *Snedden*, note 113, pp. 47-57.

115 *Arghya Sengupta / Jinaly Dani / Kevin James / Pranay Modi*, *Hamīn Ast? A Biography of Article 370*, Delhi 2022, p. 13.

116 *Suhail Naqshbandi*, <https://www.instagram.com/p/CBQZnAH12wV/> (last accessed on 8 July 2023).

117 See CAD, Volume 8, 27 May 1949, <https://www.constitutionofindia.net/debates/27-may-1949/> (last accessed on 8 July 2023); CAD, note 20. For moments outside the CA, including the UN see: *Noorani 2*, note 74, pp. 124-131.

acceded to Pakistan — and carried out a “hasty referendum” in February 1948 following a military intervention.¹¹⁸

These promises also appear to be doublespeak, possibly because of the anxiety that the accession to India would not be ratified by the people.¹¹⁹ Take, for instance, the letter Nehru wrote to Abdullah in November 1947.¹²⁰ Afraid of “a bad impression abroad especially in UN circles”, he told Abdullah to stress why the people must decide, but *also* stress how it was “absurd” to want a plebiscite in the times of a war. Around this time, Abdullah himself, as people point out, shows the “strongest opposition to the plebiscite” and continues the terms of the accession.¹²¹

Not to anyone’s surprise, this promise gets forgotten and the plebiscite, as Noorani shows, was magically replaced to become an expression of ratification (on *behalf* of the people) of the accession (and constitutional relationship) by the CA of J&K.¹²² It raises a significant principled question if such mechanisms could even be adopted for questions of such nature. No attempts are made to respond to it. However, these developments are also shown to have a significant constitutional import — cited often as evidence of Indian sovereignty and a way to avoid complying with UNSC resolutions.¹²³ In this regard, Bazaz noted how many: “believe that if the Constituent Assembly of the Nationalists ratifies State’s accession to India, the dispute will end. They forget that the Assembly enjoys no representative character and is by nature of its composition the General Council of the National Conference in another garb. If the repeated ratification of the State’s accession to India by the General Council could not end the dispute, how can a resolution of the Constituent Assembly to that effect do so.”¹²⁴

Historians also detail, how there were also encumbrances put on demands of self-determination and any dissent generally.¹²⁵ For instance, what makes the article further detached from the people it most affects is how the founding moment of 370 also accompanied

118 *Anuradha Bhasin*, Article 370: Understanding History, Legal Contexts And Why It Matters, Kashmir Times, https://kashmirtimes.com/article-370-understanding-history-legal-contexts-and-why-it-matters/?s=09#_ednref3 (last accessed on 18 December 2023).

119 See, for example, *Noorani* 2, note 74, pp. 6, 29-30, 32, 39-40.

120 *Shri. S. Gopal (eds.)*, Selected Works of Jawaharlal Nehru, Second Series, New Delhi 1984, p. 335.

121 *Duschinski / Ghosh*, note 103, p. 14; *Bazaz*, note 23, p. 559.

122 *Noorani*, note 84; See, for example, Goodwill message by Maulana Mohammad Saeed, 31 October 1951, Jammu and Kashmir CAD, Official Report, Part I, First Volume, <https://lawandotherthings.com/wp-content/uploads/2021/11/debate-Part-1-2.pdf> (last accessed on 8 July 2023), p. 18. Also see, Statement by Sheikh Mohammad Abdullah, 5 November 2008, pp. 104-105.

123 *Kanjwal*, note 16, pp. 15 and 55. In fact, SC Resolution 91, 31 January 1951, and SC Resolution 122, 24 January 1957, make a mention that the determinations the assembly takes/has taken on “future shape and affiliation” of J&K “would not constitute a disposition of the State” in accordance with “the will of the people.”

124 *Bazaz*, note 23, p. 603.

