

The De-operationalization of Article 370 of the Indian Constitution

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The state of Jammu & Kashmir (J&K) has a unique place in the political history of India.¹ The Indo-J&K relationship, and more specifically the Union Government's handling of J&K, has always been widely reported, discussed, and scrutinized from within and outside of the Indian Subcontinent.² The state had been granted limited autonomy under Article 370 of the Indian Constitution, which provided for a separate Constitution for J&K, and restricted the Union Government's legislative authority over matters concerning J&K.³

In August 2019, the Union Government, through two Presidential Orders, unilaterally announced that it was formally revoking this special constitutional status of J&K.⁴ Article 370

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1. See Zaid Deva, *Basic Without Structure?: The Presidential Order of 1954 and the Indo-Jammu & Kashmir Constitutional Relationship*, 4 INDIAN L. REV. 163, 165 (2020); *Article 370: What Happened with Kashmir and Why It Matters*, BBC NEWS (Aug. 6, 2019), <https://www.bbc.com/news/world-asia-india-49234708> (describing J&K as “the only Muslim-majority region to join India at partition.”).

2. See Express News Serv., ‘Genesis of the Kashmir Issue Does Not Lie in Article 370; Solution Doesn't Lie in (Removing) It’, INDIAN EXPRESS (Sept. 1, 2019, 7:26 A.M.), <https://indianexpress.com/article/explained/kashmir-issue-art-370-solution-removing-it-dr-aman-hingorani-5954862/>; *Kashmir: Why India and Pakistan Fight over It*, BBC NEWS (Aug. 8, 2019), <https://www.bbc.com/news/10537286>; Sadanand Dhume, *The Dueling Narratives of India's Kashmir Crackdown*, ATLANTIC (Sept. 5, 2019), <https://www.theatlantic.com/international/archive/2019/09/the-dueling-narratives-of-indias-kashmir-crackdown/597457/>.

3. See India Const. art. 370; Rinashree Khound, *Abrogation of Article 370: A Look Back at Its Origin and Aftermath*, 8 INT'L J. SCI. & TECH. RSCH. 3584, 3584 (2019) (“Article 370 allowed a certain amount of autonomy to J&K . . .”).

4. See Ministry of Law and Justice, Constitution (Application to Jammu and Kashmir) Order, 2019, C.O. 272 (Notified on Aug. 5, 2019) [hereinafter

was de-operationalized,⁵ and the state was reorganized into two separate Union Territories,⁶ thus drastically redefining the constitutional relationship between the state and the Union Government. The Union Government's stance was that this was a domestic policy prerogative, "taken for the purpose of properly integrating J&K and facilitating its economic development."⁷ However, the process by which this effort was undertaken has been described by experts as a "constitutional sleight of hand," resting on questionable legal and constitutional arguments that are likely to come before India's Supreme Court.⁸

This Note explains, analyzes, and tests the constitutionality of the legal measures adopted to de-operationalize Article 370. Part I outlines the text of Article 370 and breaks down the Presidential Orders issued to de-operationalize the provision. Part II tests this executive action from the lens of textual interpretation, Supreme Court precedent, and the "basic structure doctrine," while exploring the legal limits of exercising executive power during President's Rule. This Part also elucidates a different perspective in terms of the legal consequence of this change, as it potentially confers upon J&K a

Ministry of Law and Justice, C.O. 272]; Ministry of Law and Justice, C.O. 273 (Notified on Aug. 6, 2019) [hereinafter Ministry of Law and Justice, C.O. 273].

5. Ministry of Law and Justice, C.O. 272, *supra* note 4. The term "de-operationalize" refers to how the Presidential Orders preserved the text of Article 370, but changed the interpretation of critical terms to effectively strip J&K of its autonomy. Thus, the Article is still in the Indian Constitution, but it no longer operates to give J&K autonomy. Karan Thapar & Faizan Mustafa, *Neither Abrogated nor Removed: The Ploy Behind Centre's Article 370 Move*, THE WIRE (Aug. 28, 2019), <https://thewire.in/rights/neither-abrogated-nor-removed-the-ploy-behind-centres-article-370-move>.

6. Union Territories, by virtue of not having a separate governing body, have lesser administrative powers compared to full-fledged Indian states. Unlike Indian states, Union Territories are under the direct administrative control of the Union Government. India Today Web Desk, *What is the Difference Between a State and a Union Territory?*, INDIA TODAY, <https://www.indiatoday.in/education-today/gk-current-affairs/story/what-is-the-difference-between-a-state-and-an-union-territory-1577445-2019-08-05> (Aug. 6, 2019, 11:38 A.M.).

7. K. ALAN KRONSTADT, CONG. RSCH. SERV., R45877, KASHMIR: BACKGROUND, RECENT DEVELOPMENTS, AND U.S. POLICY 1 (2020). *See Article 370: What Happened with Kashmir and Why It Matters*, *supra* note 1.

8. FP Staff, *Shashi Tharoor Criticizes 'Constitutional Sleight of Hand' in Jammu and Kashmir, Month After Abrogation of Article 370*, FIRSTPOST (Sept. 5, 2019, 5:08 P.M.), <https://www.firstpost.com/politics/shashi-tharoor-criticises-constitutional-sleight-of-hand-in-jammu-and-kashmir-month-after-centre-revoked-article-370-in-former-state-7291481.html>; Mariya Amrayeva, *Experts Question Legality of India's Changes in Kashmir*, AP NEWS (Aug. 6, 2019), <https://apnews.com/article/634ae86e22774b6981a062e1487f5b0f>.

slew of constitutional protections which were missing earlier. This Note concludes that a successful legal argument against the availability of executive power to de-operationalize Article 370 is unlikely, since the potential de-operationalization of Article 370 was contemplated in the text of 370 itself, and the mechanism adopted by the Union Government to reach that result is carefully rooted in Supreme Court precedent.

