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OF A TUNNEL AND A (QUALIFIED)
TRAFFIC: AMENDMENT ORDERS,
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RECASTING OF ARTICLE 370

—Zaid Deva*

Abstract — Even though clauses 2 and 3 of Article 370 made it amply clear that the article had a temporary existence since the state government's power to give concurrences was subject to the final decision of the constituent assembly, the Supreme Court in the *Sampat Prakash* case held that the power to give concurrences continued beyond the constituent assembly's dissolution in 1957. While the case challenging the Indian government's actions of August 5 is pending before the apex court, evaluating the basis of powers under Article 370 beyond the life of the state's constituent assembly assumes significance. More so, when the constitutional text grants no such power and the same is an outcome of a judicial pronouncement. That is the purpose of this article – to evaluate the reasoning of *Sampat Prakash* and draw a framework for the exercise of powers under Article 370 in the post-constituent assembly phase. I argue that there is a need to distinguish the forms that the exercise of powers under Article 370 take, and consider their impact on the Indian Constitution applicable to Jammu and Kashmir (J&K) and on J&K's own constitution. I argue that there are three forms of amendments possible, which the court in *Sampat Prakash* recognises, but only one form possesses constitutional sanction, i.e., Indian constitutional amendments when extended to the state.

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I. INTRODUCTION

On July 1, 2017, the Constitution (One Hundred and First Amendment) Act, came into operation in the whole of India. The amendment introduced an indirect, multi-stage, and destination-based tax regime leviable by the centre and states both, on supply of goods and services. Due to the distinct constitutional system of the erstwhile state of Jammu & Kashmir ('J&K'), the amendment did not apply to the state on its own.¹ After the successful passage of a resolution in the state's legislature that authorised its government to give concurrence under Article 370 for adoption and implementation of the 101st Amendment and the new tax regime in the state,² Mehbooba Mufti, the then chief minister, expressed with hope and confidence that what used to happen '*chori-chori, chupke-chupke*' (surreptitiously and silently) would henceforth take place in the open – in the legislature, with due deliberations, and under full public gaze.³

Mufti was referring to fifty odd amendment orders issued by the Indian president since 1957 that systematically reduced the state's autonomous status to naught.⁴ These amendments would receive 'backdoor concurrences' by India's 'client governments' in J&K or at times by the New Delhi-appointed Governors,⁵ hence the usage of the phrase '*chori-chori, chupke-chupke*'. Little could she have known that her precedent-setting act of taking legislative approval before processes of Article 370 could be initiated⁷ would be discarded at once on August 5, 2019 for abrogating the autonomy of J&K by resorting to the old surreptitious methods.⁸ Reminiscent of the 'backdoor concurrences' that governors had given in the past to enlarge federal jurisdiction seemingly within the scheme of Article 370, the then governor gave his concurrence which had the effect of abolishing the autonomy altogether, along with Article

¹ See, AG Noorani, *Article 370: A Constitutional History of Jammu and Kashmir* (OUP 2011) 2-29; Paras Diwan, 'Kashmir and the Indian Union: The Legal Position' (1953) 2(3) *International and Comparative Law Quarterly* 333-53; See also, SP Jagota, 'Development of Constitutional Relations Between Jammu and Kashmir and India' (1960) 2(4) *Journal of the Indian Law Institute* 522-25.

² 'GST: J&K Assembly Passes Resolution for Implementation Amid Opposition Protest' *LiveMint* (5 July 2017) <www.livemint.com/Politics/ZbCE2rKERQw3Tk1Ngn2GbK/GST-JK-assembly-passes-resolution-for-implementation-amid-op.html> accessed 10 June 2020.

³ 'CM Mehbooba Mufti Speaking in Legislative Council on GST and Article 370' (*YouTube*, 9 July 2017) <<https://www.youtube.com/watch?v=gz4jRTFq3Js>> accessed 10 June 2020.

⁴ Noorani (n 1) 337-88.

⁵ Client governments essentially are governments of New Delhi, for New Delhi and by New Delhi functioning in J&K. This practice began in 1954 and continued up till the turn of century and is now being tried once again with the political mainstream obliterated post-abrogation of Article 370: See, Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* (HUP 2005) 190.

⁶ AG Noorani, 'Deception on Article 370' *Greater Kashmir* (4 July 2016) <www.greaterkashmir.com/todays-paper/deception-on-article-370> accessed 26 May 2021.

⁷ *ibid*.

⁸ AG Noorani, 'Murder of Insaniyat, and of India's solemn commitment to Kashmir' (*The Wire*, 13 August 2019) <<https://thewire.in/law/murder-of-insaniyat-and-of-indias-solemn-commitment-to-kashmir>> accessed 10 June 2020.

370.⁹ As the governor is a federal appointee acting on the instructions of the federal government,¹⁰ the autonomous status of J&K was abolished by the Indian president, essentially on his own ‘concurrence’.¹¹

More than fifty years before Mufti’s speech to the state legislature, Gulzarilal Nanda, the then Indian Home Minister, had described Article 370 as a tunnel between India and J&K through which “a good deal” of traffic had passed and would continue to pass.¹² He was speaking in response to a bill introduced for repealing Article 370.¹³ While Article 370 limited the Indian parliament’s law-making powers over J&K, the marginal note and clause 3 of the provision made it clear that the article had a temporary existence.¹⁴

The life of Article 370 was subject to two crucial temporal limitations: i) a plebiscite to decide the future political status of the Kashmir region in accordance with United Nations Security Council resolutions;¹⁵ and ii) drafting of the constitution and defining federal jurisdiction if the result of the plebiscite was in favour of India.¹⁶ A discussion on the plebiscite is beyond the scope of this article, therefore, my focus will remain on the second limitation. It was envisaged that when J&K’s constituent assembly would draft the constitution and define the federal jurisdiction, it would recommend either termination or a suitable modification of Article 370 in terms of clause 3. With no such recommendation for termination or modification tendered by the constituent assembly, the Supreme Court of India (‘SC’) in the case *Sampat Prakash v. State of J&K*¹⁷ (‘*Sampat Prakash*’) effectively held that the power under Article 370 to constantly re-define the federal jurisdiction continued to operate unfettered.

While the case challenging India’s actions of August 5 is pending before the apex court, evaluating the basis of powers under Article 370 beyond the life of state’s constituent assembly assumes significance. More so, when the constitutional text grants no such power and the same is an outcome of a judicial pronouncement. That is the purpose of this article – to evaluate the reasoning

⁹ See, Balu G Nair, ‘Abrogation of Article 370: Can the President act without the recommendation of the Constituent Assembly?’ (2019) 3(3) Indian Law Review 254-79.

¹⁰ Gautam Bhatia, ‘Do we Need the Office of the Governor?’ *The Hindu* (24 May 2018) <<https://www.thehindu.com/opinion/lead/do-we-need-the-office-of-the-governor/article23971800.ece>> accessed 10 June 2020.

¹¹ Gautam Bhatia, ‘The Article 370 Amendments: Key Legal Issues’ (*Indian Constitutional Law and Philosophy*, 5 August 2019) <<https://indconlawphil.wordpress.com/2019/08/05/the-article-370-amendments-key-legal-issues/>> accessed 27 May 2021.

¹² See, Union Home Minister GL Nanda on Abrogation of Article 370, Lok Sabha, 4 December 1964 in Noorani (n 1) 309.

¹³ Noorani (n 1) 305-15.

¹⁴ Noorani (n 8).

¹⁵ N Gopalaswami Ayyangar, CA Deb 17 October 1949, vol X; See, UNSC Res 38 (17 January 1948) UN Doc S/RES/38; UNSC Res 39 (20 January 1948) UN Doc S/RES/39; UNSC Res 47 (21 April 1948) UN Doc S/RES/47.

¹⁶ CA Deb (n 15).

¹⁷ AIR 1970 SC 1118 : (1969) 2 SCR 365.

of *Sampat Prakash* and draw an analytical framework for the exercise of powers under Article 370. In Part II, I will describe the historical background and meaning of J&K's accession to India and the subsequent design of the relationship under Article 370. In Part III, I will assess the reasoning of *Sampat Prakash* and highlight the fault-lines that it creates, both textual and normative. Since Article 370's theory and practice are extremely complex and divergent, it is not possible to study all the aspects of the provision in one paper. Therefore, this essay has modest aims – to look only at the question of continuing nature of powers under Article 370 post-dissolution of the state's constituent assembly. In Part IV, I argue that the J&K constituent assembly proceedings (debates and committee reports) and the text of the constitution bear enough evidence that Article 370 was envisaged to be replaced by the final constitution. In view of this, a lack of recommendation under clause 3 would not necessarily imply continuing nature of powers of state government. I will argue that there are three different forms of amendments and *Sampat Prakash* justifies the continuance of the exercise of powers under Article 370 by conflating the three. The three forms of amendments are – one, amendments that extend those provisions of the Indian Constitution to the state which were previously excluded from application by J&K's constituent assembly during the constitution-making process ('Amendment I'); two, amendments that extend Indian constitutional amendment acts to the state, like the example of the 101st amendment act given previously ('Amendment II') (I make a distinction between amendments I and II because the former were expressly excluded by the assembly and the latter came after the dissolution of the assembly); and three, amendments that modify the provisions of the Indian Constitution as originally applied to J&K by its constituent assembly ('Amendment III'). I will argue that only the second form of constitutional change can be exercised as an amendment rule while acting within the constitutional text, whereas the exercise of powers under Article 370 for making changes of the other two forms enjoys no constitutional basis. By justifying the other two forms of amendments using extraneous reasons, the court effectively recasts Article 370 to include powers that the provision did not originally provide. Finally, based on the premisses set above, I will argue why the abrogation of Article 370 through Article 367 is constitutionally suspect.