125 *Hussain*, note 16, pp. 184-229.

a negotiated silence of the prominent leader, Sheikh Abdullah, from invoking the slogan of self-determination after accession.¹²⁶ In return, Abdullah was chaperoned by the Indian political elite (while keeping a watchful eye on him)¹²⁷, most noticeably, to hold office as the first Prime Minister of the acceded J&K and replace the centrality of the *Maharaja*.¹²⁸ Despite serious legitimacy concerns, he is widely represented as the true representative of J&K, even at the UNSC.¹²⁹ Besides these, he also became the most salient part of the delegation that got nominated to represent a fractured J&K in the CA of India, where Article 370 was finalised.¹³⁰

As a result of this, Abdullah lost popularity and the support of many people in J&K.¹³¹ As scholars show, with the support of the Indian Army,¹³² Abdullah's leadership and support for India also marked a period of militant governance that curbs all dissent, mass arrests, disregard for civil liberties and rights, a fuelled displacement and dispossession in the aftermath of the first India-Pakistan war, and a dismantled economy.¹³³ It was a "humanitarian and economic crisis", as per Hussain.¹³⁴ All of this cumulatively "destroyed any space for consensus" and "defeated", as some say, "the very purpose of the long struggle for rights and representative democracy" that was led by Abdullah against the *Maharaja*.¹³⁵ Several of his earlier supporters withdrew support and also disagreed with the CA of J&K deciding the fate of the accession (as opposed to the promised plebiscite doing that), or had concerns with a union of J&K with a "conservative [Indian] constitution" which would not have allowed for the bold land reforms that were planned for J&K.¹³⁶

If, as some scholars today say, there were amnesias attached to the partition during the drafting of the Constitution of India, the discussions on the situation in J&K seem even more alarming.¹³⁷ Seeped in a nationalist gaze and absorbed by the process of "making a new constitution which affects not merely the Union as a whole but affects the units of the Union and Kashmir",¹³⁸ the first time J&K gets discussed in the CA of India, most

126 Hussain, note 16, pp. 78-79.

127 Duschinski / Ghosh, note 103, p. 12.

128 Sengupta et. al, note 115, pp. 3-13.

129 See, for example, Sheikh Abdullah's speech at the UNSC, Official Records, Third Year, Nos. 16-35, (241st-260th meetings 5 February-2 March, 1948).

130 CAD, note 117.

131 Vanessa Chishtii (Interview), The People of Kashmir Must Decide Their Own Future, Jacobin (2022), <https://jacobin.com/author/vanessa-chishtii> (last accessed on 8 July 2023).

132 Bazaz, note 23, p. 410.

133 Hussain, note 16, pp. 78-90; also see, Book Second, Bazaz, note 23.

134 Hussain, note 16, p. 120.

135 Hussain, note 16, pp. 80-81.

136 Hussain, note 16, p. 103.

137 See, for example, Kanika Gauba, Forgetting Partition: Constitutional Amnesia and Nationalism, Economic and Political Weekly, 51 (2016), pp. 41-47.

138 CAD, note 117.

of the background fades away. The *only* significant discussions are on the name of the acceding unit as part of the Republic, and how "the reference to the plebiscite and to the United Nations Organisation has nothing whatever to do with the representation proposed to be given to the Kashmir State." The legitimacy, the legality, or even the conditions of the accession and incorporation, and the circumstances (barring sparse discussion on why elections are not possible) don't make the cut.¹³⁹ On the contrary, an "amazed, surprised and astounded" Nehru, after hearing that the accession was conditional, as one of the members mentioned, called it "absolutely incorrect— cent per cent incorrect".¹⁴⁰

In such circumstances, how could the articles be ever conceived to be theirs?

2. What Continues to Strike?

As we see above, the founding moment of Article 370 accompanies ways that appear to be directed at territorially and ideologically integrating J&K within the Indian State¹⁴¹ and manufacturing ways to achieve "a shared national identity."¹⁴² However, as histories of self-determination struggles (and the song like the one we focus on) demonstrate, these connections cannot be fabricated.¹⁴³ Naturally, distanced from the aspirations of the ones resisting such imaginations, the Indian Constitution, created in such circumstances, cannot forge belongingness by merely (though, however, neatly) defining territory, sovereignty and citizenship. As mentioned above, what it does is quite the reverse: it paves the way for the application of what Ghosh calls "crisis constitutionalism" that treats J&K as a permanent zone of undeclared emergency¹⁴⁴ and creates a base for what Gauba maintains to be an everlasting system of "unequal citizenship"¹⁴⁵ characterised by the suspension of rights and democratic governance. While the incidents around 5 August 2019 may have reached us as news providing the brazen display of such exceptionalism and inequality, and are indeed significant, they remain a tip of the iceberg of the history of disenfranchisement, dispossession, and brutal violence upon the people.¹⁴⁶

139 Aman, https://twitter.com/CB_Aman/status/1167342370045624320 (last accessed on 8 July 2023).

140 CAD, note 117.

141 On the phenomenon see, *Shahabuddin*, note 51; *Sen*, note 52.

142 Quote from a contemporary parallel in Justice Kaul's approach to set up a "Truth and Reconciliation Commission" to "[achieve] a shared national identity." In Re: Article 370 of the Constitution, note 4, para. 125.