I. OVERVIEW OF LEGAL ASPECTS AT PLAY

A. KASHMIR ACCEDED TO THE UNION UNDER UNIQUE CIRCUMSTANCES

The final status of the former princedom of Kashmir has remained disputed since the initial years of Indian independence.⁹ As with other princely states,¹⁰ Kashmir was free to decide whether to accede to the Dominion of India, to Pakistan, or to retain sovereignty.¹¹ The British had, over time consolidated multiple smaller princely states, and had brought them all under a single, centrally administered ‘British Raj.’¹² Consequently, when the Indian subcontinent was being vacated by the British, all of these former princely states that started out as independent entities, were free to decide whether to accede to the Dominion of India, to Pakistan, or to retain sovereignty.¹³ Kashmir was a Muslim-majority princedom with a Hindu ruler and territorially contiguous with both India and Pakistan.¹⁴ The

9. See KRONSTADT, *supra* note 7, at 6. Both India and Pakistan gained independence from British rule in August 1947. *Id.*

10. “Princely states” is the most common term used to refer to monarchies or other principalities that were “nominally sovereign monarchy” but were indirectly controlled by, and were subservient to, the British Crown. These essentially represented those parts of the Indian subcontinent which had not been officially annexed by the British but were subject to subsidiary alliances. Eventually, every single princely state was absorbed into one of the two newly independent countries of India and Pakistan, with Kashmir being the sole exception. See *Princely States*, GLOBALSEcurity.ORG, <https://www.globalsecurity.org/military/world/india/princely-states.htm>.

11. See Mohan V. Katarki, *Indian Independence Act, 1947: A Forgotten Title!*, LEAFLET (Aug. 14, 2020), <https://www.theleaflet.in/indian-independence-act-1947-a-forgotten-title/#> (“The Princely States . . . were restored to their original sovereign status . . .”).

12. Arvind P. Datar, *Who Betrayed Sardar Patel?*, HINDU, <https://www.thehindu.com/todays-paper/tp-opinion/who-betrayed-sardar-patel/article5366083.ece> (Nov. 19, 2013, 5:40 A.M.).

13. *Id.*

14. Balu G. Nair, *Abrogation of Article 370: Can the President Act Without*

ruler of Kashmir agreed to accede to India in the face of an attempted tribal invasion supported by Pakistan.¹⁵ He signed an Instrument of Accession (IoA) with the Indian Government in return for military assistance.¹⁶ The IoA conferred on the Indian Union Government the power to legislate on matters of defense, external affairs, and communications.¹⁷ With the accession completed, Article 370 was drafted into the Indian Constitution in order to reflect the legal relationship between the Union Government and J&K.¹⁸ Article 370, which exclusively caters to J&K, recognized the special status of the state within the Constitutional framework of India.¹⁹ Interestingly though, at the time of drafting, as a precursor to the actual text of this provision, a marginal note was included: “[t]emporary provisions with respect to the State of Jammu and Kashmir.”²⁰ This special status (as it stood prior to its de-operationalization) is better understood by delving into the text of the Article.

B. ARTICLE 370 HAS *SUI GENERIS*²¹ ASPECTS

Article 370, as it stood before August 2019, had three main clauses.²² However, it can be broken down into five broad elements:

1. The power of the Union Government to make laws for J&K was limited to matters of defense, foreign affairs and communications.²³

2. For matters other than those specified in the IoA, the legislative authority of the Union Government was contingent

the Recommendation of the Constituent Assembly?, 3 INDIAN L. REV. 254, 256 (2019).

15. *Id.*

16. Kashish Mahajan, *The Abrogation of Article 370 and Bifurcation of Jammu and Kashmir – a Bridge Too Far*, 9 INDIAN J. CONST. L. 106, 107 (2020).

17. Venkatesh Nayak, *The Backstory of Article 370: A True Copy of J&K's Instrument of Accession*, WIRE (Aug. 5, 2019), <https://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india>.

18. See Nair, *supra* note 14, at 257.

19. *Id.*

20. India Const. art. 370.

21. Sui generis is a Latin term, which literally translates to “of its own kind.” *Sui generis*, LEGAL INFO. INST., https://www.law.cornell.edu/wex/sui_generis (Aug. 2021). It is typically used to describe a form of legal protection that is unique or different. *Id.*

22. India Const. art. 370.

23. *Id.* art. 370, cl. (1)(b)(i).

on the concurrence of J&K's state government.²⁴

3. Insofar as the application of the Indian Constitution to J&K is concerned, only Article 1 and Article 370 itself were extended to the state.²⁵ Other Articles of the Indian Constitution could be extended to the state—with possible “exceptions and modifications”—only by way of a Presidential Order issued in concurrence with the J&K state government.²⁶

4. The Article also set out the mechanism for its own abrogation or continuation-subject-to-modifications.²⁷ Either of these could be achieved through a Presidential declaration, but subject to a condition precedent: a recommendation to that effect by the Constituent Assembly of J&K.²⁸

5. Lastly, the Article expressly recognized the existence of a separate Constitution for J&K.²⁹

C. ARTICLE 370 USED TO DE-OPERATIONALIZE ITSELF

The first of the two Presidential Orders was issued pursuant to sub-clause (d) of clause (1) of Article 370 with the “concurrence of the Government of the State of Jammu and Kashmir.”³⁰ However, since J&K was under President's Rule, the concurrence obtained was in reality the concurrence of the Governor of J&K acting on behalf of the President.³¹ Firstly, this order expressly superseded all previous executive orders that had over time culled and applied certain provisions of the Indian Constitution to J&K.³² The same order then went on to extend

24. *Id.* art. 370, cl. (1)(b)(ii).

25. *Id.* art. 370, cl. (1)(c).

26. *Id.* art. 370, cl. (1)(d).

27. *Id.* art. 370, cl. (3).

28. *Id.*

29. *Id.* art. 370, cl. (2).

30. *Id.* art. 370, cl. (1)(d); Ministry of Law and Justice, C.O. 272, *supra* note 4.

31. President's Rule refers to the suspension of a state government and the imposition of direct rule of the Union Government over that state. Article 356 of the Indian Constitution gives the President the power to impose this rule on a state. In such a situation, the Governor assumes all executive power previously vested in the state government. India Const. art. 356, cls. (1)(a)–(b); *see also* Express Web Desk, *What is Article 356?*, INDIAN EXPRESS (July 19, 2019), <https://indianexpress.com/article/what-is/what-is-article-356-presidents-rule-imposition-5838367/>.

32. Ministry of Law and Justice, C.O. 272, *supra* note 4; *see Nair, supra* note 14, at 258 (summarizing “the numerous executive orders” issued by the Union Government prior to the August 2019 order).

the entire Indian Constitution to J&K, while modifying Article 367—an interpretation provision—in relation to J&K by replacing the expression “Constituent Assembly of the State” with “Legislative Assembly of the State” in the proviso to clause (3) of Article 370.³³ This modification of Article 367 has been characterized as the “lynchpin,”³⁴ as it enabled the circumvention of clause (3) which required the President to take the prior recommendation of the J&K Constituent Assembly for abrogating the Article.³⁵ Consequently, on the recommendation of the Indian Parliament acting on behalf of the Legislative Assembly of J&K (because the state was under President’s Rule),³⁶ a second order was issued.³⁷ It declared that Article 370 had ceased to be operative, except for a residuary clause which provided that all provisions of the Constitution, without any modifications or exceptions, would now be applicable to the state.³⁸ “The [a]brogation [o]rders raise a number of questions – both of legality and propriety.”³⁹ These issues are analyzed below.