While there has been significant engagement with Article 370,¹⁸ its origins, and the scheme of powers it lays down,¹⁹ not much attention has been given to the exercise of powers under Article 370 in the post-constituent assembly phase which *Sampat Prakash* formalises. Noorani has only critiqued *Sampat Prakash* for some aspects of its reasoning²⁰ mainly for its conflict with *Prem Nath Kaul*.²¹ In fact, the petitioners in the *Shah Faesal* case relied on Noorani's

¹⁸ See, Noorani (n 1).

¹⁹ See, Jagota (n 1); Nair (n 9).

²⁰ Noorani (n 1) 15-16.

²¹ Noorani (n 1); *Prem Nath Kaul v State of Jammu and Kashmir* AIR 1959 SC 749.

arguments to argue for a reconsideration of *Sampat Prakash*, which the court eventually denied.²² In this article, my aim is to delineate an interpretation for Article 370 in the post-constituent assembly phase, disassociated from its interpretations when the President was acting on the authorisation of the constituent assembly, i.e., from 1951-57. I have argued elsewhere for this phase-wise with interpretations since the source of power and the operation of the provision are different in the post-constituent assembly phase and the period in which the constituent assembly was functioning.²³ The post-constituent assembly phase differs from the pre-constituent assembly phase in terms of the form that the exercise of powers under Article 370 takes, as I show later. Instead of focusing on the exercise of powers under Article 370, which get labelled merely as “leading to application of provisions of the Indian Constitution to J&K”, my focus is on the form that the exercise of these powers take, i.e., amendments – and the effects of these amendments – on the Indian Constitution applicable to J&K and the J&K Constitution. The court in *Sampat Prakash* holds that J&K’s constituent assembly “did not desire that this article [Article 370] should cease to be operative”²⁴ without even examining the assembly proceedings. I will rely on the assembly proceedings to confirm the veracity of this claim.

Before I proceed, two caveats: while the SC²⁵ and most Indian scholarship on Article 370 articulate powers under Article 370 as powers of the President,²⁶ even though, under Indian constitutional law, the President is a nominal head,²⁷ I have articulated the powers as powers of the state government since the President is bound by the decision of the state government and cannot act on individual discretion.²⁸ References to Article 370 mean the provision as it existed before August 5, 2019.

II. ARTICLE 370: TEXT, PRETEXT, AND SUBTEXT

With the Indian Independence Act, 1947 coming into effect on August 15, 1947 the British Indian territories in the subcontinent gained independence in the form of Pakistan and India.²⁹ There was one other set of territories – the princely states – that exercised “sovereignty in many degrees”³⁰ while also

²² *Shah Faesal v Union of India* (2020) 4 SCC 1.

²³ See, Zaid Deva, ‘Basic Without Structure?: The Presidential Order of 1954 and the Indo-Jammu & Kashmir Constitutional Relationship’ (2020) 4(2) Indian Law Review 20-21, 24-25.

²⁴ *Sampat Prakash* (n 17).

²⁵ *Sampat Prakash* (n 17).

²⁶ Madhav Khosla, *The Indian Constitution* (OUP 2002) 74. See also, Louise Tillin, ‘Asymmetric Federalism’ in Sujit Choudhry, Madhav Khosla and Pratap Bhanu Mehta (eds), *The Oxford Handbook of the Indian Constitution* (OUP 2016) 576–78.

²⁷ *Ram Jawaya Kapur v State of Punjab* AIR 1955 SC 549; *Samsher Singh v State of Punjab* (1974) 2 SCC 831.

²⁸ Noorani (n 1) 7-8.

²⁹ See, Indian Independence Act 1947 (UK), s 1.

³⁰ Report of Joint Select Committee on the Government of India Act, 1935, as quoted in VP Menon, *Integration of the Indian States* (Orient Black Swan 1956) 34.

recognising the suzerainty of the crown as a result of treaty relations between the two,³¹ that gained independence. The Indian Independence Act relieved such states from their respective treaties, leading to their independence from the British, and, in theory, from India and Pakistan as well.³² However, most of the princely states had merged into either of the dominions by the time the Independence Act came into operation, except a few which included J&K.³³

The ruler of J&K signed an instrument of accession on October 27, 1947, transferring competence to legislate on defence, foreign affairs and communications to India.³⁴ This instrument ensured that sovereignty was retained and the Indian constitution excluded from application in the state.³⁵ At this juncture, it must be noted that the transfer of competence was not in the nature of complete surrender since the state's constitution at that time, the Constitution Act of 1939, vested all legislative, executive and judicial powers in the ruler.³⁶ In view of this, the J&K High Court later held that accession led in essence to a concurrent exercise of law-making powers by the state and the union in respect of the three subjects.³⁷

This was the pre-constitutional position. With the Indian constitution almost ready in early 1949, there still existed no provision in it dealing with J&K. This led to negotiations between the two sides and it was agreed that the spirit of the instrument of accession would be embodied within the constitutional text. The draft of the provision was agreed between the two sides,³⁸ introduced in the constituent assembly,³⁹ and inserted in the draft constitution just a month before the final constitution was adopted. From that point onwards, the relationship between India and J&K began to be governed by Article 370. Article 370 under clause 1(b)(i) limited the parliament's law-making powers to those

³¹ For more on the relationship between the princely states and the British crown, see, *Report of the Indian States Committee, 1928-1929* (His Majesty's Stationery Office 1929) <www.nottingham.ac.uk/research/groups/conferencing-the-international/documents/official-documents/pre-conference/report-of-the-indian-states-committee-1928-1929.pdf> accessed 27 May 2021.

³² Indian Independence Act 1947 (UK), s 7; 'Cabinet Mission's Memorandum on States' Treaties and Paramountcy, May 12/22, 1946' in B Shiva Rao (ed), *The Framing of India's Constitution: Select Documents*, vol 1 (Universal Law Publishing 1967) 247-48.

³³ For an account of the merger of the princely states, see, Ministry of States, *White Paper on Indian States* (1950) <<https://archive.org/details/in.ernet.dli.2015.207474/mode/2up>> accessed 10 June 2020.

³⁴ For J&K's Instrument of Accession, see, Venkatesh Nayak, 'The Backstory of Article 370: A True Copy of J&K's Instrument of Accession' (*The Wire*, 5 August 2019) <<https://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india>> accessed 27 May 2021.

³⁵ Noorani (n 1) 29-50.

³⁶ See, 'Constitution Act of 1939' in MK Teng, RK Bhatt, and S Kaul (eds), *Kashmir: Legal & Historical Documents* (Light & Life Publishers 1977) 133.

³⁷ *Rehman Shagoo v State of J&K* 1958 SCC OnLine J&K 1 : AIR 1958 J&K 29.

³⁸ Unlike the rest of the constitution which was drafted by the Indian constituent assembly's drafting committee, the draft of Article 370 was prepared by the Government of J&K: see, Noorani (n 1) 52-53.

³⁹ Ayyangar (n 15).

matters in the union and concurrent lists which are declared by the President in consultation with the state government, to correspond to the acceded subjects. Under clause 1(b)(ii), the parliament's law-making powers could be enlarged beyond the acceded subjects by the President only if the state government tendered its concurrence for the same. Under clause 1(d), parts of India's constitution that corresponded to the acceded subjects could be applied on consultation with the state government; and after concurrence, for provisions corresponding to the non-acceded subjects. As per clause 2, concurrences tendered in terms of clauses 1(b)(ii) and 1(d) were required to be placed before J&K's constituent assembly for any decision it may take thereon. As per clause 3, the President could terminate the operation of Article 370 or make modifications therein, condition precedent being that a recommendation to that effect comes from the constituent assembly mentioned in clause 2. As per the explanation appended to Article 370, 'state government' meant the ruler of the state acting on the aid and advice of the council of ministers headed by a prime minister. The article as a whole was classified as a temporary provision since the final decision was the prerogative of the state's constituent assembly,⁴⁰ whenever it would convene.

On the eve of adoption of the Indian Constitution, the ruler of the state issued a proclamation which read as: "That the Constitution of India shortly to be adopted by the Constituent Assembly of India shall in so far as it is applicable to J&K govern the constitutional relationship between this State and the contemplated Union of India".⁴¹ Subsequently, a presidential order under Article 370 was issued in 1950 which applied parts of the Indian constitution that corresponded to the acceded subjects.⁴² The constituent assembly of J&K was convoked in 1951 with the following objectives: to draft a constitution for the state, to decide the question of accession to the Indian Union, to define the federal jurisdiction, and to take a decision on the monarchical rule in the state.⁴³ One of the first decisions it took was to replace the monarchical rule in the state with a republican parliamentary democracy by abolishing the position of the monarch and replacing it with an elected head of state to be called *Sadar-e-Riyasat* (President).⁴⁴ This necessitated an amendment to Article 370 since it referred to the ruler, a position which no longer existed. Accordingly, a recommendation for amendment of Article 370 under clause 3 was made by the constituent assembly in 1952.⁴⁵

⁴⁰ 'Sheikh Abdullah's Inaugural Address to the Constituent Assembly' in *J&K Constituent Assembly Debates*, vol I (5 November 1951); Prem Nath Kaul (n 21).

⁴¹ See Proclamation for the State of Jammu & Kashmir in (n 33) 371-372 (n 33) 371-72.

⁴² The Constitution (Application to Jammu & Kashmir) Order 1950.

⁴³ Sheikh Abdullah's Inaugural Address (n 40); 'Bakshi Ghulam Mohammad's Speech' in *J&K Constituent Assembly Debates*, vol II (25 October 1956).

⁴⁴ 'Interim Report of the Basic Principles Committee' in *J&K Constituent Assembly Debates*, vol I (10 June 1952).

