

**INTERPRETATION OF THE ABROGATION OF ARTICLE 370 AND THE  
JAMMU AND KASHMIR REORGANISATION ACT, 2019 IN LIGHT OF THE  
THEORY OF THE CONSENT OF THE GOVERNED**

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### ABSTRACT

*This essay aims to understand the theory of the consent of the governed in light of India's representative democratic setup with special reference to the abrogation of Article 370 of the Indian Constitution. The abrogation of Article 370 and the withdrawal of statehood from Jammu and Kashmir poses questions as to whether the idea of consent of the governed was effectively exercised in this situation and to what extent can positivist interpretation of existing legislations assume hypothetical consent of the governed in such situations. This essay aims to question the scope of the 'governed' and whether it is a rigid or dynamic concept. The author seeks to undertake interpretation of relevant provisions of the Constitution to identify whether the theory of the consent of the governed is germane to the political discussion on Jammu and Kashmir and whether the framers of the Constitution intended to apply such theory in all effectiveness to this situation.*

### I. INTRODUCTION

*"The will of the people shall be the basis of the authority of government."*

-Article 21 of the Universal Declaration of Human Rights<sup>1</sup>

Democracies, across time and time zones, have been the torch bearers of the will of the people. Although this abstract concept of the will of the people forms the core of the idea of democracy, its manifestation in reality is questionable and obscure. John Locke, in his 'Second Treatise of Government', propounded a state of nature wherein men, bereft of a politically organised state, existed.<sup>2</sup> The state of nature was a state of equality among men with the right to all actions except those undertaken to cause detriment to self or others in terms of body or property.<sup>3</sup> It was a society devoid of civil bonds and structures of authority and laws. According to Locke, men are born naturally free and cannot be deprived of their freedom without their own consent.<sup>4</sup> Thus, the basis of civil society, that is, subjugation to the political power of another, lay in the consent of a free man.

Once a person agrees to be a part of one body politic with one government, he becomes obliged to adhere to the decisions of the majority of such body politic irrespective of whether he approves of such decision.<sup>5</sup> This marks a key difference between the state of nature and a civil society governed by a State where a free man puts fetters on his own actions by consenting to be a part

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<sup>1</sup> Universal Declaration of Human Rights, G.A. Res. 217 (III) A, U.N. Doc. A/RES/217(III) (Dec. 10, 1948).

<sup>2</sup> JOHN LOCKE, SECOND TREATISE OF GOVERNMENT 4 (C.B. Macpherson et al. Eds., 6<sup>th</sup> ed. 1980).

<sup>3</sup> *Id.*, at 6.

<sup>4</sup> *Id.*, at 95.

<sup>5</sup> *Id.*, at 97.

of a civil society. Thus, consent is the cornerstone of political obligation in a democracy and the premise on which free men have entered into a social contract to form the civil society.

However, as mentioned above, even though entrance into the social contract is based on consent of free men, subsequent compliance to the obligations put forth by the State in furtherance of the social contract, is not based on unanimous consent of the people. Under such circumstances, it is necessary to analyse the contours of the social contract and to what extent the State can oblige people to follow laws against their consent. This gives birth to the idea of the consent of the governed and raises questions about the relevance of such consent of the governed in a continuing democracy.

Locke's idea of the consent of the governed was based on the process of evolution of a civil society from a state of nature through a social contract, thereby imposing political obligations in the form of laws on people. Locke's idea of social contract was strictly based on the consent of the parties to such contract. He also protected the right to rebellion and the right to self-determination as being a part of the social contract.<sup>6</sup>

In applying these concepts to a real democracy, the problems faced are in terms of the interpretation of the word 'consent', i.e., mode of giving consent, what it entails, to what extent consent given to one action can be construed to mean consent given for other actions and whether consent can be given by an individual for self-detriment; the word 'governed', i.e., its scope, whether it applies uniformly or specifically and whether it is dynamic in nature; and the implementation of such concepts in the real time interpretation of laws.

This essay aims specifically to deal with the abrogation of Article 370 of the Indian Constitution and the Jammu and Kashmir Reorganisation Act, 2019 and the interpretation of the same in light of the concept of consent of the governed. For the purposes of this essay, the author seeks to restrict her analysis to the ideas put forth by John Locke only.

## II. THEORY OF THE CONSENT OF THE GOVERNED

Consent of the governed comes from the consent theory of political obligation propounded by John Locke. As mentioned earlier, Locke believed that individuals experienced unfettered freedom in a state of nature. The state of nature, as described by Locke, was a situation in which individuals were perfectly free and equal and no one enjoyed differential power or authority.<sup>7</sup> However, such

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<sup>6</sup> *Id.*, at 222.