II. ANALYSIS

A. FIRST STEP: “CONSTITUENT ASSEMBLY” REPLACED WITH “LEGISLATIVE ASSEMBLY”

The first presidential order issued under sub-clause (d) of

33. Ministry of Law and Justice, C.O. 272, *supra* note 4.

34. Mahajan, *supra* note 16, at 108; K. Venkataramanan, *Under the Cover of President’s Rule*, HINDU (Aug. 26, 2019, 12:37 P.M.), <https://www.thehindu.com/opinion/lead/under-the-cover-of-presidents-rule/article29254040.ece>.

35. *See* India Const. art. 370, cl. 3.

36. *See id.* art. 356, cl. 1(b) (“[T]he powers of the Legislature of the State shall be exercisable by or under the authority of the Parliament.”); Venkatraman, *supra* note 34 (“The legal fiction is that whatever Parliament or the President does in respect of J&K, it is the State Assembly or the State government that is actually doing it.”). The Union Government’s reasoning was that for that second order which achieved the actual abrogation, it only had to take the consent of the Parliament, which acts on behalf of a legislative assembly when it is suspended under President’s Rule. The Bharatiya Janata Party (“BJP”) led Government enjoyed a clear majority in the Parliament at the time. Michael Safi, *India Election Results 2019: Modi Claims Landslide Victory*, GUARDIAN (May 23, 2019), <https://www.theguardian.com/world/2019/may/23/india-election-results-narendra-modi-bjp-victory>.

37. Ministry of Law and Justice, C.O. 273, *supra* note 4.

38. *Id.*

39. Nair, *supra* note 14, at 273.

clause (2) substituted the phrase “Legislative Assembly” for “Constituent Assembly” in clause (3) of Article 370.⁴⁰ This was the cornerstone for all subsequent legal measures—a tool to circumvent the obligation placed on the Union Government to take the prior recommendation of the J&K Constituent Assembly before de-operationalizing the Article.⁴¹ Sub-clause (d) of clause (1) of Article 370 states that “*other* provisions” of the Indian Constitution can be modified and then made applicable to the state by Presidential order.⁴² Therefore, textually speaking, the phraseology of Article 370 suggests that the power meted out under it—to modify provisions of the Constitution before applying them to J&K—does not extend with respect to a modification of Article 370 itself. Here, however, the power under Article 370(1)(d) was used to modify Article 370(3) by modifying Article 367 “in relation to the State of Jammu and Kashmir”⁴³ In fact, the potential modification of 370 has been expressly addressed a mere two clauses further down, in clause (3) of the same Article.⁴⁴ Surely then, the same provision could not have created two separate pathways of achieving the same result—one procedurally more burdensome on the Union Government than the other.

It is undeniable that the substitution of these expressions through this order represents a “back-door” modification of Article 370, since it was accomplished without even invoking clause (3). The question then arises—why was this substitution necessary in the first place? The Constituent Assembly of J&K, the body that had been vested with this power of recommending (or refusing to recommend) the de-operationalization of 370 has been officially dissolved for a long time.⁴⁵ If the Indian Supreme Court tests this ‘back-door’ modification of 370 under the framework of 370(3) instead of under 370(1)(d), then it will have

40. Ministry of Law and Justice, C.O. 272, *supra* note 4.

41. See *supra* notes 34–35 and accompanying text.

42. Faizan Mustafa, *On Dilution, Bifurcation and ‘Special Status’*, HINDU (Aug. 31, 2019, 12:44 P.M.), <https://www.thehindu.com/opinion/lead/on-dilution-bifurcation-and-special-status/article29291747.ece> (emphasis added).

43. Ministry of Law and Justice, C.O. 272, *supra* note 4 (“[I]n proviso to clause (3) of article 370 of this Constitution, the expression ‘Constituent Assembly of the State referred to in clause (2)’ shall read ‘Legislative Assembly of the State.’”).

44. See India Const. art. 370, cl. 3.

45. See M. Sridhar Acharyulu, *The Legal Subversions That Helped the Centre Undercut J&K’s Powers*, WIRE (Aug. 18, 2019), <https://thewire.in/law/article-370-jammu-kashmir-constituent-assembly>.

to decide whether this modification was procedurally flawed and is thus unconstitutional, in the absence of a recommendation by the non-existent Constituent Assembly of J&K.

B. THE UNION GOVERNMENT CAREFULLY TRACED ITS STEPS ON PRECEDENT

An analysis of relevant Supreme Court case law illustrates that the Union Government carefully made sure its orders complied with the decision in *Mohd. Maqbool Damnoo v. State of Jammu and Kashmir*.⁴⁶ In this case, the Supreme Court addressed an exactly parallel question of whether “Sadar-i-Riyasat” (a government position that had ceased to exist) was validly replaced by “Governor” in the explanation to clause (1) of Article 370 through the exercise of a Presidential order that amended Article 367.⁴⁷ Similar to the August 2019 Presidential Order, the substitution of “Sardar-i-Riyasat” with “Governor” was accomplished by using Article 370(1)(d) to modify Article 367 and then by applying the modified text of Article 367 back to Article 370.⁴⁸ The Court considered whether the change in definition amounted to a modification of Article 370 as contemplated under Article 370(3) and hence should have been achieved by following the procedure laid out under Article 370(3).⁴⁹ However, the Court concluded that the change in definition was not procedurally flawed and went on to uphold the replacement primarily on the ground that it only gave legal meaning to a phrase which had previously become redundant.⁵⁰ Accordingly, the change in definition was not considered a “modification” of Article 370, which would have necessarily required the recommendation of the Constituent Assembly.⁵¹

Extrapolating the rationale of *Maqbool Damnoo*, the current analysis will likely turn on whether the Legislative Assembly of J&K can be appropriately considered a valid successor of the long-dissolved Constituent Assembly. With the doctrine of *stare decisis* suggesting that the Union Government has a strong argument, it will likely satisfy this relatively low bar of showing

46. *Mohd. Maqbool Damnoo v. State of Jammu and Kashmir*, AIR 1972 SC 963 (India).

47. *Id.* at 965.

48. *Id.* at 966.

49. *Id.* at 968–69.

50. *Id.* at 970.