⁴⁵ The new Explanation read as: For the purpose of this article, the Government of the State means the person for the time being recognized by the President on the recommendation

The constituent assembly appointed a basic principles committee to lay down the broad framework based on which the state constitution and federal jurisdiction would be designed. Based on its recommendations,⁴⁶ the constituent assembly drafted the Constitution of India *as applicable to J&K*, and on its authorisation, the President enacted the Constitution (Application to Jammu and Kashmir) Order, 1954 – the Basic Order superseding the 1950 Order.⁴⁷ The Basic Order thoroughly modified the Indian Constitution in its application to J&K. The constituent assembly completed its tasks with the adoption of the Constitution of Jammu & Kashmir in 1957.⁴⁸ It passed a resolution for the assembly's dissolution⁴⁹ without recommending any change to Article 370 in terms of clause 3. With no change in Article 370, 'client governments', at the behest of the central government, indulged in what Jawaharlal Nehru later described as "erosion of Article 370",⁵⁰ leading to massive enlargement of the federal jurisdiction seemingly acting within the scheme of the article. This rogue exercise of powers was finally challenged in the *Sampat Prakash* case.

III. *SAMPAT PRAKASH* – A NEW LIFE FOR ARTICLE 370?

Article 35(c) of the Basic Order protected any state law on preventive detention from being challenged on grounds of inconsistency with any of the fundamental rights. This protection to the state's preventive detention laws was for a limited time period of five years from the date of commencement of the Basic Order, i.e., from 1954 to 1959. Presidential 'amendment orders' were issued from time to time extending the protection under Article 35(c) by an additional ten years and subsequently by fifteen years. Through these orders, the federal jurisdiction was also sharply increased, displacing J&K's own constitutional structures and authorities, amendment by amendment.⁵¹ It must be noted that these presidential orders were passed: i) on the concurrence of the state government even though textually no support could be found for the continuing nature of its powers under Article 370 post-dissolution of the constituent assembly, and, ii) in the form of amendment orders which effected an

of the Legislative Assembly of the State as the Sadr-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office. See, 'Mirza Beg's Speech' in *J&K Constituent Assembly Debates*, vol I (10 November 1952) and the Constitution (Application to Jammu & Kashmir) Order 1952, passed under Article 370(3), in Noorani (n 1) 225.

⁴⁶ 'Report of the Basic Principles Committee' in *J&K Constituent Assembly Debates*, vol I (3 February 1954).

⁴⁷ See, the Constitution (Application to J&K) Order 1954. For the original, un-amended version, see, Noorani (n 1) at 264-74.

⁴⁸ The Constitution of Jammu & Kashmir 1957.

⁴⁹ 'Syed Mir Qasim's Speech' in *Jammu & Kashmir Constituent Assembly Debates*, vol II (14 November 1956).

⁵⁰ 'Jawaharlal Nehru on the 'Erosion' of Article 370' in LS Deb 27 November 1963, vol XII.

⁵¹ See, Noorani (n 1) 337-88.

amendment to the Basic Order for which neither textual support could be found nor any normative support mustered.

The amendment orders that increased the duration of protection under Article 35(c) were challenged in *Sampat Prakash* on the ground that there was no constitutional basis for amendments of the Basic Order under Article 370. Firstly, the petitioner sought to impose a temporal bar on the powers of the state government under Article 370. He argued that since the state government's concurrence was subject to the decision of the constituent assembly and hence not absolute, the powers could not continue beyond the life of the constituent assembly and must die with the dissolution of the body.⁵² The court answered this with somewhat contradictory reasoning. It first made a distinction between "legislative history of Article 370" and the "historical background in which Article 370 was incorporated" in the Indian Constitution, only to dismiss the former as "providing no assistance" to the petitioner's arguments.⁵³ It found "considerable force" in the respondent's argument that "the situation in which the Article was inserted in the Indian Constitution had not materially altered" to hold that powers under Article 370 continued beyond 1957.⁵⁴ This 'situation' was spelt out by N Gopalaswami Ayyangar while moving draft Article 370 in the Indian constituent assembly. It was summed up in seven points. Reliance was placed by the court on these seven points to hold that conditions like war, the drawing of the cease-fire line between the Indian and Pakistani-held Kashmir, an unusual and abnormal situation, among others still existed in the state and were therefore the reason for the continuing nature of powers under Article 370.⁵⁵ One of the conditions was that "a constituent assembly would determine the constitution of the state as well as the sphere of the union jurisdiction over the state".⁵⁶ The "considerable force" that the court finds in the respondent's argument emanated from a point that contradicted the argument itself since the constitution-making process had been concluded.

Next, the petitioner contended that clause 2 of Article 370 prevailed over the concurrence of the state government to the extent it subjects the government's decision to the constituent assembly. This submission was inextricably linked to the first submission of the petitioner.⁵⁷ The court found nothing in the language of clause 2 which is suggestive of any restrictions on the state government's powers post-dissolution of the constituent assembly. According to the court, clause 2 existed only for concurrences given in the pre-constituent assembly phase, i.e., from 1950-1951.⁵⁸ This was supported by the argument that clause 2 does not talk about "completion of the work of the constituent

⁵² *Sampat Prakash* (n 17) [4].

⁵³ *Sampat Prakash* (n 17) [5].

⁵⁴ *Sampat Prakash* (n 17).

⁵⁵ *Sampat Prakash* (n 17). *See also*, Ayyangar (n 15).

⁵⁶ *Sampat Prakash* (n 17) [4].

⁵⁷ *Sampat Prakash* (n 17) [6].

⁵⁸ *Sampat Prakash* (n 17) [6].

assembly or its dissolution”.⁵⁹ This reading of clause 2 was misplaced. When Article 370 did not provide for a constituent assembly for J&K, it is difficult to comprehend how Article 370 could have envisaged controlling the constitution-making process or completion thereof. As Noorani argues, “it [Article 370] merely refers to the constituent assembly before it was set up...it [constituent assembly] did not derive its power or authority from this [Indian Constitution]”.⁶⁰

If the state government could exercise the same powers in the post-constituent assembly phase that it exercised before the constituent assembly was convoked and as a consequence, constantly re-define J&K’s relationship to India, what purpose did the constituent assembly serve by drafting the state constitution and defining the state’s constitutional relationship to India? The court holds that the state government’s powers under Article 370 continue beyond the life of the constituent assembly on three premises: *first*, it finds that no recommendation for termination of operation of Article 370 under clause 3 was made by the constituent assembly with the completion of its tasks;⁶¹ *second*, it reads into the 1952 recommendation made by the constituent assembly for amending the meaning of ‘state government’ in Article 370,⁶² as a recommendation for the continued operation of Article 370 beyond the life of the constituent assembly;⁶³ *third*, it justifies the continued operation of Article 370 on the basis that amendments made to the Indian Constitution could only be extended to the state by employing the mechanism of clause 1, as per Article 368 as contained in the Basic Order.⁶⁴ Below, I unpack this three-pronged reasoning of the Court.

The first justification given by the court is not very convincing, particularly since the court does not engage with the constituent assembly proceedings to buttress its claim. As I show later, the constituent assembly did envision replacing Article 370 with the state constitution. Therefore, a lack of recommendation under clause 3 cannot justify the continued wholesale operation of Article 370, just as clause 2 cannot impose an absolute bar on the state government’s powers when read with Article 368 in the Basic Order. The fact that there was no recommendation under clause 3 necessitates the court’s intervention for all the more reasons since an unconstrained Article 370 has the

⁵⁹ Sampat Prakash (n 17) [6].

⁶⁰ AG Noorani, ‘The Supreme Court and Kashmir’ *Greater Kashmir* (19 February 2017) <<https://www.greaterkashmir.com/news/opinion/the-supreme-court-and-kashmir/>> accessed 10 June 2020.

⁶¹ *Sampat Prakash* (n 17) [7].

⁶² ‘Mirza Beg’s speech’ (n 45).

⁶³ *Sampat Prakash* (n 17) [7].

⁶⁴ *Sampat Prakash* (n 17) [8]. Article 368 of the Indian Constitution prescribes the process of amendment of the constitution. Such amendments do not apply to J&K on their own, as stated earlier. Article 368 has been applied to J&K through the Basic Order with a modification that Indian constitutional amendments must also go through Article 370(1) for application in the state.

potential to disturb well-settled theory, practice, and conventions by allowing the executive at the state and union level to engage in constitution making⁶⁵ and constitutional change.⁶⁶ I will deal with this in more detail in the next part.

As regards the second justification, it is noteworthy that the 1952 recommendation was based on an interim report of the Basic Principles Committee appointed by the constituent assembly.⁶⁷ Nowhere does the report talk about giving another life to Article 370 after the body's dissolution. It had only one purpose – to decide the future of monarchy in J&K and accordingly recommend changes to Article 370. Reading the same as a recommendation for continued operation of Article 370 alters facts and distorts history. The third justification of the court is complex, to say the least. As per the SC, since Article 368 in the Basic Order allows amendments made to the Indian Constitution to be extended to J&K through the mechanism of Article 370(1), all powers under the provision should be of a continuing nature. It conflated here three forms of amendments into one to buttress its claim that all powers under Article 370 continue beyond 1957. As I show later, only amendments of the form II have textual support through Article 368 – this cannot be used to justify the other two kinds of amendments.