<sup>7</sup> *Id.*, at 4.

liberty was at the exclusion of the detriment to self and others. According to Locke, unfettered liberty could not be used to destroy self or to the detriment of others in body or object.<sup>8</sup>

However, such a state of equality is utopic and such unregulated state of nature based only upon self-imposed obligations in favour of others leads to a state of inequality based on force and violence.<sup>9</sup> This drawback of an egalitarian state of nature stems from the fact that there exist inherent differences among human beings and an unfettered state of nature intensifies inequality between them. Thus, it can be surmised that a civil society regulated by laws is necessary to create a situation of artificial equality propagated by the existence of legal rights and remedies. This paves the way for formation of a civil society and a single body politic by the creation of a social contract.<sup>10</sup>

One of the key elements of this social contract forming a body politic, as strongly emphasised upon by Locke, is consent. Locke states that since individuals are naturally free, they can only renounce the free state of nature on the basis of their own consent. Therefore, the transition of a group of individuals from the state of nature to a political society happens in accordance to the consent given by them.<sup>11</sup> In doing so, the three general criteria of consent must be fulfilled, i.e., consent must be given freely, the individual giving consent must be aware of what it construes to mean and the individual in question must be competent to give such consent.<sup>12</sup>

According to Locke, consent may be given either expressly or tacitly. Locke understood the hurdles express consent posed and thereafter proposed a more realistic mode of giving consent through their actions, that is, tacit consent.<sup>13</sup> Further theorists have also extended the concept of consent to hypothetical consent wherein the State assumes consent on part of its citizens if they do not overtly revoke such consent.<sup>14</sup>

Conclusively, it can be said that consenting to the existence of the State forms an important part of the social contract. The question that arises is whether such consent is to be given only during the formation of the State and if so, whether it construes blanket consent for all government actions.

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<sup>8</sup> *Id.*, at 6.

<sup>9</sup> *Id.*, at 11.

<sup>10</sup> *Id.*, at 95.

<sup>11</sup> *Id.*

<sup>12</sup> GEORGE KLOSKO, *Consent Theory of Political Obligation* in *The Routledge Handbook of the Ethics of Consent* 2 (Schaber & Muller ed., 2018).

<sup>13</sup> JOHN LOCKE, *supra* note 2, at 119.

<sup>14</sup> KLOSKO, *supra* note 12, at 12.

Another aspect to such consent theory is that of the giver of consent or the ‘governed’. The flip side of the consent theory revolves around who can and should give consent in this setup of the social contract. The social contract theory and the political society as envisaged by Locke presents a scenario wherein certain group of individuals voluntarily come together to undertake political obligations and accept the supremacy of the State. Thus, in this case the ‘governed’ is made up of all such people who would undertake political obligations by giving consent.

The consent of the governed, as a theory, is best represented by representative democracies prevalent across the world, wherein the people choose their representative, who in turn makes laws that govern the people. The ultimate objective is that the people on whom laws and political obligations are applied should consent to such application before they are compelled to obey such law. This can be displayed through an example of traffic regulations wherein most people on whom traffic laws apply, believe that these laws should be implemented to further the goal of safety and order and therefore, in spite of the penalty imposed for violation, consent to the implementation of such laws, as they agree to the objective that the law seeks to fulfil and the means it employs.<sup>15</sup> Thus, the concept of the consent of the governed entails the idea that a State can legitimately use its power justifiably and legally only when consented to by the people or society over which that political power is exercised.

The concept of consent of the governed emphasises on the idea that even though a social contract reduces the scope of consent of individuals and instates the State as the maker of law, since the State is made for the people and not vice versa, the extent to which the State can exercise supremacy over the people must be restricted by the consent of such people whom the State aims to govern. Further, the idea of majoritarianism, which the social contract encompasses, must be constrained by the idea of the governed.

### **III. THE ABROGATION OF ARTICLE 370 AND ENACTMENT OF THE JAMMU AND KASHMIR REORGANISATION ACT, 2019**

In 2019, the incumbent National Democratic Alliance [NDA] government came out with a Presidential Order abrogating Article 370 and subsequently passed the Jammu and Kashmir Reorganisation Act, 2019 in the Parliament.<sup>16</sup> This was done in a step wise manner.<sup>17</sup> Article 370

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<sup>15</sup> C.W. Cassinelli, *The “Consent” of the Governed*, 12 WESTERN POL. Q. 2. 391-409 (1959) (discussing the practical implications of consent based legislations).