143 See, *Hussain*, note 16, pp. 77-131.

144 *Ghosh*, note 48.

145 *Kanika Gauba*, Book Review, *India's Founding Moment: The Constitution of a Most Surprising Democracy*, Public Law (2021), p. 222.

146 See, *Zanaan Wanaan*, Revisiting Dispossession and Loss in Kashmir, <https://zanaanwanaan.com/wp-content/uploads/2022/11/ZW-Issue-1.pdf> and <https://zanaanwanaan.com/issues/cover-art-explainer/> (both last accessed on 8 July 2023).

For many, perhaps like our singers, the unresolved (and unacknowledged) questions around the founding moment, in fact embolden reasons for distancing themselves from the Constitution — and more so as time passed and more measures to entrench control were operationalised.¹⁴⁷ More proximately to the times we were discussing in the previous section, one could see so when the very Abdullah the Indian State supported was dismissed as the Prime Minister of J&K in 1953 and put behind bars for 11 years when he expressed concerns with the Indian governance and re-centred the demand for the plebiscite – beyond vocabularies of autonomy.¹⁴⁸ The arrest, amidst protests, was followed by a contested confirmation of the accession to India by the CA of J&K in the absence of the person “believed” to be the representative of the people of J&K. In addition, there is also a creeping and radical integration through the subsequent amendments Nanda and Nehru refer to through the time of Abdullah’s successor, whom the Indian government parked and protected for a while — Bakshi.¹⁴⁹

Satya Pal Malik, the Governor of J&K who assented (overnight) to some of the August 5 changes, recently said, “Delhi takes the entire system for granted. That what they say will go.”¹⁵⁰ Perhaps this also explains how India’s respect for the “constitutional relationship” was put into operation. In fact, as scholars note, even post Abdullah and Bakshi, subsequent changes were orchestrated through almost 16 years of “declared” emergency (since 1977), several client and puppet regimes, coups, deep counterinsurgency and rigged elections — and were often articulated and justified using the vocabularies of the Constitution.¹⁵¹ Bazaz writing in the 1950s, noted that if the integration happens against the wishes of the people (as it had been), it may need such orchestrations and no puppet government would ever be “stable”. Naturally, now (almost) resonating with the events of 2019, Bazaz further spoke of how “finally” there will be enough reasons for the President to impose emergency in times of instability. In such times the “safety valves will disappear”, leading to “such dreadful consequences as no one can foretell.”¹⁵²

In 2019 too, besides being packaged as a move to “improve socio-economic conditions” and “bring peace and tranquillity” in J&K, the changes also attempted to “strengthen

147 *Deva*, note 46.

148 *Noorani*, note 74, pp. 226-241; *Noorani 2*, note 74, p. 35, pp. 46-53.

149 *Noorani*, note 74, pp. 336–415; *Kanjwal*, note 16, p. 66.

150 *Karan Thapar*, Pulwama, Modi, Corruption: Full Explosive Transcript of Satya Pal Malik’s Viral Interview, *The Wire* (2023), <https://thewire.in/politics/satya-pal-malik-full-interview-pulwama-modi> (last accessed on 26 December 2023).

151 See, *Noorani*, note 74. On emergencies, see *Newslick Production*, Repeated Misuse of Section 92 in J&K - A Brief History, *Newslick* (2018), <https://www.newslick.in/repeated-misuse-section-92-jk-brief-history> (last accessed on 26 December 2023); *Anjishnu Das*, 13 years in J&K, 10 times in Manipur, UP: History of President’s Rule, *Indian Express*, <https://indianexpress.com/article/political-pulse/13-years-in-jk-10-times-in-manipur-up-history-of-presidents-rule-8912688/> (last accessed on 26 December 2023).