The third submission of the petitioner was related to the aforementioned. He argued that through Article 370, only provisions of the Indian Constitution that were excluded by the constituent assembly from application could be extended. This power did not include altering the provisions as contained in the Basic Order and the modifications made therein – amendment III as stated before. He sought to delineate the latter Indian constitution from the former Indian constitution and draw a distinction between amendments I and III vis-à-vis Article 370.⁶⁸ Another argument that the petitioner made is that the power to amend cannot be read into Article 370 by relying on Section 21 of the General Clauses Act, 1897 ('GCA'). He argued that while the Act can be employed for ordinary presidential orders, it cannot be used to interpret a 'constitutional power'.⁶⁹ Article 367 of the Indian Constitution makes the GCA applicable for interpretation of the constitution. Section 21 states:

Where by any Central Act of Regulation, a power to issue notifications, orders, rules, or bye-laws is conferred, then that

⁶⁵ The August 5's actions of the Indian government create a new legal order in J&K by abrogating the previous one. See, 'The Constitution (Application to Jammu and Kashmir) Order 2019' <<https://egazette.nic.in/WriteReadData/2019/210049.pdf>> accessed 15 February 2020; 'Declaration under Article 370 (3) of the Constitution' <<http://egazette.nic.in/WriteReadData/2019/210243.pdf>> accessed 27 May 2021.

⁶⁶ For the amendment orders passed under Article 370, see, Noorani (n 1) 337-88.

⁶⁷ 'Sheikh Abdullah's Speech' in *J&K Constituent Assembly Debates*, vol 1 (10 June 1952); Interim Report of the Basic Principles Committee (n 44).

⁶⁸ *Sampat Prakash* (n 17) [9].

⁶⁹ *ibid* [9].

power includes a power, exercisable in the like manner and subject to the like sanction and conditions (if any), to add to, amend, vary or rescind any notifications, orders, rules or bye-laws so issued.

The court found the two arguments “proceeding on an entirely incorrect basis”.⁷⁰ It held the GCA applicable to Article 370 on the strength of Article 367. The court found comparable the powers under Article 370, which lead to a substantive constitutional change, and powers, for example, conferred by the constitution or a legislation under which general rules regarding transaction of business of governments or service rules are made, which are not as constitutionally salient as the former.⁷¹ It held that changing circumstances require change in rules that can only be guaranteed by the application of the GCA to the interpretation of the constitution.⁷² The question whether exercise of “constitutional power” prevented the GCA from applying, remained unanswered.

To further justify the employment of the GCA, the court relied on the “legislative history of the Article”⁷³ (which it had dismissed earlier) and once again resorted to distortion of history by holding:

It was because of the special situation [seven points stated before] existing in Jammu and Kashmir that the Constituent Assembly [of India] framing the Constitution decided that the Constitution should not become applicable to Jammu and Kashmir under Article 394, under which it came into effect in the rest of India, and preferred to confer on the President the power to apply the various provisions of the Constitution with exceptions and modifications. It was envisaged that the President would have to take into account the situation existing in the State when applying a provision of the Constitution and such situations could arise from time to time.⁷⁴

To digress from the main subject here briefly, there are several fundamental problems with this holding: *one*, the very articulation of powers and the situating of the locus of authority in the Indian legal sphere. As pointed out earlier, and as I argue here⁷⁵ in more detail, the President has no powers under Article 370 – the powers reside with the state government and the constituent assembly. Further, the Indian Constitution did not apply to J&K on its own because its application was excluded by the instrument of accession⁷⁶ that the erstwhile

⁷⁰ Sampat Prakash (n 17) [10].

⁷¹ Sampat Prakash (n 17) [10]-[11].

⁷² Sampat Prakash (n 17) [11]-[12].

⁷³ Sampat Prakash (n 17) [12].

⁷⁴ Sampat Prakash (n 17) [12].

⁷⁵ Deva (n 23) 22.

⁷⁶ See, Nayak (n 34).

ruler had signed. Article 394 is inconsequential. As discussed earlier, this instrument was embodied in the Indian constitution in the form of Article 370 by mutual agreement between the governments of J&K and India.⁷⁷ *Two*, the ‘situation’ that the court refers to is extraneous to Article 370 and cannot be relied on as an interpretative tool to allow the wholesale continuation of Article 370.⁷⁸ How would the President “take into account the situation existing in the state”? On whose aid and advice? *Three*, the orders passed till 1951 and the powers under clause 1 were both subject to the final decision of J&K’s constituent assembly. This is made clear by clauses 2 and 3. Therefore, it is difficult to accept the reasoning of the court that the President could issue orders “from time to time” based on their assessment of the situation.

The petitioner’s fourth submission was that when an amendment process in the form of Article 368 in the Basic Order is available, that should preclude any other form of amendment of the Basic Order. The court answers this by holding that Article 368 as applied to J&K does not provide the mechanism for amending the Basic Order but only paves the way for carrying amendments made to the Indian Constitution to the Basic Order.⁷⁹ This line of reasoning is the result of conflation of the three forms of amendments that the court makes to hold that powers under Article 370 are of a continuing nature.

In his fifth submission, the petitioner sought to place limits on the scope of the power of modification under Article 370. He argued that it should include powers to make only “minor alterations” and not to “practically abrogate an entire provision” as applied to J&K.⁸⁰ The court relied on the *Puranlal* case⁸¹ to hold that powers of modification are vast and unbounded. But as I show elsewhere,⁸² reliance on *Puaranal* is misplaced because it dealt with a modification that was inserted by the constituent assembly while here, the modification was made by the state government. Since the source of power for the impugned orders was different and in fact, subordinate in character,⁸³ *Puaranal*’s reasoning could not be employed in this case. Lastly, the petitioner argued that the amendment order in question qualified as ‘law’ within the meaning of Article 13(3) and therefore was subject to fundamental rights.⁸⁴ The court held that if the Basic Order could not be deemed invalid on the ground of inconsistency with fundamental rights, the subsequent amendment orders would also enjoy

⁷⁷ For J&K-India negotiations on Article 370, see, Noorani (n 1) 50-88.

⁷⁸ Jill Cottrell, ‘Kashmir: The vanishing autonomy’ in Yash Ghai and Sophia Woodman (eds), *Practising Self-Government: A Comparative Study of Autonomous Regions* (CUP 2013) 172.

⁷⁹ Sampat Prakash (n 17) [13].

⁸⁰ Sampat Prakash (n 17) [14].

⁸¹ *Puranlal Lakhanpal v President of India* AIR 1961 SC 1519 : (1962) 1 SCR 688.

⁸² Deva (n 23) 27.

⁸³ On the nature and purpose of the constituent power, see, Yaniv Roznai, *Unconstitutional Constitutional Amendments: The Limits of Amendment Powers* (OUP 2017) 105-10.

⁸⁴ On amendments and the meaning of ‘law’ under the Indian Constitution, see, Sudhir Krishnaswamy, *Democracy and Constitutionalism: A Study of the Basic Structure Doctrine* (OUP 2008) 5-11.

the same protective cover.⁸⁵ This must be read with the third submission of the petitioner and the related holding of the court that the GCA is applicable to Article 370. If the presidential orders under Article 370 passed on consultation/concurrence of the state government are comparable with ordinary executive orders, what prevents the testing of the Basic Order on the touchstone of fundamental rights? With this, the most fundamental of questions – what is the nature of presidential orders under Article 370? – remained unanswered. All in all, the court in *Sampat Prakash* failed to develop a coherent framework for the exercise of powers under Article 370 and instead offered an account that distorts history, is self-contradictory, and keeps vital questions unanswered.

To sum up, the court holds powers under Article 370 to be of a continuing nature on the basis of the following: 1) it reads the recommendation for changing the meaning of ‘state government’ in Article 370 as a recommendation for continued operation of the article beyond the life of the constituent assembly; 2) it finds a lack of recommendation under clause 3 to imply the constitution-makers’ intention to continue the operation of Article 370 beyond the life of the constituent assembly. No care is taken to support this ‘finding’ from the J&K constituent assembly proceedings; 3) It supplements point 2 with Article 368 of the Basic Order which allows ‘carrying’ Indian constitutional amendments to the Basic Order, and hence the reason for continuing nature of powers under Article 370. It holds this ‘carrying’ of amendments to not have the effect of amending the Basic Order; 4) Even after holding that powers of Article 370 continue beyond 1957, it reads into the article amendment powers by application of the GCA. The arguments related to Article 370 granting constitutional power and the nature of the Basic Order are inextricably linked to point 4. Having dealt with point 1 in the previous section, I will address points 2, 3, and 4 in more detail in the next section.

IV. TEMPORARY CHARACTER AND POWERS UNDER ARTICLE 370

In the previous section, I studied the *Sampat Prakash* case and highlighted the shortcomings of the reasoning the court supplies to justify the continuation of powers under Article 370 beyond the life of the constituent assembly. In this section, I deal with the two amendments that are purportedly made within the scheme of Article 370 – i) Amendment I – extending provisions of the Indian Constitution to J&K that were originally excluded from application by the state’s constituent assembly; ii) Amendment II – extending amendments made to the Indian constitution to J&K through Article 370. I argue that only amendments of the category ‘Amendment II’ can be constitutionally made to the Basic Order while acting within the constitutional text, whereas, amendments of the category ‘Amendment I’ have no constitutional basis.

⁸⁵ *Sampat Prakash* (n 17) [15].

Even though all three exercises of powers take the form of amendments, there are some fundamental differences between the three, in terms of the nature of changes they seek to make.⁸⁶ While the first two forms seemingly work within Article 370 to extend provisions of the Indian Constitution to the Basic Order by amending the latter, the third form amends that which has already been extended. To use Nanda's analogy of a tunnel,⁸⁷ while the first two amendments enable the passing of more traffic through the tunnel, the third one seeks to control the traffic that has already passed from the tunnel, i.e., was out of the scope of Article 370. In so far as the first form of amendments is concerned and how it is different from the second – the constituent assembly had excluded certain provisions from application to J&K while defining the Indo-J&K constitutional relationship. Extending the same after dissolution of the assembly defeats the purpose of convoking the body in the first place. On the other hand, the second form of amendment enables extending of amendments made to the Indian constitution to the Basic Order. The source of authority shifts from Article 370 to Article 368 of the Basic Order in cases of the second form of amendment.