51. *Id.*

that the J&K Legislative Assembly shares key characteristics with the Constituent Assembly.⁵²

Moreover, the text of Article 370 suggests that—whether created intentionally or not—there are in fact two pathways to de-operationalize it. Hypothetically, relying on the authority granted to it under Article 370(1)(d), the Union Government could apply all other provisions of the Indian Constitution to J&K, as long as the concurrence of the “Government of the State” was achieved.⁵³ This would practically render Article 370 inoperative, in other words, it would de-operationalize Article 370 without invoking clause (3)—which represents the other, more direct pathway of accomplishing the same result. Post *Maqbool Damnoo*, “[g]overnment of the State” means “[g]overnor, acting on the advice of his council of ministers.”⁵⁴ Surely then, if an implied power, through Article 370(1)(d), lies with the Governor to virtually de-operationalize 370, it may logically be extended to the Legislative Assembly under clause (3). Therefore, the legislative assembly will likely be considered as the valid successor to the Constituent Assembly of J&K.

C. “CONCURRENCE OF THAT GOVERNMENT” REQUIRED—BUT WAS IT TRULY OBTAINED?

According to Article 370(1)(d), other provisions of the Constitution may be extended to J&K—with possible “exceptions and modifications”—only by way of a Presidential order issued in concurrence of the “Government of the State.”⁵⁵ The explanation to clause (1) provides that any reference to the “Government of the State” is to be construed as “including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers.”⁵⁶ The first Presidential order stated that the concurrence of the Government of J&K had been obtained.⁵⁷ However, in reality, the concurrence obtained was

52. See Mahajan, *supra* note 16, at 111 (explaining that the Legislative Assembly, similar to the erstwhile Constituent Assembly, is an elected body).

53. See India Const. art. 370, cl. 1(d).

54. *Mohd. Maqbool Damnoo*, AIR 1972 at 968.

55. India Const. art. 370, cl. 1(d).

56. India Const. art. 367, cl. 4(c), *amended* by Ministry of Law and Justice, Constitution (Application to Jammu and Kashmir) Order, 2019, C.O. 272 (Notified on Aug. 5, 2019).

57. Ministry of Law and Justice, C.O. 272, *supra* note 4 (“In exercise of the powers conferred by clause (1) of article 370 of the Constitution, the President, with the concurrence of the Government of State of Jammu and Kashmir, is

the concurrence of the Governor acting on behalf of the President of India, since J&K was under President's Rule at the time.⁵⁸

Further, the second Presidential order, relying on Article 370(3), declared that Article 370 had ceased to be operative.⁵⁹ Merely based on the substitution of terms achieved in Article 370(3) through the first order (assuming that the first order is not found procedurally lacking), the Union Government would still have required the recommendation of J&K's Legislative Assembly before declaring the provision inoperative.⁶⁰ However, during President's Rule, the Indian Parliament exercises all powers of the Legislative Assembly of that state.⁶¹ In reality, Article 370 was de-operationalized on the recommendation of the Indian Parliament, not of J&K's Legislative Assembly. Therefore, a question arises regarding the scope of the powers that may be exercised by the Union Government and the Indian Parliament during President's Rule, and whether there are any limits to this power.

Article 356 of the Indian Constitution forms the basis of this analysis, as it governs the situation of President's Rule.⁶² As per sub-clause (a) of clause (1) of Article 356, the President may by proclamation "assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor."⁶³ Further, sub-clause (b) states that the President may "declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament."⁶⁴ A *prima facie* reading of the text suggests that the actions of the Union Government are within the confines of the bare text laid out in the provision.

However, when considered in accordance with the spirit of these provisions, a credible counterargument can certainly be advanced. President's Rule has always been intended as an emergency provision.⁶⁵ Therefore, experts have argued that it is

pleased to make the following Order[.]").

58. See Express Web Desk, *supra* note 31.

59. Ministry of Law and Justice, C.O. 263, *supra* note 4.

60. India Const. art. 370 cl. 3.

61. See *id.* art. 356, cl. 1(b) ("[T]he powers of the Legislature of the State shall be exercisable by or under the authority of the Parliament.").

62. See *generally id.* ("Provisions in case of failure of constitutional machinery in States.").

63. *Id.* cl. 1(a).

64. *Id.* cl. 1(b).

65. See *id.* arts. 352–60 ("PART XVIII: EMERGENCY PROVISIONS").

not meant for making far-reaching decisions.⁶⁶ It is meant to provide a safety net when there has been a breakdown of the constitutional machinery in any state, a stopgap adjustment, a temporary arrangement.⁶⁷ However, in this situation, New Delhi's own appointee gave consent to New Delhi to apply the entire Constitution to the state—a far-reaching decision.⁶⁸

Speaking of the spirit of Article 370, the decision to de-operationalize the provision was intended to be in the hands of the people of J&K. Powers vested in the Union Government under both 370(1)(d), and 370(3) are expressly contingent on either the “concurrence” or the “recommendation” of elected bodies of Government, that by design reflect the will of the people of J&K.⁶⁹ In fact, one of the reasons the J&K Legislative Assembly will likely be considered a valid successor of the Constituent Assembly by the Indian Supreme Court is that both are elected bodies with a popular mandate.⁷⁰

In *S.R. Bommai v. Union of India*, the Indian Supreme Court observed that the object of Article 356 was to enable the Union Government to take “remedial action” in order to restore governance of the State in accordance with the provisions of the Constitution.⁷¹ The Court in *S.R. Bommai* stopped short of devising a bright line, or a test that can be applied for determining whether a particular Union Government action constitutes “remedial action” or not.⁷² Thus, there is not enough judicial clarity regarding the specific scope of “remedial action” or the ambit of powers that may be exercised during President's Rule.

Therefore, relying on the plain text of Article 356, the Union Government's action through the Presidential orders is likely

66. See Mustafa, *supra* note 43 (“When a State is under President's rule, Parliament can act as nothing more than a ‘night watchman.’ It certainly cannot pass a resolution to bifurcate the State.”).

67. See Acharyulu, *supra* note 45.

68. See *supra* note 58 and accompanying discussion.

69. See India Const. art. 370.

70. *Supra* note 52 and accompanying text.

71. *S.R. Bommai v. Union of India*, AIR 1994 SC 1918, 2052 (India).