152 *Bazaz*, note 23, p. 603.

the sovereignty of [India]¹⁵³ in the midst of a siege. Ironically, but predictably for the ones familiar, such changes were occasioned under emergency administration with no semblance of an elected government since June 2018 and no venter of a functional legislative assembly since November 2018.¹⁵⁴ J&K was also demoted from the status of a federal state and split into two "Union Territories" — to arguably bring it under *more* direct control of the Union. Even today it continues to be under one of the longest phases of President's rule with uninspiring promises to re-instate the status of a federal state (with Ladakh severed), and to conduct an election in the unsure future.¹⁵⁵

Once again, through the Constitution, the strengthening of "sovereignty" is pitted against self-determination demands – and constitutional law language used to limit the scope and scale of its expressions in such times. However, despite the absence of "grand protests" (whose news may not always reach us) in a climate of fear, hopelessness and silence post-August 2019, resistance against the import of the move, as Bhasin notes, has not completely vanished.¹⁵⁶ Speaking of the times, Bhasin notes how hopelessness is a form of "undefeated despair" and the silence a "deceptive volcano" which could erupt in ways that are chaotic and even hard to predict. Even now, as Bhasin adds, the silence is being broken by "feeble murmurs of disappointment, despair, anger and dissent." In fact, despite the state's official data suggesting a weak armed rebellion against such "strengthening" (despite a spike in recruitments)¹⁵⁷ — as mentioned in Part B, there has always been a complex, popular and plural civilian resistance, often demonstrating a clear expression against Indian sovereignty (particularly its exercise) in the region; and it can't just magically be wished away. Historically, on several occasions, it has "roared" among the "constant murmurs", in support of a right of self-determination,¹⁵⁸ and "continues to spin new and multiple meanings" even today.¹⁵⁹

To offer some visibility to the continuities (of the 'strikes') I referred to in constitutional conversations, from "an odd night, away from home,"¹⁶⁰ we can travel to the SC in

153 Rajya Sabha Debates, Statutory Resolution and Government Bills, 5 August 2019, https://rsdebate.nic.in/bitstream/123456789/698155/2/PD_249_05082019_p22_p96_14.pdf (last accessed on 8 July 2023).

154 Plurality, note 4, paras. 2-6.

155 Plurality, note 4, paras. 514 (m) and (n). On the "uninspiring" aspect see, *Krishnesh Bapat*, On Representative Democracy, ICLP (2023), <https://indconlawphil.wordpress.com/2023/12/22/guest-post-the-supreme-courts-article-370-judgment-vi-on-representative-democracy/> (last accessed on 28 December 2023).

156 *Bhasin*, note 5, esp. pp. 296-297.

157 *Bhasin*, note 5, p. 290.

158 *Vanessa Chishti*, Dissent Is A Kashmiri Carpet Woven Over A Century: Three Instances When The Murmur Became A Roar, *The Outlook* (2020), <https://www.outlookindia.com/magazine/story/opinion-dissent-is-a-kashmiri-carpet-woven-over-a-century-three-instances-when-the-murmur-became-a-roar/303475> (last accessed on 7 June 2023), also see, *Bhasin*, note 5, p. 295.

159 *Hussain*, note 16, pp. 349-360.

160 *Zanaan Wanaan*, note 15.

Delhi, the heart of where the legal battle around 370 was last playing out. To some, it “was a lost battle from the word go”, considering how the Court seemed to be “batting on behalf of the Government.”¹⁶¹ However, it may be also useful to ask what the ‘battle’ was worth? How much of this would be a win if the Court recognised “autonomy” as the other goal of Article 370 or took an “ideological choice” beyond locating “constitutional integration” with India as the sole objective for having a provision like Article 370?¹⁶² — Would the Court be able to move to interrogate its conviction that J&K’s surrender of sovereignty was absolute and unconditional, and integration complete,¹⁶³ especially with the petitioners themselves making such an acknowledgment?¹⁶⁴ How much of it would be a win if the Court annulled this action by recognising the lack of “involvement of the representatives of the people”¹⁶⁵ of J&K pursuant to Article 370(3) — Would it possibly be able to navigate possibilities if it already admits that “seeking the opinion of people has to be through established institutions” or how in a “Constitution like ours, there is no question of a referendum”?¹⁶⁶

It may *also* be useful to ask whether it was equally worthy a “battle” for all. Especially for the singers we focus on. Who were the actors in the Court who expressed their angers? How attached and connected were they from the context? Could the singers even take part in this ‘battle’? Especially when the lead petitioner in the case (incidentally, part of the pro-integration party) was asked to file an affidavit affirming that he “unconditionally accept[ed] that J&K was an integral part of India, and that he abides by, and owes allegiance to the Constitution” to be able to invoke the jurisdiction of the SC.¹⁶⁷ Or especially when a not so privileged petitioner who expressed challenges in teaching principles of a

161 *Rashid*, note 72.