First, I deal with the question of continuing nature of powers under Article 370 beyond the life of the constituent assembly. I argue that the constituent assembly envisaged that Article 370 would get replaced by the final constitution (Basic Order and the J&K Constitution) and that the same is manifested in the text of the constitution as well.

A. Article 370 and Jammu and Kashmir's Constituent Assembly Proceedings

During the framing of the Constitution, one of the concerns of the members was the word 'temporary' attached to Article 370.⁸⁸ Many naturally suspected that a temporary provision necessarily implied a temporary autonomous status. The members of the house who negotiated Article 370 with the government of India, like Sheikh Abdullah and Mohammad Afzal Beg, dispelled such concerns on the premise of clause 3, arguing that the final decision was the prerogative of the constituent assembly which was a sovereign body and hence the temporary character of the article. Even though there was no recommendation made under clause 3 for modifying or terminating Article 370 – the reason for this is not clear either from the constituent assembly debates or the declassified

⁸⁶ While scholars have attempted to make conceptual classifications for amendments, my aim here is to see how amendment orders operate under Article 370 and the form they take in their interaction with the Basic Order. See, Richard Albert, 'The Structure of Constitutional Amendment Rules' (2014) 49 Wake Forest Law Review 924-928.

⁸⁷ Nanda (n 12).

⁸⁸ 'Mirza Afzal Beg's Speech' in *J&K Constituent Assembly Debates*, vol I (19 August 1952).

correspondences⁸⁹ between the leadership of the two sides – there is evidence however, in the constituent assembly proceedings and the text of the constitution, that the final constitution was envisaged to replace Article 370. With respect to the constituent assembly proceedings, it is worth pointing out that after 1953, i.e., after the dismissal of Sheikh Abdullah, there is no significant (in terms of length) or substantive debate on Article 370. The debates that I rely on here took place before the Sheikh's dismissal.

Before explaining to the constituent assembly the agreement arrived at between him and Nehru in 1952, Sheikh Abdullah had occasion to explain the history of accession and the framing of Article 370. Regarding the temporary character of the provision and the future of the Indo-J&K relationship, he noted:

The temporary nature of this Article arises merely from the fact that the power to finalise the constitutional relationship between the state and the union has been specifically vested in the J&K constituent assembly...which would finally be competent to determine the ultimate position of the state in respect of the sphere of its accession which would be incorporated in the shape of permanent provisions of the constitution.⁹⁰

Responding to reports that a certain provision of the Indian Constitution would supersede Article 370, Mubarak Shah while dismissing such claims stated: "When it [Article 370] is deleted it will be substituted by our constitution."⁹¹ Beg's speech to the constituent assembly on the Sheikh-Nehru Agreement is instructive. He explained:

So long as it [constitution-making process] is not completed, Article 370 will remain there and when it reaches completion, we shall give to parliament what is parliament's, i.e., centre will have the acceded subject and the rest will remain here. Article 370 is therefore temporary till we complete our constitution...its spirit will be incorporated in that constitution.⁹²

Even though no modification was recommended to Article 370 by the constituent assembly, it is evident from these speeches that the final constitution

⁸⁹ There was a good deal of correspondence between Jawaharlal Nehru and Sheikh Abdullah on the constitution-making process. Nehru was attempting to influence the constitution-making process and might have been successful after the dismissal of the Sheikh. See, 'Nehru's letter to Sheikh Abdullah on 27 April 1953' in S Gopal (ed), *Selected Works of Jawaharlal Nehru*, vol 22 (OUP 1998) 212.

⁹⁰ 'Sheikh Abdullah's Speech' in *J&K Constituent Assembly Debates*, vol I (11 August 1952).

⁹¹ 'Mubarak Shah's Speech' in *J&K Constituent Assembly Debates*, vol I (14 August 1952).

⁹² 'Mirza Afzal Beg' (n 88).

was envisaged to replace Article 370 and any change to be made to the constitutional relationship would take place within such constitutional forms. The union jurisdiction would be defined in the “shape of permanent provisions” within the constitutional text. While the constituent assembly debates are not authoritative aids for interpreting the constitution as per the SC,⁹³ they do nevertheless reveal reasons underwritten into a certain act or text.

Reports of committees appointed by the constituent assembly, however, do enjoy more salience in constitutional interpretation than speeches of members. Here, we turn our attention to the report of the Basic Principles Committee based on which the Basic Order and the J&K Constitution came to be drafted. First, it recognised the principle of popular sovereignty⁹⁴:

The sovereignty of the state resides in the people thereof and shall except in regard to matters specifically entrusted to the union be exercised on their behalf by the various organs of the state...the state's legislature will have powers to make laws for the state in respect of all matters falling within the sphere of its residuary sovereignty.⁹⁵

It further goes on to say: “The committee is of the opinion that it is high time that finality in this [Indo-J&K relationship] respect should be reached and the relationship of the state with the union should be expressed in clear and precise terms”. The report is important for several reasons: *first*, for the very articulation of sovereignty as emanating from the people of the state rather than as situating all authority and powers in the Indian constituent assembly (something that *Sampat Prakash* does, as pointed out earlier). *Second*, it seeks to demarcate “in clear and precise terms” the law-making powers of the centre and the state, and with the demarcation of competences, finality is sought to be achieved in the constitutional relationship through the constitution. This assumes significance because it shifts the locus of authority from the Indian constitution, more particularly Article 370 as the site of distribution of powers, to the state constitution which will define the relationship and divide the competences between the state and the union. *Finally*, instead of ‘accession’, the constitution will ‘entrust’ law-making powers to the union parliament.

By relying on the proceedings of J&K's constituent assembly, I have tried to argue that a mere lack of recommendation under clause 3 of Article 370 is not enough to hold that powers under clause 1 are of a continuing nature

⁹³ This has been held and reiterated in many cases of the Supreme Court. For example, *see*, *Kesavananda Bharati v State of Kerala* (1973) 4 SCC 225 (Sikri CJ). For a criticism of the court's treatment of constituent assembly proceedings, *see*, HM Seervai, *Constitutional Law of India* (NM Tripathi Pvt Ltd Bombay 1967) 1202.

⁹⁴ On popular sovereignty and constituent power, *see*, Andreas Kalyvas, ‘Popular Sovereignty, Democracy, and the Constituent Power’ (2005) 12(2) *Constellations* 238.

⁹⁵ Report of the Basic Principles Committee (n 46).

when a seemingly contrary intention becomes evident in so far as the assembly sought to replace the article with the final constitution. It must also be remembered that the assembly did not express its intention for Article 370 to continue governing the relationship, instead, it sought to shift the control of the relationship from the Article to the state constitution. Therefore, to conclude that the constituent assembly “did not desire that Article 370 should cease to be operative”⁹⁶ is fallacious, if not distortionary. By allowing the wholesale exercise of powers under Article 370 to continue beyond 1957, the court does two things: first, it enables amendments of the Basic Order, which Article 370 itself does not provide for. And second, it prevents the shifting of authority to govern the constitutional relationship from Article 370 to the state constitution. By only relying on the Indian constituent assembly debates (which incidentally in respect of Article 370 and J&K is just one speech by N Gopalaswami Ayyangar⁹⁷), the court produces a verdict on the question of the continuing nature of powers under Article 370 which is not true to the vision of the framers of the constitutional relationship between India and J&K – the J&K constituent assembly. In the next part, I demonstrate how this contrary intention was incorporated in the constitutional text.

B. The Constitutional Relationship and ‘Clear and Precise Terms’

As has been stated before, the Indian Constitution does not apply to J&K by itself. What applies is a modified form of the constitution through the Basic Order on the authorisation of the state’s constituent assembly. While Article 370 laid down the processes for governing the relationship on an interim basis, finality was sought to be achieved through the text of the constitution.

Part XI of the Indian Constitution deals with centre-state relations, laying down the legislative and executive powers of the states and the union. The Basic Order for J&K makes some crucial modifications and interpretive changes to this part.⁹⁸ Article 245 which deals with the territorial extent of laws made by the parliament and the legislature has been applied without any modifications. Under Article 246, the parliament has the exclusive competence to legislate on matters specified in the union list. Out of the 97 entries in the union list of the Indian Constitution, the Basic Order applied 84 and modified 6.⁹⁹ Clauses 2 and 3 which deal with the concurrent and the state list respectively have been excluded from application. Articles 248, which vests residuary powers of law-making in the parliament, and 249, which gives power to the parliament to legislate on matters of the state list, have been omitted in the Basic Order. Article 253 is interesting in so far as it limits union authority over the state. While states have the sovereign power to bind their constituent units

⁹⁶ *Sampat Prakash* (n 17).

⁹⁷ Ayyangar (n 15).

⁹⁸ For the text of the Basic Order, 1954, *see*, (n 47).

⁹⁹ Noorani (n 1) 435.

through any treaties they enter into, India cannot change the disposition of J&K by virtue of any treaty or like instrument without the consent of the state government.¹⁰⁰ With the omission of the concurrent list read with Article 254, any state law which corresponds to a subject matter specified in the concurrent list of the Indian Constitution would not be rendered void to the extent of repugnancy or otherwise. Regarding the union's executive powers, Article 53 vests the same in the Indian president and it extends to all matters over which the parliament can legislate.

It is evident that an elaborate scheme of distribution of law-making and executive powers was achieved by the constituent assembly through the Basic Order. The Basic Order, despite its revolutionary guarantees in the form of civil and political rights, was still wedded to the Constitution Act of the *ancien régime*.¹⁰¹ A formal and conclusive rupture with the previous legal order was caused with the commencement of the state constitution in 1957.¹⁰² I use the term rupture in two senses: one, rupture with the monarchical legal order which included the instrument of accession; and two, rupture from Article 370. I explain this in more detail below.