72. When justification of a Proclamation under President's rule is “wholly irrelevant or bears no nexus between purpose of the action and the satisfaction reached by the President . . . the Court may declare that the satisfaction reached by the President was either on wholly irrelevant grounds or colourable exercise of power and consequently [the] Proclamation issued under Article 356 would be declared unconstitutional.” *Id.* at 2036. But it added shortly thereafter, “[t]he Court cannot go into the question of adequacy of the material or the circumstances justifying the declaration of President's rule.” *Id.*

justified in this situation. Moreover, a string of Supreme Court judgments has confirmed that the Indian political structure is “quasi-federal” since it contains both federal and unitary elements with a clear tilt towards the latter.⁷³ The Supreme Court has in the past categorically cited Article 356 as one of the provisions of the Constitution which is representative of this tilt in favor of the Union Government.⁷⁴

D. THE BASIC STRUCTURE DOCTRINE ARGUMENT CARRIES LITTLE WEIGHT

The basic structure doctrine postulates that the Parliament may amend any provision of the Constitution, as long as the core features and principles of the Constitution remain unchanged.⁷⁵ This doctrine was formulated in *Kesavananda Bharti v. State of Kerala*, and essentially stands for the notion that no constitutional amendment may alter the basic features of the Indian Constitution.⁷⁶ Relying on this doctrine, experts have argued that Article 370 is part of the basic structure of the Indian Constitution, and thus cannot be tinkered with.⁷⁷ However, this doctrine was expressly developed in relation to the Parliament’s power to amend the Constitution as set out in Article 368.⁷⁸ At the outset, Article 370 does not fall within the scope of this doctrine since this was not a case of the Parliament using its Article 368 power to pass a constitutional amendment with respect to 370. Procedurally speaking, the de-operationalization of Article 370, as envisaged in clause 3, did

73. See, e.g., *State of West Bengal v. Union of India*, 1963 AIR 1241, 1251–52 (1962) (India); *State of Karnataka v. Union of India*, AIR 1978 SC 68, 162 (1977) (per Kailasam, J., concurring).

74. See *Kuldip Nayar v. Union of India*, AIR 2006 SC 3127, 3149 (India); *Government of NCT of Delhi v. Union of India*, 8 SCC 501, 590–91 (2019) (India).

75. See *Deva*, *supra* note 1, at 189–90.

76. *Kesavananda Bharati Sripadagalvaru v. State of Kerala*, AIR 1973 SC 1461, 1624 (India) (“[A] Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed.”)

77. Faizan Mustafa, *Article 370, Federalism and the Basic Structure of the Constitution*, THE INDIA FORUM (July 5, 2019), <https://www.theindiaforum.in/article/article-370-federalism-and-basic-structure-constitution> (“[Article 370] cannot be amended and thus can be said to be the part of the basic structure.”).

78. See generally *India Const. art. 368* (“Power of Parliament to amend the Constitution . . .”).

not even involve a Parliamentary amendment.⁷⁹ In its original form, it provided for its own modification or de-operationalization based on a mere Presidential order, albeit on the recommendation of the Constituent Assembly of J&K.⁸⁰

Assuming the basic structure doctrine would be extended by the Supreme Court where an unalienable feature of the Constitution is altered by executive action, the question still remains whether Article 370 can be considered a part of the basic structure of the Constitution. The most glaring piece of evidence is the inclusion of the marginal note⁸¹ in relation to Article 370, which reads “[t]emporary provisions with respect to the State of Jammu and Kashmir.”⁸² The Indian Supreme Court, as part of the *obiter dicta* in *State Bank of India v. Santosh Gupta*, observed that “though the marginal note refers to Article 370 as only a temporary provision, it is in fact in current usage and will continue to be in force until the specified event in sub-clause (3) of the said Article takes place.”⁸³ Even in this case however, there is no direct clarification of whether or not Article 370 even holds a place under the basic structure doctrine.⁸⁴

The test developed by the Supreme Court for determining whether a constitutional amendment is infringing upon the basic structure analyzes whether it abrogates an over-arching principle of the Constitution so as to change the very identity of the Constitution.⁸⁵ Article 370 arguably deviated from the distribution of powers between the Union Government and State Governments by limiting the Parliament’s law-making authority in the context of J&K and by granting greater

79. India Const. art. 370, cl. 3.

80. *Id.*

81. Marginal notes “are inserted at the side of the sections in an Act and express the effect of the sections stated.” Mohd Aqib Aslam, *Legitimacy of Marginal Notes Under Interpretation of Statutes*, LEGAL SERV. INDIA, <https://www.legalserviceindia.com/legal/article-1880-legitimacy-of-marginal-notes-under-interpretation-of-statutes-.html#:~:text=Marginal%20notes%20are%20inserted%20at,not%20considered%20to%20be%20helpful> (last visited May 12, 2022).

82. India Const. art. 370

83. *State Bank of India v. Santosh Gupta*, AIR 2017 SC 25, 34 (2017) (India). See also Dhananjay Mahapatra, *Article 370 Has Acquired Permanent Status: Supreme Court*, TIMES OF INDIA (Apr. 4, 2018, 9:13 A.M.), <https://timesofindia.indiatimes.com/india/article-370-has-acquired-permanent-status-supreme-court/articleshow/63603527.cms>.

84. See *State Bank of India v. Santosh Gupta*, AIR 2017 SC 25, 36 (India).

85. See *M. Nagaraj v. Union of India*, (2006) 8 SCC 212, 245 (India); *Indian Medical Association v. Union of India*, AIR 2011 SC 2365, 2411 (India).

autonomy to J&K.⁸⁶ On its face, Article 370 stood out, as it deviated from the essence or the core nature of the larger federal structure embodied in the Constitution which has been confirmed by the Indian Supreme Court on multiple occasions.⁸⁷ Accordingly, applying the basic structure doctrine to this situation would likely result in Article 370 (as it stood prior to its de-operationalization) falling squarely outside of what can be considered the inherent features of the Indian Constitution. Thus, the abrogation of Article 370 in a way aligned J&K with the core of the Indian federal structure.

E. PRACTICAL IMPLICATIONS OF DE-OPERATIONALIZING ARTICLE 370 AND A DIFFERENT PERSPECTIVE: HAS THE UNION GOVERNMENT LOST SPECIAL STATUS?

It has already been established that as a result of the abrogation orders, the entire Indian Constitution is now applicable to J&K.⁸⁸ There are some key implications of this development. Perhaps the most consequential outgrowth of the abrogation orders was that the Union Government now had at its disposal the Article 3 power (to propose and carry out re-organization of Indian states) with respect to J&K. In fact, it wasted no time in wielding this self-anointed authority, and instantaneously pushed through the process of demoting J&K to the status of a Union Territory.⁸⁹

The abrogation orders also expressly superseded all previous executive orders that had been issued over time with respect to J&K.⁹⁰ Therefore, “[o]ne natural consequence of this . . . is the automatic abrogation of Article 35A of the Indian Constitution, which was inserted through a Presidential Order in the year 1954.”⁹¹ Article 35A allowed the state legislature of J&K to define permanent residents of the state.⁹² Only such

86. See India Const. art. 370 cl. 1.

87. See, e.g., *State of West Bengal v. Union of India*, 1963 AIR 1241, 1251–52 (1962) (India); *State of Karnataka v. Union of India*, 1978 AIR SC 68, 162 (1977) (per Kailasam, J., concurring).