162 *Kartik Kalra*, On “Integration” and Ideological Choices, ICLP (2023), <https://indconlawphil.wordpress.com/2023/12/29/guest-post-the-supreme-courts-article-370-judgment-vii-on-integration-and-ideological-choices/> (last accessed on 30 December 2023).

163 See discussion in Court on 10th August 2023. Transcript of Hearing (“ToH”), 10 August 2023, https://main.sci.gov.in/supremecourt/transcribedarguments/2019/29796/297962019_2023-08-10.pdf (last accessed on 30 December 2023).

164 Kapil Sibal starts off by saying how, “we stand here on the premise that the integration of Jammu and Kashmir into India is unquestionable, was unquestionable and always remained unquestionable.” ToH, 2 August 2023, https://main.sci.gov.in/supremecourt/transcribedarguments/2019/29796/297962019_2023-08-02.pdf (last accessed on 30 December 2023), p. 10.

165 *Bapat*, note 155.

166 ToH, 8 August 2023, https://main.sci.gov.in/supremecourt/transcribedarguments/2019/29796/297962019_2023-08-08.pdf (last accessed on 30 December 2023), p. 14, line 24-37.

167 ToH, 4 September 2023, https://main.sci.gov.in/supremecourt/transcribedarguments/2019/29796/297962019_2023-09-04.pdf (last accessed on 30 December 2023) pp. 69-73.

"beautiful Constitution"¹⁶⁸ to his students in J&K is suspiciously suspended two days after his appearance in the SC.¹⁶⁹

Answering these may help us acknowledge limitations in the vocabulary and platforms the Constitution has (or is being permitted) for realistic debates. To that end, such an attack on 370, rather than being acknowledged by its rightful name in frameworks that may exist outside the ontologies imposed by statist law/constitutions, finds one compelled to always find 'acceptable' terms to name and measure infractions within the Constitution.¹⁷⁰ This argument finds further support in how Courts (especially the SC) have historically been unwelcoming of (even violent towards) any alternative imagination.¹⁷¹ In this way, foreclosure of debates is happening as much outside of courts¹⁷² as it is happening inside.

With such provocations, holding on to the Constitutional framework around these questions at a "hallowed pedestal"¹⁷³ requires closer scrutiny. The inability to question only reduces the Constitution to a feeble conscience of our colonialism.

II. Finding Language for the Injury

But what was attacked? In Part C, I suggested that in August 2019 what was struck was beyond the text and behind the 'gate' the 'gatekeeper' (Article 370) guarded. For different people, this imagery had different (and, sometimes, related) names. To some, it was a symbol (of what remained) the underlying promise of asymmetric (yet largely understood

168 ToH, 23 August 2023, https://main.sci.gov.in/supremecourt/transcribedarguments/2019/29796/297962019_2023-08-23.pdf (last accessed on 30 December 2023), p. 33.

169 Even the Solicitor General of India acknowledged that the "timing" of the suspension was not proper. ToH, 28 August 2023, https://main.sci.gov.in/supremecourt/transcribedarguments/2019/29796/297962019_2023-08-28.pdf (last accessed on 30 December 2023), p. .3. The suspension order is later revoked.

170 Aman, note 48.

171 Ghosh, note 48. See, for example, the response to arguments made by Zafar Shah of the J&K Bar Association in January 2020 [Bar and Bench, <https://twitter.com/barandbench/status/1220222207026065408> (last accessed on 8 July 2023); Bar and Bench, <https://twitter.com/barandbench/status/1219924733560414208> (last accessed on 8 July 2023)]. While this was found to be an acceptable "perspective" by the Court [Bar and Bench, <https://twitter.com/barandbench/status/1219924920810917888> (last accessed on 8 July 2023)], statements by many are restrictively construed and may even be criminalised.

172 See, Fazili, note 13; Ather Zia, Sanctioned Ignorance and the Crisis of Solidarity for Kashmir, in: Routledge Handbook, note 13.