Recall that the purpose of the Basic Order in J&K's constitutional space was to govern the constitutional relationship of the union with the state by delimiting union authority. The preamble to the J&K Constitution states: "...having solemnly resolved, in pursuance of the accession of this State to India which took place on the twenty sixth day of October, 1947, to further define the existing relationship of the State with the Union of India". It seeks to "further define" the "existing" constitutional relationship by defining the state's legislative and executive powers. The state's constitution under Section 2(1) expressly recognises India's constitution to mean the Indian Constitution as applicable to the state, i.e., the Basic Order. Section 5 lays down the extent of law-making and executive powers of the state. Embodying 'residuary sovereignty',¹⁰³ the Section states that the law-making and executive powers of the state extend to all matters except those with respect to which the parliament has power to make laws for under the Constitution of India as applicable to J&K. It is noteworthy that an express constitutional 'unamendability' has been placed on Section 5, entrenching the constitutional relationship under the Basic Order

¹⁰⁰ Irfan Rasool, 'Jammu and Kashmir: A Confederate within a Federal System' (2014) 49(4) Economic and Political Weekly 70.

¹⁰¹ Constitution Act of 1939 (n 36).

¹⁰² On discontinuity in legal orders and the role of constituent power, *see*, Rainer Nickel, 'Private and Public Autonomy Revisited: Habermas' Concept of Co-originality in Times of Globalization and the Militant Security State' in Martin Loughlin and Neil Walker (eds), *The Paradox of Constitutionalism: Constituent Power and Constitutional Form* (OUP 2007) 148-49.

¹⁰³ *See*, Report of the Basic Principles Committee (n 46), 1954 (n 46).

and the J&K Constitution.¹⁰⁴ Together, the two create a cohesive constitutional order which not only provides civil-political rights under the Basic Order but also socio-economic guarantees under the J&K Constitution. By resorting to Article 370 to increase the federal jurisdiction, the constitutional relationship is recalibrated, which effectively strikes Section 5 of the J&K Constitution. It is worth pointing out here that Section 147 of the Constitution prevents the state legislature from amending the Indian Constitution as applicable to J&K. When there is an express bar on the state legislature from amending the Basic Order, it is difficult to see how the governments in J&K have exercised such powers in the past which have had the effect of amending the Basic Order. The only powers that can be exercised through Article 370 are provided for by Article 368 of the Basic Order. That is another problem with the articulation of powers under Article 370 as the powers of the President, because it invisibilises the source of powers which in the case of J&K has been both the constituent assembly and the state government at different times – the nature and breadth of the powers that the two exercise are not the same. And when the powers are articulated as that of the President's, the powers can be interpreted to be without any limits.¹⁰⁵

Till now I have shown that Article 370 was envisaged to be replaced by the Basic Order and the J&K Constitution taken together, preventing amendments of the form I to be made. The constituent assembly debates are instructive in this regard and the constitutional text further supports this position. Additionally, while the court identifies the sources of authority for making amendments of the forms II (Article 368 in the Basic Order) and III (Article 367 and GCA), it is not clear from the judgment how the court justifies the exercise of powers under clause 1 of Article 370 in the form of amendments. It is one thing to argue that powers under Article 370 are of a continuing nature, and another thing to argue that the exercise of powers takes the form of amendments.

If provisions of the constitution that were excluded from application by the constituent assembly can be extended after dissolution of the assembly, the purpose of convoking such a body gets defeated. But what does this hold for Article 370 when read with Article 368 of the Basic Order which allows amendments to be extended to J&K through Article 370? *Sampat Prakash* is categorical in holding that extending amendments does not lead to amendments of the Basic Order. I will now unpack this part of the judgment.

¹⁰⁴ Nivedhitha K, 'Article 370: The Constitutional Challenge' (Indian Constitutional Law and Philosophy, 13 August 2019) <<https://indconlawphil.wordpress.com/2019/08/13/guest-post-article-370-the-constitutional-challenge/>> accessed 27 May 2021.

¹⁰⁵ *Sampat Prakash* (n 17) [14].

C. Article 370 – Demise by Interpretation?

During the passing of the Basic Order in the constituent assembly, there seems to have been some confusion with respect to the place of the Basic Order in the constitutional scheme. While some hinted at incorporation in the Indian Constitution,¹⁰⁶ some others argued that it would naturally become part of state constitutional law.¹⁰⁷ With the Basic Order being inextricably linked to the J&K Constitution, the text offers us guidance as to its place in the constitutional scheme.¹⁰⁸ With respect to clause 3's recommendation, the debates point us to one direction – that Article 370 was envisaged to be replaced by the constitution.

As per *Sampat Prakash*, amendments to the Indian Constitution when extended to J&K do not lead to a formal amendment. When an Indian constitutional amendment is to be applied to J&K, it is worth pointing out here that the preambular part of the Basic Order is amended to include the amendment act or the specific provisions of the act – the same part that reaffirms the application of Article 1 and Article 370.¹⁰⁹ The court may be right in its holding that Article 368 in the Basic Order does not lead to a textual amendment, but it restricts the analysis to Article 370 and does not include the Basic Order or its preamble in its analysis.

Only those provisions of an amendment act are applied which correspond to a provision that has originally been made applicable to the state as against a wholesale application of the amendment act. We can understand this by an example. The whole of the 21st amendment was applied to the state since the provisions being amended formed part of the Basic Order, modified or

¹⁰⁶ 'Girdhari Lal Dogra's Speech' in *J&K Constituent Assembly Debates*, vol I (15 February 1954).

¹⁰⁷ 'Syed Mir Qasim's Speech' in *J&K Constituent Assembly Debates*, vol I (15 February 1954); 'Bakshi Ghulam Mohammad's Speech' in *J&K Constituent Assembly Debates*, vol I (13 February 1954); 'GM Hamdani's Speech' in *J&K Constituent Assembly Debates*, vol I (13 February 1954).

¹⁰⁸ *ibid.*

¹⁰⁹ The Basic Order's preambular portion:

In exercise of the powers conferred by clause (1) of article 370 of the Constitution, the President, with the concurrence of the Government of the State of Jammu and Kashmir, is pleased to make the following Order:

- (1) This Order may be called the Constitution (Application to Jammu and Kashmir) Order, 1954.
- (2) It shall come into force on the fourteenth day of May, 1954 and shall thereupon supersede the Constitution (Application to Jammu and Kashmir) Order, 1950.

[2. The provisions of the Constitution as in force on the 20th day of June, 1964 and as amended by the Constitution (Nineteenth Amendment) Act, 1966.....sections 2, 5, 6 and 7 of the Constitution (Thirty-eighth Amendment) Act, 1975....which, in addition to article 1 and article 370, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows.

otherwise.¹¹⁰ Whereas, only Sections 2, 3 and 6 of the 52nd amendment act were applied since the provisions that the said sections were amending were already applicable in J&K, whilst the rest of the sections were excluded from application, since the corresponding provisions were not applicable in the state.¹¹¹ In effect, the Basic Order does get amended by extending amendment acts through Article 368 of the Basic Order. This is telling for two reasons: i) it turns on its head the argument that the entire constitution could be applied to J&K by amending Article 370; ii) it reveals the absurdity of the argument that Article 370 can be amended by resorting to the parliament's amending powers under Article 368. Let us look at point ii) more closely. Suppose ordinary amending powers of the parliament are used to change Article 370. Let us call the original Article 370 as 370(x) and the amended version as 370(y). For this amendment to apply to J&K, it has to go through the mechanism of 370(x) which no longer exists. Even if the process of application of constitution is retained, i.e., clause 1 while the rest of the provisions are amended, then too the amendment cannot be applied to J&K for the reason that the Basic Order recognises and authorises 370(x) alone in the preambular part and in the proviso to Article 368. Further, for employing Article 368 of the Basic Order to amend Article 370, the latter needs to form part of the Basic Order. As the preamble makes it clear, Article 370 applies on its own and before the application of the Basic Order. I elaborate on this in the next section.

Coming back to my argument, Article 368 as applied to J&K does provide the mechanism for amendment of the Basic Order. Only to this extent, Article 370 must be held to be of a continuing nature. But how would this operate practically? I have argued that the constitution-makers' intention and final text of the constitution point us to one direction – that Article 370 was sought to be superseded by the new constitution. The amending process under Article 368 is part of this constitutional form – recognised within the constitutional text. More than a political arrangement between India and J&K, Article 370 fulfilled a more important purpose. It linked the two legal orders, or to borrow from G L Nanda again, acted as a tunnel¹¹² between the two. With the repeal of the old legal order by Section 157 of J&K Constitution and the formal recognition of the Basic Order as the guiding document for governing the constitutional relationship between J&K and India, Article 368, by acting within the new legal order, allows powers of Article 370 to be employed for applying Indian constitutional amendments to J&K. Even though Article 370's original powers cease to operate once the constituent assembly gets dissolved, the only powers that can be exercised through Article 370(1) in the post-constituent assembly phase are provided by Article 368 of the Basic Order. In other words, the source of authority shifts from Article 370 of the Indian Constitution to Article 368 of the Basic Order – the latter only recognising clause 1 of Article 370. The

¹¹⁰ See, the Basic Order, 1954 (n 47).

¹¹¹ See, the Basic Order, 1954 (n 47).

¹¹² Nanda (n 12).

provisions of the Indian Constitution excluded from application by the constituent assembly cannot be applied in the new legal order by resorting to Article 370.

