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Chicaneries of Power and Subterfuge: Constitutional Laws on Kashmir

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This piece is part of APLA's newest Speaking Justice to Power Series, which focuses on Kashmir and marks the one-year anniversary of the abrogation of Articles 370 and 35A of the constitution (August 5, 2019). The Series page is [available here](#).

On August 5 and 6, 2019, the Union Government of India unilaterally revoked the special status accorded to India's only Muslim majority state of Jammu and Kashmir under Article 370 of the Constitution of India by the President of India. Following this, the presidential order(s), namely the Jammu and Kashmir Reorganization Act, 2019, was passed by both legislative houses of the Indian Parliament and got assent from the President on August 9, 2019. This Act reorganized the existing State of Jammu and Kashmir into two Union Territories, Jammu and Kashmir and Ladakh.

Speculations about the abrogation of the Indian constitutional provision that considered the territory of disputed Jammu and Kashmir has been gaining significant traction in various political, legal and intellectual circuits of Srinagar and New Delhi since Narendra Modi's election as the Prime Minister of India in 2014. Of the several promises listed in the ruling party Bhartiya Janata Party (BJP)'s Hindutva-envisioning manifesto, the abrogation of Article 370 and consequently making 35A redundant for the State of Jammu and Kashmir has been a major talking point for election campaigns and rallies to garner votes in several parts of India. [The communal election campaign was predicated on the facts that the majoritarian Hindu communities imagine the minority Muslim community as a threat to their existence](#) and that the neighbouring nation-state of Pakistan is the sole reason for all socio-economic and political problems facing India. Although these fears, insecurities, everyday communal sensibilities, and discomfitures with the tenants of secularism have historical roots, the use of a populist Hindutva mandate to exercise the fascist powers

of the state to alter the fundamental structures of the state has witnessed a new methodology.

A mid-career professional Kashmiri interlocutor of mine in Kashmir valley recollected seven months later that on August 5, 2019, a few hours after telecommunication and internet connections were completely blocked and the local political representatives of all ranks were put behind bars, the televised decision of the Indian legislative house to abrogate Article 370 felt like a déjà vu of a bad dream. She remembers saying to her husband; “They didn’t even ask us once!” Much to the contrary of the consistent demands of the right to self-determination by the people of Kashmir, the Indian state’s conniving act to abrogate the single most important law that mitigated the relationship between India and the disputed Jammu and Kashmir in the absence of a set of elected representatives to represent (albeit figuratively) the peoples’ voices has been one of the watershed moments of India’s dilapidating democratic and federal health.

The chicanery of the process through which the abrogation took place was not an act of simple legal amendment or re-adjustment. The Indian state’s constitutional relationship with the disputed territory of Jammu and Kashmir has been never common sense or normative even by the standards of postcolonial statecraft. In the past 70 years, the disputed and partitioned state of Jammu and Kashmir has been “kept” within the Indian federal system through a delicate and complicated set of constitutional laws that have been exploited to its greatest fascist capacities for the Indian state’s desperation for a colonial model of governance. At large, the essence of most constitutional, civil and criminal laws in India have continued to sustain or develop into a concoction of Victorian-era morality, aspirational socialism, neoliberal ethics, classist-Hindutva economics and Westphalian imagination of polity. The nation-state system that arose post-1947 in the Indian subcontinent could neither engage with and conclude the Kashmir dispute (as it is popularly referred to) through political statesmanship, nor develop a legal apparatus for upholding basic humanitarian values offering the dignity of life. Though historically practised, the intensity of brutal chicaneries of law and power that empower the arbitrary subterfuge of Indian constitutional laws for matters ranging from horrific human violations by the apparatuses of the Indian state to issues about the status of Jammu and Kashmir within the ambit of constitutional parameters have increased manifold in recent years. Unlike most other princely states of the Indian subcontinent in 1947, the State of Jammu and Kashmir, then ruled by King Hari Singh, acceded to the Indian Dominion in October 1947 through an instrument of accession that endorsed only a conditional accession to the Indian state in return for military protection for the king and his subjects. Adopted in the Indian constitution by the Constituent Assembly of India in 1950, Article 370 accorded the erstwhile princely state of Jammu and Kashmir a special status within the Indian federal unit, granting relatively greater autonomy to the state as compared to other states in India (Noorani 2014). Members of the Indian Constituent Assembly like [N. Gopalaswami Iyenger, while commenting on the drafting of the Indian Constitution, argued for the necessity of granting special status to the disputed state](#) because India was bound by the commitment to allow the will of the people to be expressed through the instrument of a state constitution; in addition, the United Nations had issued several resolutions on the disputed territory owing to the ceasefire agreement signed after the Indo-Pakistani war of 1948. Thus, the special status accorded to the state through Article 370 was intended to operationalize the