88. Ministry of Law and Justice, C.O. 273, *supra* note 4.

89. See *Express News Serv.*, *supra* note 2.

90. Ministry of Law and Justice, C.O. 273, *supra* note 4.

91. Varun Kannan, *Will the Abrogation of Article 35A Lead to Greater Gender Equality in Jammu & Kashmir?*, 8 J. INDIAN L. & SOC'Y 85, 85 (2017).

92. *What Is Article 35A and Why Is Everyone in India Talking About It Now*, ECON. TIMES (Aug. 5, 2019, at 1:03 P.M.), <https://economictimes.indiatimes.com/news/politics-and-nation/what-is-article->

permanent residents were eligible for employment with the state government, and, more importantly, had the exclusive right to acquire any real property throughout the state.⁹³ This provision was designed to “protect[] [J&K]’s distinct demographic character” and was always at the center of the unrelenting, ultra-passionate public discourse on the Indo-J&K relationship.⁹⁴ It was undoubtedly the most polarizing legal provision in the J&K context and had faced numerous legal challenges for protecting laws that allegedly discriminated against women.⁹⁵ The abrogation orders however—in one clean sweep—removed this major bone of contention.

Across the border, Pakistan has always been an interested party in any J&K-related issues.⁹⁶ In fact, it has gone to war with India over J&K multiple times.⁹⁷ Re-uniting Pakistan Occupied Kashmir with J&K—whether that is achieved through military or diplomatic means—has always been a high-priority political agenda for virtually every Pakistani government over the last seventy years.⁹⁸ Along these lines, another far-reaching consequence of the de-operationalization is an increased potential for geopolitical instability, with Pakistan having expressly adopted an official stance opposing the Union Government’s actions.⁹⁹ Lastly, the psychological blow that this delivers to the populace of J&K, keeping in mind the past instances of insurgency in the region, may have given rise to a

35a-and-why-is-everyone-in-india-talking-about-it-now/articleshow/70507788.cms.

93. *Article 35A: Why a Special Law on Kashmir Is Controversial*, BBC NEWS (Aug. 5, 2019), <https://www.bbc.com/news/world-asia-india-40897522>.

94. *Id.*; Jon Lunn, *Kashmir: The Effects of Revoking Article 370*, U.K. PARLIAMENT: HOUSE COMMONS LIB. (Aug. 8, 2019), <https://commonslibrary.parliament.uk/kashmir-the-effects-of-revoking-article-370/>.

95. Kannan, *supra* note 91, at 86, 88. The challenges of gender discrimination brought before the Supreme Court challenged laws in J&K that barred women who married non-Kashmiris to buy property in J&K. Ather Zia, *The Specter of Gender Discrimination in the Removal of Kashmir’s Autonomy*, ASS’N FOR POL. & LEGAL ANTHRO. (Sept. 1, 2020), <https://politicalandlegalanthro.org/2020/09/01/the-specter-of-gender-discrimination-in-the-removal-of-kashmirs-autonomy/>.

96. *See Kashmir: Why India and Pakistan Fight over It*, *supra* note 2.

97. *Id.*

98. *See* Shaheen Akhtar, *Kashmir: Pakistan’s ‘Unfinished Agenda’*, ALJAZEERA (Aug. 21, 2011), <https://www.aljazeera.com/opinions/2011/8/21/kashmir-pakistans-unfinished-agenda>.

99. Lunn, *supra* note 94.

new set of problems for New Delhi.¹⁰⁰

As a result of de-operationalizing Article 370, the Union Government's powers with respect to J&K have been reduced in several critical aspects.¹⁰¹ An analysis of all the past "modifications" made using Article 370(1)(d) makes it clear that the Union Government could exercise certain powers in J&K that it cannot exercise in other states. Firstly, by means of the Presidential Order of 1954, and the subsequent amendments to this order, almost the entire Constitution (including most constitutional amendments) was extended to J&K.¹⁰² Ninety-four out of ninety-seven entries of the Union List had already been made applicable to J&K.¹⁰³ Two hundred and sixty out of the three hundred and ninety-five Articles of the Constitution had been extended to J&K before the August 2019 Presidential orders.¹⁰⁴ Thus, over time the Union Government eroded guarantees of greater autonomy. In fact, the longest serving Prime Minister of India, Jawaharlal Nehru, admitted 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."¹⁰⁵ Therefore, by allowing the Union Government to erode Article 370's initial guarantees of J&K autonomy, Article 370 was, in a sense, more useful to the Union Government than to the State Government of J&K.¹⁰⁶

The Indian Constitution under Article 352 confers upon the Union Government the authority to declare a "national

100. See M Ilyas Khan, *Kashmir Crisis 2019: Between a Rock and a Hard Place*, BBC NEWS (Dec. 24, 2019), <https://www.bbc.com/news/world-asia-50826419>.

101. See Mustafa, *supra* note 42.

102. Nair, *supra* note 14, at 258; see generally The President, The Constitution (Application to Jammu and Kashmir) Order, 1954, C.O. 48 (Notified on May 14, 1954) (promulgating provisions of the Indian Constitution in effect for J&K pursuant to Article 370(1)(d)).

103. Mustafa, *supra* note 77.

104. *Id.*

105. Sonia Dasgupta, *Article 370: An Example of Asymmetrical Federalism*, 11 NUALS L. J. 27, 48 (2017). *But see* Thapar & Mustafa, *supra* note 5 (explaining that Article 370 had "symbolic and sentimental value" in the eyes of the people of J&K).