173 Oishik Sircar, Spectacles of Emancipation: Reading Rights Differently in India's Legal Discourse, Osgoode Hall Law Journal 49 (2012), p. 532.

as hierarchical)¹⁷⁴ federalism;¹⁷⁵ to some, it was a case of “maybe little” autonomy;¹⁷⁶ to some, it was the last-standing symbol of a special status; and to some, a (weak) constitutional safeguard for the extra-constitutional, arrangement of two coordinate constitutional structures (one Indian, and one J&K constitution).¹⁷⁷ All of these framings met tragic ends in 2019 within the statist constitutional framework. While it was still technically hard to argue, and materially to imagine that the Constitution of J&K (a distinct constitutional structure that did not draw force from 370) and the “lush undergrowth of laws, bye-laws, judgments and executive orders”¹⁷⁸ arising out of two co-ordinate legal orders (that defined the everyday), abruptly dropped dead — with four years since 2019 and the ‘constitutional strike’ having received a seal of finality from the SC, such questions too have been largely rendered meaningless.

However, to be able to see with (and not past) the singers and to understand what the women express, we may have to move past the statist framings — and focus once again on the “constitutional realities” beyond the text in all that *materially* accompanied and followed the constitutional strikes. In doing so, we see *injury* to (not the death of) such struggles and hopes — carried out through a lethal attack (what I refer to as the ‘siege’) that has been put into operation through political, social, economic, judicial and militarised machinations.¹⁷⁹ Scholars note how this has led to the State “[doubling] down on its repression of Kashmiris.”¹⁸⁰ In addition to such elimination tactics, one should also focus on the *import* of such a move as being part of (yet) another settler colonial strategy of ‘assimilation’, Kanjwal discusses.¹⁸¹ Its deployment could be seen in it being directed (and now cemented by the SC) to “erase historical specificity and sovereignty” of the people — ideas that the singers hold dear.

More proximately and materially connected to 370, one may also find the August 2019 changes to be an attack on the collective rights over land and livelihood of the people of J&K. Elements of such protections were, in a way, legally preserved in the arrangement between India and J&K, and were codified in both the legal orders as certain residency

174 Plurality, note 4, paras. 163-165.

175 *Gautam Bhatia*, Power Dispersed: Asymmetric Federalism and Constitutional Pluralism under the Indian Constitution (2022), SSRN, <https://ssrn.com/abstract=4169659> (last accessed on 7 June 2023).

176 ToH, 10 August 2023, note 163.

177 *Deva*, note 76; *Khushagr Bakshi*, Constitutional Pluralism in the Article 370 Hearings, ICLP, <https://indconlawphil.wordpress.com/2023/10/20/guest-post-constitutional-pluralism-in-the-article-370-hearings/> (last accessed on 27 December 2023).

178 *Ghosh*, note 1.

179 Bhasin highlights the conditions in her book, note 5.

180 *Junaid / Misri / Zia*, note 59, p. 3.

181 *Kanjwal*, note 16, p. 19.

rights.¹⁸² The "death" of Article 370 marked the unambiguous end of such an arrangement. With it, the loss of the protections to define and preserve the rights of residents, particularly their associations with the land, became more palpable than ever, and possibilities of irreversible demographic changes became more material.¹⁸³ Take, for instance, how — in the middle of the COVID lockdown in May 2020— domicile rules on eligibility for a J&K employment law were amended, and domiciliary certificates were issued to non-residents under a fast-track process.¹⁸⁴ In light of this, there is also a deep sense of foreboding, what many say, of the propelling of an already-rooted settler colonial project.¹⁸⁵ Moreover, there are also fears of the August 2019 move becoming an imprimatur of a clear title for the Indian state, and a license for the entrenchment of state control.¹⁸⁶

Another such target has been the flagship land reforms that attempted to work towards land re-distribution in favour of tillers, end landlordism over big estates, protect and regulate the transfer of agricultural and public land, food security etc. Scholars suggest how these laws made J&K a "unique example" where socio-economic disparities were not "as striking" compared to other states under India's jurisdiction.¹⁸⁷ Anuradha Bhasin points from conversations with the veteran leader of Kashmir, Krishan Dev Sethi, who was part of the J&K CA and was instrumental in efforts behind such laws on how "the special status [of J&K] propelled the crucial land reforms in J&K." These reforms were undone on 26 October 2020, "interestingly coinciding" with the day of accession with India¹⁸⁸ — and particularly emboldening existing attempts of non-residents to own/control land, sometimes at great ecological costs.¹⁸⁹

182 A product of this was Article 35A of the Constitution of India as it applied to Jammu and Kashmir that codified pre-existing guarantees to regulate certain proto-citizenship rights after The Delhi Agreement between Indian and the J&K government in 1952.