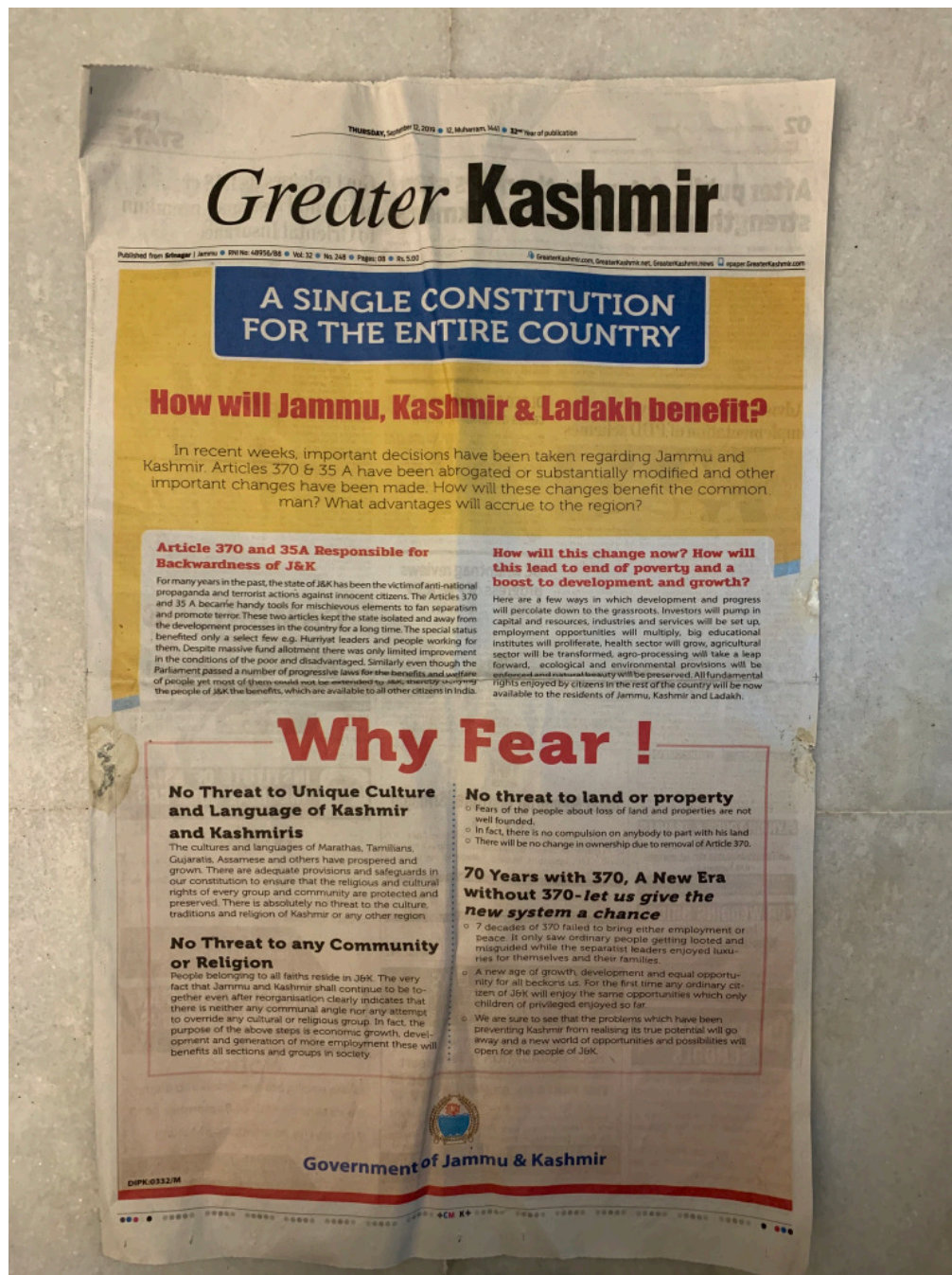
instrument of accession within the Indian constitutional framework that would acknowledge the exceptional political situation of Jammu and Kashmir in the post-partition political landscape of India and Pakistan and limit the direct access of the Indian constitution to the state until the implementation of the UN-mandated promised plebiscite. Through the Article 370, the people's elected representatives in the State of Jammu and Kashmir Legislative Assembly were primarily governed by a separate Constitution of Jammu and Kashmir since 1957. Though the scope and contents of Article 370 were amended repeatedly for various economic and political reasons, Jammu and Kashmir's special status mitigated the direct extension of Indian constitutional laws in the disputed state, upheld a distinct criminal penal law system, and empowered the State of Jammu and Kashmir to decide matters relating to state citizenship under Article 35A (Noorani 2014). In the everyday social and political life of people in the disputed territory, Article 370 circulated with diverse understandings of the utility of the law per se. Nonetheless, this specific legal provision was often read with an assurance of a distinct political existence owing to the distinct political history of the state within the Indian federal structure.