By lumping the 1952 recommendation with the “lack of recommendation under clause 3” argument, the court allows excluded provisions of the Indian Constitution to be applied to J&K. I have argued thus far that only amendments of the form II can be made by acting within the constitutional text, whereas no constitutional basis exists for amendments of the form I. In the next part, I consider the question of amendment of the Basic Order, i.e., amendment III using the GCA.

V. BASIC ORDER – AN AMENDMENT RULE OUTSIDE THE CONSTITUTION?

Having argued that the amendment rule resides within the Basic Order, I now turn to amendments made through the GCA. To recapitulate the argument – with Article 370 being replaced by J&K’s Constitution and Basic Order, amendments of the form I (which have been used to enlarge federal jurisdiction by extending provisions excluded by the constituent assembly) cannot be made legally for lack of a constitutional basis in the new legal order. Amendments of the form II can be made in the new legal order by employing the mechanism of Article 368 of the Basic Order and Article 370. Before such processes are initiated, the state legislature would determine modifications, if any, to be made to the amendment acts, and based on its authorisation the state government would tender its consultation/concurrence. A convention to this effect has been set by the constituent assembly when it passed the Basic Order.¹¹³ In fact, for some time after 1957, concurrences of the state governments were always preceded by a resolution in the state legislature recommending changes to be made through Article 370.¹¹⁴

The third form of amendment, i.e., amendments to the text of the Basic Order, is what poses a challenge for it operates outside the constitutional text. To borrow Nanda’s analogy of the tunnel and the traffic once again, the third form of amendment poses a problem because it enables controlling of the traffic even when it has passed through the tunnel. Second, such amendments allow the central government to obliterate the autonomous status of J&K by: i) deleting or altering any modifications that the constituent assembly might have made when applying a provision of the Indian Constitution to the state; and ii) potentially amending a provision applied sans any modifications, in

¹¹³ Girdhari Lal Dogra’s Speech (n 106).

¹¹⁴ Jagota makes a mention of a resolution passed in the state legislature authorising the state government to give concurrence under Article 370 for extending certain provisions of the Indian Constitution. *See*, Jagota (n 1) 536.

essence, amendment II through the back door. Finally, as Albert has argued, amendments are “constitutionally continuous changes to higher law”¹¹⁵ whose “content is consistent with the existing design, framework, and fundamental presuppositions of the constitution”.¹¹⁶ Only amendments of the form II fit this description while amendments I and III are disruptive of the constitution’s design and content.

For example, Article 81 of the Indian Constitution which lies at the heart of parliamentary democracy in India by defining the process of election to the parliament, was modified in its application to J&K through the Basic Order. For the seats in the parliament belonging to J&K, MPs were nominated by the state legislature thereby barring parliamentary elections in the state. This modification was eventually deleted through a presidential amendment order. Constitutional changes such as these are not merely unconventional changes which at times can have the same legal status as that of formal constitutional amendments;¹¹⁷ rather these changes are made extra-legally which the national court then formalises by characterising the changes as progression in the Indo-J&K constitutional relationship.

The court in the *Sampat Prakash* case finds amendments of the form III possible under the scheme of Article 370 on the strength of two arguments: i) continuing and unfettered nature of powers of the state government under Article 370 post-dissolution of the constituent assembly; and ii) reading amendment powers in Article 370 by applying Article 367, i.e., Section 21 of GCA. Having dealt with i) in the previous section, I now consider how ii) will fare on the premise of my earlier arguments.

A. Nature of the Basic Order

Let us begin by restating the court’s answer to the applicability of the GCA to Article 370. While applying the GCA for reading amendment powers into Article 370, *Sampat Prakash* treats the Basic Order like any other executive order issued by the President. Constitutional orders or presidential orders qualify as ordinary ‘law’ within the meaning of Article 13(3), i.e., they are subject to fundamental rights. They are called ‘constitutional’ because powers to issue such orders are derived from the constitution – for the purposes of this essay, I will use the term constitutional executive orders such orders. The legal status of constitutional executive orders is not very different from presidential orders

¹¹⁵ Richard Albert, *Constitutional Amendments: Making, Breaking, and Changing Constitutions* (OUP 2019) 79.

¹¹⁶ Change to “Albert (n 115) 79.

¹¹⁷ See generally, Bruce Ackerman, *We the People: Foundations* (HUP 1991). See also, Stephen M Griffin, ‘Constituent Power and Constitutional Change in American Constitutionalism’ in Martin Loughlin and Neil Walker (eds) (n 102) 56-62.

issued under a parliamentary legislation – both are ‘law’ within the meaning of Article 13(3) and hence subject to fundamental rights.

The court, however, seems to be reluctant to accept that the amendment order, which granted further protection to state’s preventive detention laws from being challenged on the grounds of violation of fundamental rights, could itself be made subject to fundamental rights. It grounds this on a very facile reasoning:¹¹⁸

If the order of 1954 [Basic Order] is not invalid on the ground of infringement or abridgement of fundamental rights under Part III, it is difficult to appreciate how extension of period of immunity made by subsequent amendments can be said to be invalid as constituting an infringement or abridgement of any of the provisions of Part III.

The court is partially correct in holding this, as subjecting the amended Article 35(c) or any provision of the Basic Order for that matter, to the Indian Constitution’s fundamental rights would in essence mean subjecting constitutional law to fundamental rights, a position already refuted by the court in the famous *Kesavananda Bharati* case.¹¹⁹ Here, the 13 judge’ bench had held that constitutional amendments are not ‘law’ within the meaning of Article 13(3). However, there is an inherent contradiction in the court’s reasoning in the *Sampat Prakash* case. If the Basic Order is comparable to an ordinary constitutional executive order for applicability of the GCA, there is no reason to hold that it cannot be made subject to fundamental rights. If instead, it cannot be made subject to fundamental rights because of its character, the argument that it is comparable to an ordinary constitutional executive order for enabling amendments through the GCA is difficult to accept. The two arguments of the court that – the Basic Order is susceptible to the GCA like any other constitutional executive order, and at the same time is not subject to fundamental rights, cannot co-exist. Beyond this binary, the court offers no reasoning to hold otherwise.

The question of applicability of the GCA to Article 370 is inextricably linked to the question of the nature of the Basic Order. I have argued elsewhere¹²⁰ that the Basic Order must be treated as a constitution in its own right, on the strength of the following:

Source of authority: The Basic Order, for all intents and purposes, is the outcome of the labours of the constituent assembly of J&K, i.e., the state’s constituent power. It was drafted by the drafting committee, the same body which

¹¹⁸ *Sampat Prakash* (n 17) [15].

¹¹⁹ *Kesavananda Bharati* (n 93).

¹²⁰ *See*, Deva (n 23).

drafted the state constitution.¹²¹ Both were based on the common report of the Basic Principles Committee.¹²² The draft of the Basic Order was presented alongside the report of the drafting committee, appended to the latter as its annexure. Its provisions were debated in the constituent assembly, amendments were moved, and it was finally adopted by the assembly in 1954.¹²³ Based on its authorisation and resolution, the state government forwarded the copy of the annexure to the President who then enacted it in the form of the Basic Order.¹²⁴ In fact, even the constituent assembly treated the Basic Order as a constitution in its own right which would eventually become part of J&K's constitutional law.¹²⁵

Purpose and content: The purpose of the Basic Order was as pointed out before, to govern the Indo-J&K constitutional relationship.¹²⁶ It delimits the executive and legislative authority of the Indian Union and subjects such exercise of powers to the provisions of the Basic Order and not to the Indian Constitution.¹²⁷ The Basic Order complements the J&K Constitution, and together, they form a cohesive whole which “provides a framework for the institutional structure of government”¹²⁸ – while the Basic Order for the most part governs the relationship between the state and the union, the J&K Constitution governs the people's relations with state institutions.

In the previous section, I showed how this argument enjoyed textual support as well. Indeed, a certain level of constitutional salience must be enjoyed by the Basic Order for it is drafted by and enacted on the authorisation of a constituent assembly as against constitutional executive orders which are made on the ‘aid and advice’ of the political executive. Further, the content of the Basic Order is of essentially constitutional character.

There is a crucial distinction between the Basic Order and ordinary constitutional executive orders relating to the nature of the source of authority and the content. For both, the presidential act of enacting the order is the same but where the two become distinct is their source of power. In the former, the outcome is an exercise of constituent power leading to a constitutional form whereas in the latter, the exercise is initiated within the constitutional form with organs constituted by the constitution. It is worthwhile to note that the

¹²¹ ‘Report of the Drafting Committee’ in *J&K Constituent Assembly Debates*, vol I (11 February 1954).

¹²² See, ‘Report of the Basic Principles Committee (n 46).

¹²³ See, ‘Discussion on the Report of the Drafting Committee’ in *J&K Constituent Assembly Debates*, vol I (13-15 February 1954).

¹²⁴ Girdhari Lal Dogra's Speech (n 106).

¹²⁵ Bakshi Ghulam Mohammad's Speech (n 107) GM Hamdani's Speech (n 107).

¹²⁶ Proclamation for the State of Jammu & Kashmir (n 33).

¹²⁷ See, section IV B.

¹²⁸ Cheryl Saunders, ‘The Constitutional Credentials of State Constitutions’ (2011) 42 Rutgers Law Journal 853.

GCA applies to constitutional orders, rules, notifications, etc. as it applies to legislative orders, rules, and notifications for their legal status is the same – all of such exercises qualify as ‘law’ within the meaning of Article 13(3). It is not clear how the court considers the Basic Order as an ordinary constitutional executive order for establishing the amendment rule by the GCA, and in the same vein finds it difficult to accept the argument that it and the subsequent amendment orders can be subject to fundamental rights.

B. Text of the Basic Order

Beyond the aforementioned normative reasons, there is textual evidence as well that unhinges the arguments that the Basic Order is comparable to ordinary constitutional executive orders or that the GCA is applicable to Article 370.