106. See Arshu John, *This is a Question of Autonomy, Not Integration: Faizan Mustafa on the Constitutional Background of Article 370*, THE CARAVAN (Aug. 6, 2019), <https://caravanmagazine.in/government/article-370-bjp-amit-shah-jammu-kashmir> ("[370] was giving huge power to the Central Government to issue presidential orders and do whatever it wants in Jammu and Kashmir . . ."); Mustafa, *supra* note 69 ("[370] is more useful to the central government today than for the people of Jammu and Kashmir.").

emergency,” which can be imposed in a certain part of the country, or throughout the country.¹⁰⁷ Today, such a national emergency can only be declared on the grounds of “war,” “armed rebellion” or “external aggression.”¹⁰⁸ However, prior to the 44th Amendment to the Indian Constitution, “internal disturbance” was also a valid ground for imposing such an emergency.¹⁰⁹ After a two-year long emergency throughout India under the Indira Gandhi-led Government from 1975 to 1977, the incoming Government felt the need to pass the 44th Amendment.¹¹⁰ A major change was made to Article 352—“internal disturbance” (the ground used by the Indira Gandhi Government to declare a nationwide emergency) was considered too low a bar, and too vague a term.¹¹¹ The widespread feeling was that the outgoing Union Government had taken advantage of the vagueness of Article 352, and thus the provision needed to be tightened up.¹¹² One of the measures adopted was to replace the term “internal disturbance” with “armed rebellion” via the 44th Amendment to the Indian Constitution.¹¹³ Interestingly though, the 44th Amendment was never extended to J&K—as evident from the text of Article 370, unless a constitutional provision was expressly extended with respect to J&K under Article 370(1)(d), it did not apply to J&K.¹¹⁴ Therefore, before Article 370 was de-operationalized and the entire Constitution was applied to Kashmir, the Union Government could impose an emergency in J&K based on “internal emergency”¹¹⁵—a relatively lower standard to meet.

107. India Const. art. 352, cl. 1.

108. *Id.*

109. *Id.* n.1.

110. See Pretika Khanna, *The 44th Amendment Ensured Democracy's Survival in India: Shanti Bhushan*, MINT (June 23, 2015, 1:36 A.M.), <https://www.livemint.com/Politics/zwYWp4CHWdDDZ3KY7xHUVK/The-44th-amendment-ensured-democracys-survival-in-India-Sh.html> (“The 44th amendment was enacted unanimously. That ensured that the conditions of the Emergency could not be replicated in the country.”).

111. See Ujjaini Chatterji, *Pre and Post 44th Amendment: How to Declare a National Emergency*, LEAFLET (June 26, 2020), <https://www.theleaflet.in/pre-and-post-44th-amendment-how-to-declare-a-national-emergency/#> (“Article 352, prior to the 44th Amendment, was rather vague and arbitrary.”).

112. See *id.* (“[Article 352] concentrated too much power in the hands of the Prime Minister and cabinet.”).

113. See India Const. art. 352, cl. 1, n.1.

114. Mustafa, *supra* note 42 (“[F]ollowing the 44th Amendment, unlike in the rest of the country, national emergency in J&K could still be imposed on the grounds of ‘internal emergency.’”).

115. *Id.*

On a similar note, prior to the 44th Amendment, the fundamental rights of all Indian citizens under Articles 19 and 21 of the Indian Constitution could be suspended by the executive Government during an emergency.¹¹⁶ These provisions guarantee every citizen's right to "freedom of speech" and to "[p]rotection of life and personal liberty."¹¹⁷ However, the 44th Amendment restricted the Union Government's authority to derogate from certain fundamental rights even during an emergency.¹¹⁸ The amendment eliminated the authority to suspend the right to life and personal liberty.¹¹⁹ While the right to freedom of speech was previously suspended automatically during an emergency, this amendment limited this automatic suspension to emergencies predicated upon war or external aggression, not those based on armed rebellion.¹²⁰ In fact, the preamble to the 44th Amendment even proposed that changes to the constitution that would have the effect of impairing its secular or democratic character, should only be adopted if approved through a referendum in which at least fifty-one percent of the electorate participated.¹²¹ As already mentioned though, since this Amendment was never expressly applied to J&K, the Union Government did technically enjoy the authority to suspend these fundamental protections with respect to the residents of J&K during an emergency.

Regarding the maximum duration of President's Rule, Article 356 expressly provides that President's Rule cannot be extended in any state beyond a period of one year unless there is a national emergency, or the Election Commission of India certifies that elections cannot be held currently for that state's Legislative Assembly.¹²² In fact, the Indian Parliament had to amend the Constitution four times so that the President's Rule imposed in Punjab in 1987 could be continuously extended.¹²³ However, in the context of J&K, which had experienced a continuous imposition of President's Rule for a whopping six years between 1990 and 1996,¹²⁴ all it took prior to 370's de-

116. See Khanna, *supra* note 110.

117. India Const. arts. 19, 21.

118. Anil Kalhan et al., *Colonial Continuities: Human Rights, Terrorism, and Security Laws in India*, 20 COLUM. J. ASIAN L. 93, 139 (2006).

119. *Id.*

120. *Id.*

121. See The Constitution (Forty-fourth Amendment) Act, 1978.

122. India Const. art. 356, cl. 5.

123. Dasgupta, *supra* note 105, at 49.

124. Rakesh Dubbudu, *Which State was Under President's Rule Most*

operationalization were mere presidential orders for extending President's Rule.¹²⁵

The right to freedom of speech and expression, as laid out under Article 19 of the Indian Constitution is subject to “reasonable restrictions” imposed by law.¹²⁶ However, such restrictions are categorically subject to judicial review.¹²⁷ In the context of J&K though, a modification of Article 19 had been achieved before applying it to J&K through a presidential order issued under Article 370(1)(d).¹²⁸ According to this modification, restrictions could be placed on the right of J&K residents to freedom of speech that the “appropriate legislature considered reasonable.”¹²⁹ Thus, under the Article 370 scheme, as it stood prior to its de-operationalization, there was no judicial review of the restrictions placed on the freedom of speech in J&K.

Ultimately, J&K subsequently lost its status as a full-blown state and is now demoted to the status of a Union Territory.¹³⁰ Therefore, all the crucial aspects in which J&K has been inadvertently brought up to par with other states will only be relevant if and when J&K's statehood is reinstated.

F. J&K'S REORGANIZATION ALSO CONTRAVENED THE SPIRIT OF THE CONSTITUTION.

Article 3 of the Indian Constitution empowers the Indian Parliament to form a new state by separation of territory from any state, or by uniting two or more states or parts of states.¹³¹ It also empowers Parliament to “increase the area of any state; diminish the area of any state; alter the boundaries of any state; [or] alter the name of any state[.]”¹³² Further, the proviso to

Number of Times?, FACTLY (June 21, 2018), <https://factly.in/state-presidents-rule-number-times/>.

125. See Mustafa, *supra* note 77.

126. See India Const. art. 19, cl. 1–2.

127. See generally Npradhan, *Constitution of India-Freedom of Speech and Expression*, LEGAL SERVICE INDIA, <http://www.legalserviceindia.com/legal/article-572-constitution-of-india-freedom-of-speech-and-expression.html> (citing Supreme Court cases interpreting Article 19).