183 Bhasin, note 5, pp. 279-281, 285-88, 292; OHCHR, UN experts say Jammu and Kashmir changes risk undermining minorities' rights, <https://www.ohchr.org/en/press-releases/2021/02/india-un-experts-say-jammu-and-kashmir-changes-risk-undermining-minorities> (last accessed on 30 December 2023).

184 Mirza Saaib Bég, J&K's New Domicile Order: Disenfranchising Kashmiris, One Step at a Time, *The Wire*, <https://thewire.in/rights/kashmir-domicile-law> (last accessed on 30 December 2023).

185 See, X, note 64; Kanjwal, note 16, pp. 17-19.

186 Ghosh, note 22.

187 Bhasin, note 5, pp. 24-27, 240-27; Shinzani Jain, Land Reform and Development in J&K, *Newslick* (2019), <https://www.newslick.in/land-reform-development-jammu-kashmir> (last accessed on 30 December 2023).

188 Bhasin, note 5, p. 240.

189 Bhasin, note 5, pp. 241-259, 279-281, 285-88.

E. Concluding Refractions

The article is an attempt to understand the singers. It has also expressed hope that we be more attentive to (and less suspicious of) their articulations (and other similar sentiments expressed outside institutions) and see them as being legally significant expressions.

It is also an invitation to be more suspicious about the promises of the Constitution. That said, despite the predictability of the results, this piece was not to suggest that one should have given up on the constitutional challenge of Article 370 and *only* looked to frameworks that address issues of self-determination, and contested sovereignties more directly. Naturally, this is also not to give up on the Constitution-centred advocacy generally. Even if one finds persuasion in the singers — often the recourse to constitutional law (howsoever concerning) remains one of the strategies adopted to respond to questions of “survival and the immediacy of claims.”¹⁹⁰ Take, for instance, the recourse to the Constitution and constitutional courts in cases of detention or internet shutdowns. It is mostly to urge that we be guided by the sense of caution Sircar flags in “unquestioningly believing in the political emancipation promised in the liberal incantations of constitutionalism”¹⁹¹ and be cognisant of its systemic failures and limitations in the context. More specifically, this hopes to encourage us to be open to how, in the engagement with J&K, the Indian Constitution and, specifically, Article 370 need not be the protagonist in discussions (especially now).

As Sfarid, while speaking of the Israeli legal system for Palestine, says, a role Israeli law may (?) play is to “appear in the cracks in the occupation” with the hope to indict the *status quo*.¹⁹² Such an understanding is not to endorse an occupational system of which law (even the Constitution) is a fundamental architect.¹⁹³ However, for such imaginations it may help to consider law, and even constitutional law, as a tactic/tool for an engagement in service of a wider political strategy — especially in cases of legally sanctioned and state-centred machinations, rather than an adequate site for all struggles and conversations.¹⁹⁴ In any case, it should definitely not impede the possibility of a meaningful engagement on the questions of self-determination and contested sovereignties any further. If nothing else, the

190 Borrowing phrase from *Ata R. Hindi* [A Palestinian Perspective on Teaching International Law, TWAIR reflections, <https://twair.com/a-palestinian-perspective-on-teaching-international-law/> (last accessed on 31 December 2023)] with respect to the use of IL.

191 *Sircar*, note 173, p. 570.

192 *Michael Sfarid*, *The Wall and the Gate - Israel Palestine and the Legal Battle for Human Rights*, New York 2018.

193 *Duschinski / Ghosh*, note 103, pp. 314-337.

194 Though used in the context of IL see, *Duschinski / Bhan*, note 29; *Noura Erakat / John Reynolds*, *We Charge Apartheid? Palestine and the International Criminal Court*, TWAIR Reflections, <https://twair.com/we-charge-apartheid-palestine-and-the-international-criminal-court/> (last accessed on 9 July 2023).

use of the Constitution must not anaesthetize, subvert, or erase these questions — especially in engagements outside courts.



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