In August 2019, chicanery of law was initiated using the legal maneuvering around the striated clauses of Article 370 using presidential orders in the absence of an elected government in the disputed territory. The Indian state first amended Article 367 of the constitution that provides various guidelines to interpret the Indian Constitution. Since Article 370 could be abrogated only after being passed by the democratically elected government of the state, the Central Government of India amended Article 367, which allowed them to modify the fundamental constitutional understanding of the powers of a democratically elected state government in India. [In a major abasement of federal structure of India, the central government arbitrarily substituted the powers of a elected Jammu and Kashmir state government on to the Central government appointed Governor of a state, who in turn could advise the President of India to abrogate the Article 370 bypassing the constitutionally mandated democratic legislative and executive powers.](#)

This illustrated the absolute chicaning of law against the fundamental principles of constitutional laws. Though Article 370 (1) confers the article's supremacy over the rest of the articles of the constitution, sub-clause 370(1)(d) provided unfettered powers to the President of India to extend any other provision or exception by simply issuing a presidential order. The conniving exploitation of presidential powers in the absence of any people's representation in the parliament, placing the state under lockdown, muzzling independent media and ban on internet and tele-communication for the entire population was justified on the grounds of populist promises of "job creation" and "development" aimed to "correct the historical errors" in the disputed territory.

Following August 2019, more than half a dozen public interest litigation petitions approached the Supreme Court of India, each of them arguing for a review of the presidential order that arbitrarily re-interpreted certain articles of the constitution to abrogate foundational articles of the constitution. These petitions have highlighted the threat to the structure of the Indian constitution itself that defines the framework of the Indian Union government's relationship with its federal units, which has developed a growing tendency to confer principles of legal exceptionalism for the

sake of political domination against the tenants of the people's right to self-determination.



Public Notices published by Government of Jammu & Kashmir in local daily *Greater Kashmir* immediately after the abrogation of Article 370 justifying the benefits of abrogation according to the government. Photo by Author.

On the one hand, in the event of such subterfuge of the constitutional laws, one is persuaded to ask questions regarding the utility of law in disputed territories like Jammu and Kashmir, wherein enactment of laws is itself an act of occupation and repression. On the other hand, one is anthropologically curious how contemporary authoritarian structures of rule imbibe and inverse the existence of law per se.

References:

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