128. See Thapar & Mustafa, *supra* note 5.

129. Ministry of Law and Justice, Constitution (Application to Jammu and Kashmir) Order, 1954, C.O. 48 (Notified on May 14, 1954); see also Mustafa, *supra* note 42.

130. See *supra* note 6 and accompanying discussion.

131. India Const. art. 3(a).

132. *Id.* art. 3(b)–(e).

Article 3 provides for a reference to the state legislature by the President of India for its “views” if the proposal contained in the Bill “affects the area, boundaries or name of any of the states[.]”¹³³ This proviso makes it compulsory for the President to refer the Bill containing the proposal for re-organization of a state “to the legislature of that state for *expressing its views* thereon.”¹³⁴

Importantly though, the “views” of a state legislature are toothless, practically speaking, since Parliament is free to ignore them.¹³⁵ As it turns out, in contrast to the requirement of ascertainment of views—that applies with respect to all other states—Article 3, as extended to J&K (prior to the de-operationalization of 370) required the “consent” of the Legislature of J&K for any change in area, name, or boundaries of the state.¹³⁶ It is therefore clear from the text that a higher standard (requiring consent as opposed to merely referring to the state legislature) had been placed for any potential re-organization of J&K. It is also useful to know at this point that there is no prior example of a full-blown state being bifurcated into two separate Union Territories.¹³⁷

This begs the question of exactly whose “views” should be obtained by the President in order to meet this procedural requirement. Considering the state is under President’s Rule, should it be the views of the Parliament, which assumes the powers of the Legislative Assembly. Perhaps the President should wait until the Assembly is reconstituted. In this instance though, it was effectively Parliament that consented to its own proposed re-organization bill in place of the Legislative Assembly of J&K. Even assuming that after the August 2019 Presidential orders J&K was on par with all other Indian states, Parliament clearly expressed its views instead of the Legislative Assembly of J&K.

According to Article 356(1)(b), the President shall “declare that the powers of the Legislature of the State shall be

133. *Id.* art. 3.

134. *Id.* (emphasis added).

135. See Thapar & Mustafa, *supra* note 5.

136. Ministry of Law, The Constitution (Application to Jammu and Kashmir) Order, 1954, C. O. 48 (Notified on May 14, 1954). The proviso inserted by C.O. 48 was abrogated by Ministry of Law and Justice, C.O. 272, *supra* note 4, cl. 2.

137. Mahajan, *supra* note 16, at 120.

exercisable by or under the authority of Parliament[.]”¹³⁸ Accordingly, when a state comes under President’s Rule, the Parliament will exercise the powers of the Legislature.¹³⁹ The powers of a state legislature are generally understood to be “essentially twofold. One, to make laws and two, to pass the budget.”¹⁴⁰ Flowing from the text of Article 356, there exists an argument that “when the President takes over the state government under Article 356, what passes to [P]arliament are only [the twofold] powers of the Legislature of the state.”¹⁴¹ In that sense of the concept of powers, expressing an opinion, or expressing “views” must surely mean something different from making laws and passing a budget.¹⁴²

According to this position, expressing an opinion cannot be a part of the powers of the state legislatures. Therefore, nothing stops Parliament from passing a law on any matter in the state list or from passing the budget of the state while the state is under President’s Rule, since these actions fall squarely within the meaning of “powers of the Legislature.” But Parliament cannot deputize for the state to express the state legislature’s views on a Bill which affects the area, boundaries, or name of any of the states.¹⁴³ In that sense, the question then becomes whether the re-organization of J&K undertaken by the Union Government is marred by a procedural flaw flowing from the text of Article 3—of failing to solicit the views of J&K’s state Legislature.¹⁴⁴

In fact, the purpose of this presidential reference of the proposed bill to the state legislature is to enable Parliament to have the views of the relevant legislature before it.¹⁴⁵ It should therefore be characterized as somewhat of a procedural good governance prerequisite. The Indian Supreme Court in *Babulal*

138. India Const. art. 356, cl. 1(b).

139. *Id.*; see also *supra* notes 61–64 and accompanying text.

140. See P.D.T. Achary, *J&K’s Demotion to Union Territory Status is a Violation of the Constitution*, WIRE (Sept. 5, 2019), <https://thewire.in/government/kashmir-news-union-territory-indian-constitution>.

141. *Id.*

142. Compare India Const. art. 3 (“[T]he Bill has been referred by the President to the Legislature of that State for expressing its views thereon . . .”), with India Const., art. 356, cl. 1 (“[D]eclare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament . . .”).

143. See Achary, *supra* note 140.

144. See Mahajan, *supra* note 16, at 123.

145. *Babulal Parate v. State of Bombay*, AIR 1960 SC 51, 53 (India).

Parate v. State of Bombay clarified that “[a]ll that is contemplated is that Parliament should have before it the views of the State Legislatures as to the proposals contained in the Bill & then be free to deal with the Bill in any manner it thinks fit[.]”¹⁴⁶ Therefore, if Parliament has only its own views before it, the mandate of the proviso to Article 3 has not been fulfilled.

What happens to the Article 3 “ascertainment of views” requirement when the Union Government is attempting to re-organize a state under President’s Rule is a question that has never been judicially addressed before. Undoubtedly though, this sets a potentially harmful political precedent, one that eats away at the prerogative of states to have a say in their own purported re-organization.¹⁴⁷

CONCLUSION

The Union Government in August 2019, through two Presidential Orders, unilaterally announced that it was formally revoking the special constitutional status of J&K. Article 370 was de-operationalized, and the state was re-organized into two separate Union Territories, thus drastically redefining the constitutional relationship between the state and the Union Government. However, the potential de-operationalization of Article 370 was contemplated in the text of 370 itself, and the mechanism adopted by the Union Government to reach that result is demonstrably rooted in Supreme Court precedent. A successful legal argument against the availability of such executive power is therefore unlikely. However, in the context of the actual de-operationalization of Article 370, it was the Indian Parliament that supplied its recommendation—thereby on paper satisfying the procedural requirement set out in 370(3)—in lieu of J&K’s legislative assembly since the state was under President’s Rule. Similarly, for the purpose of expressing views on J&K’s reorganization, it was again the Indian Parliament that stepped into the shoes of the state legislative assembly since J&K was under President’s Rule. Accordingly, there are pertinent questions relating to the scope and limitations on the authority of the Union Government with respect to states during President’s Rule that will have to be answered by the Indian Supreme Court.

146. *Id.* at 53–54.

147. *See* Thapar & Mustafa, *supra* note 5.