To begin with, Article 370 in itself is a self-contained code – an “outlier in the Indian Constitution”.¹²⁹ It begins with a non-obstante clause which implies that Article 370 of the Indian Constitution or any order passed under it has an overriding effect over anything contrary or otherwise in the Indian Constitution. Two conclusions can be drawn from this: i) Article 370 and its interpretations cannot be regimented by Indian constitutional text or interpretations thereof; and, ii) being linked to Article 370, the Basic Order and/or any amendment orders made in terms of Article 368, would enjoy the same overriding effect over Indian constitutional text. This critical textual limitation on the applicability of the GCA to Article 370 was ignored by the court. Next, even though Article 367 which authorises the GCA for constitutional interpretation has been made applicable in J&K through the Basic Order (albeit in a modified form), it must be noted that it functions within the Basic Order to give effect to amendments made to constitutional executive orders in J&K’s constitutional space. Article 367 reads: “Unless the context otherwise requires, the General Clauses Act, 1897...apply for the interpretation of this Constitution”. As per its clause 4 in the Basic Order, Constitution of India means the provisions as applied to the state through the Basic Order. Therefore, Section 21 of the GCA becomes relevant for giving effect to amendment orders (passed under other provisions of the constitution) in J&K’s constitutional space – it cannot be employed to amend the Basic Order itself. Take the example of CO 73¹³⁰ passed by the President under Articles 270 and 275 which pertain to distribution of revenues. An amendment order, Constitution Order 84,¹³¹ was passed under the same provisions amending the original order, even though the constitutional provisions do not provide for such amendment orders. This would not take effect in J&K unless the GCA was applicable

¹²⁹ Khosla (n 26) 74.

¹³⁰ See, The Constitution (Distribution of Revenues) Order 1965 <https://legislative.gov.in/sites/default/files/legislative_references/CO_PtI_0.pdf> accessed 27 May 2021.

¹³¹ The Constitution (Distribution of Revenues) (Amendment) Order 1969.

through Article 367. Therefore, the GCA and Article 367 cannot be used to amend the text of the Basic Order itself.

A question that can be asked here is if Articles 367 and 370 both form part of the Indian Constitution *as applicable to J&K*, can the former control the latter and therefore enable application of the GCA on Article 370? The problem with this argument is that it blurs the line between the Basic Order and Articles 370 and 1. The Basic Order applies the provisions of the Indian Constitution to J&K part-wise.¹³² Only the provisions that are omitted or modified are specified in the Order, while the ones that are applied in their original form are not mentioned. Articles 1 and 370 are also not mentioned. But that does not imply that the Basic Order extends them to J&K. In fact, the preamble to the Basic Order says; “the provisions of the Constitution which, in addition to Article 1 and Article 370, shall apply in relation to the State”, implying that the two provisions apply on their own (Article 1 applies through Article 370) and hence do not form part of the Basic Order. Therefore, Article 367 under the Basic Order cannot control Article 370.

For amending the text of the Basic Order, Article 367 of the Indian Constitution must be applicable to Article 370. Therefore, the GCA through Article 367 of the Basic Order cannot be used to amend the Basic Order itself, nor can Article 367 of the Indian Constitution be employed for its lack of control over Article 370. Employing the GCA also conflicts with Article 368 of the Basic Order – the former allows amendments of the form II to be made to the Basic Order. In essence, what can be done directly and legally, acting within the constitutional text, the GCA allows to be done indirectly, and extra-legally. Having argued that Article 370 was sought to be replaced by the constitution, and the Basic Order being an integral part of this constitutional regime, the court’s holding that it is comparable to other constitutional executive orders to allow the GCA’s applicability stands on a shaky ground.

Given the rules/orders enacted, for example, under Articles 77, 166, 275 and 309 are strictly executive in nature, reliance on these provisions is of little or no avail to the court for holding the GCA applicable to the Basic Order. In 1974, an amendment was made to the Indian Constitution inserting Article 371D, a special provision for Karnataka. Under this provision, the President was empowered “notwithstanding anything in the constitution” to provide equitable access to public employment and education through a presidential order for locals in the state. The presidential order was issued in 1975. For interpretative purposes, under Section 2(2) of the Order, the GCA was applied. An amendment was made to the 1975 order by employing Section 21 of the GCA. This was challenged in the state’s high court¹³³ on the ground that no provision existed in Article 371D which allowed such amendments to be made

¹³² cf the Constitution Order (n 42) and the Basic Order (n 47).

¹³³ *Mohd Ameenuddin v Govt of AP* 2000 SCC OnLine AP 469 : (2000) 5 ALD 311.

to the 1975 order. The court held otherwise on the strength of Article 367 and Section 21 of the GCA.

How is this different from Article 367 in the Basic Order which also recognises the GCA for matters of interpretation? Two points of departure can be made out in the case of the Basic Order: i) the nature of the non-obstante clause: for amendments to be made to the Basic Order through Article 370, Article 367 must first apply. This has been expressly ruled out by the non-obstante clause in Article 370 and by the limitation on the application of the constitution to Articles 370 and 1; ii) the nature of the presidential order: Article 367 of the Basic Order operates in a different realm, i.e., it recognises amendments made to constitutional executive orders in the J&K constitutional space, as explained before. The same cannot be used to interpret amendment powers for effecting an amendment of the Basic Order itself. Further, the presidential order issued under Article 371D makes the GCA applicable to itself in the preamble for interpretive purposes, despite the sanction to the GCA provided by Article 367. This is lacking in the Basic Order.

In another case¹³⁴ dealing with the presidential order, the court held that that the GCA can be invoked “only if, and to the extent, if any, the context and the scheme of the Presidential Order so permits” and not to “negate express provisions of the presidential order”. Even if it is assumed that the GCA is applicable, there are multiple limitations on the power, as specified in Section 21 itself. For one, such amendment orders will be subject to the final decision of a new constituent assembly.

In this section, relying on my arguments from the previous section, I argued why for both normative and textual reasons, the GCA cannot be invoked as a valid method for amending the Basic Order. At best, it acts as an extra-legal way to amend that for which an amendment procedure is already specified within the constitutional text.

VI. ON ARTICLE 370'S ABROGATION

A re-look at the *Sampat Prakash* case offers us new insights on the August 5 actions of the Indian government. Apart from the fact that only one form of amendments is possible under Article 370 after 1957, hence making August 5's actions constitutionally suspect, there are multiple other reasons why the abrogation of Article 370 will not stand constitutional scrutiny. Many have pointed out that the problematic nature of the abrogation of Article 370 is that it abides with the constitutional text even though it is deeply violative in spirit.¹³⁵ A fundamental question that the abrogation has raised is, where we situate Article

¹³⁴ *Govt of AP v P Vema Reddy* (2007) 4 ALD 209.

¹³⁵ Gaurav Sarkar, ‘Does the Legality Behind Revoking Article 370 Hinge on the Way a Court Looks at SC's Sampath Prakash Judgement?’ (*Newslaundry*, 6 August 2019) <<https://www.newslaundry.com/2019/08/06/does-the-legality-behind-revoking-article-370-hinge-on-the-way-a-court-looks-at-sc-s-sampath-prakash-judgement/>>

370 in the constitutional scheme. Once we have an answer to this, the problems associated with the 2019 orders¹³⁶ will become evident. The only addition that Constitution Order 272 made in Article 367 of the Indian Constitution as applicable to J&K was in the form of clause 4(d), interpreting the constituent assembly to mean the state legislature. The rest of the sub-clauses were present in the 1954 order as amended from time to time. As has been already argued, Article 370(1)(d) only mentions “such other provisions” of the constitution, hence a presidential order under it could not have amended Article 370 itself.¹³⁷

To elaborate on this distinction between Articles 370 and 1 and “such other provisions”, as pointed out before, for Article 367 of the Indian Constitution to govern the interpretation of Article 370, it must be applicable on the latter. The non-obstante clause in Article 370 expressly rules out its application. For Article 367 in the Basic Order to govern the interpretation of Article 370, Article 370 must form part of the Basic Order. As pointed out before relying on the preambular part of the Basic Order, Articles 370 and 1 do not form part of the Basic Order. Therefore, Article 367 in its application to J&K cannot be employed to alter the text of Article 370.

VII. CONCLUSION

I argued in this article that there is adequate evidence in the constituent assembly proceedings of J&K and the resultant final text of the constitution taken as whole, that Article 370 was envisaged to be replaced by permanent, unamendable provisions of the constitution. A lack of recommendation under clause 3 is not enough ground to hold the powers of the state government under Article 370 to be of a continuing nature when a contrary intention appears from the constituent assembly proceedings. I argued that in the post constituent assembly phase, due to the introduction of a new legal order under which only a specific form of amendment through Article 370 is permissible, the other two forms of amendment that *Sampat Prakash* recognises must be put to rest for lack of a similar constitutional sanction. Particularly, the amendments made to the Basic Order by relying on Article 367 are constitutionally suspect since the GCA has not been expressly made applicable to the Basic Order for interpretation, as in the case of the rest of the constitutional orders. Amendments of the form II can be made through Article 370 but the constitutional sanction is provided by Article 368 of the Basic Order, i.e., only a limited and a ‘qualified’ traffic can be passed through the ‘tunnel’ in the post-constituent assembly phase.

newslandry.com/2019/08/06/article-370-supreme-court-sampath-prakash-jammu-kashmir-special-status> accessed 28 May 2021.

¹³⁶ See, the Constitution Order (n 65).

¹³⁷ Bhatia (n 11).

While there has been a renewed interest in Article 370 with many pointing out reasons why its abrogation was unlawful, the question that remains to be asked is not *whether* the constituent assembly 'desired' continuation of Article 370 but *why* no recommendation under clause 3 for termination or appropriate modification was made.