<sup>16</sup> The Jammu and Kashmir Reorganisation Act, 2019.

<sup>17</sup> Press Release, *Sbri Amit Shah introduces Jammu and Kashmir (Reorganisation) Bill, 2019 President issues Constitution (Application to Jammu and Kashmir) Order 2019 Jammu & Kashmir Reservation (2nd Amendment) Bill, 2019 introduced in Rajya*

of the Indian Constitution provided for a special status to be given to the State of Jammu and Kashmir such that it was entitled to its own Constitution and the laws made by the Parliament of India could only be applied in consultation or concurrence, as the case may be, with the Government of the State.<sup>18</sup>

The original text of Article 370 of the Indian Constitution provided for application of the provisions of the Constitution with modifications, in respect of the State of Jammu and Kashmir, by the President in concurrence with the Government of the State of Jammu and Kashmir.<sup>19</sup> Clause (3) of Article 370 said that the entire Article could be repealed by Presidential Order provided that such notification be released in concurrence with the Constituent Assembly of the State.<sup>20</sup>

The Government, on 5<sup>th</sup> August 2019, released a Presidential Order C.O. 272 which inserted a new clause (4) in Article 367 of the Constitution which read:

*“(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir—*

*(a) references to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;*

*(b) references to the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir;*

*(c) references to the Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers; and*

*(d) in proviso to clause (3) of Article 370 of this Constitution, the expression “Constituent Assembly of the State referred to in clause (2)” shall read “Legislative Assembly of the State”.”<sup>21</sup>*

The above mentioned Presidential Order C.O. 272 explicitly included the Governor of Jammu and Kashmir within the meaning of the term ‘Government of the State for the purposes of Article

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*Sabha* All of the above passed in Rajya Sabha unanimously, MINISTRY OF HOME AFFAIRS (Aug. 5, 2019), <https://pib.gov.in/newsite/PrintRelease.aspx?relid=192487>.

<sup>18</sup> INDIA CONST., art. 370, § 1, cl. b.

<sup>19</sup> INDIA CONST., art. 370, § 1, cl. d.

<sup>20</sup> INDIA CONST., art. 370, § 3.

<sup>21</sup> The Constitution (Application To Jammu And Kashmir) Order, 2019, C.O. 272, G.S.R. 551 (E) (Aug. 5, 2019), <http://egazette.nic.in/WriteReadData/2019/210049.pdf>.

370 and expressly replaced the phrase ‘Constituent Assembly’ with the phrase ‘Legislative Assembly of the State’ in the proviso of clause (3) of Article 370.

Therefore, by amending Article 367, the government has explicitly given the right to apply the Constitution of India with respect to the State of Jammu and Kashmir, to the President in concurrence with the Governor; and has given the right to repeal Article 370 to the President, in concurrence with the Legislative Assembly of the State.

The legality of the abrogation of Article 370 has been questioned due to its convoluted interpretation and the possibility of multiple outcomes. As discussed earlier, clause (3) of the original text of Article 370 provides for the repeal of Article 370 through a Presidential Order in concurrence with the Constituent Assembly of Jammu and Kashmir.<sup>22</sup> However, since the Constituent Assembly of Jammu and Kashmir no longer exists, the status of Article 370(3) becomes ambiguous. Two divergent arguments have been proposed to resolve the ambiguity.

*First*, theorists have argued that the provision is etched in time and that since the Constituent Assembly of Jammu and Kashmir ceases to exist, the procedure for repeal of Article 370 provided for in clause (3) is obsolete, rendering the Article a permanent character.<sup>23</sup>

*Second*, it has been argued that since Article 367 has been amended to substitute the ‘Constituent Assembly’ with ‘Legislative Assembly’, the President, in concurrence with the Legislative Assembly, can repeal Article 370 through a Presidential Order. This argument is *prima facie* legal and appears to be a practical solution to resolve the ambiguity that the obsolescence of the Constituent Assembly places in this case. However, this argument has certain problematic aspects.<sup>24</sup>

The Presidential Order abrogating Article 370<sup>25</sup> was passed when the State of Jammu and Kashmir was under President’s Rule i.e. a situation of State Emergency imposed by the President.<sup>26</sup> The Presidential Order amending Article 367 was done in concurrence with the Government of the State which effectively meant the Governor of Jammu and Kashmir since the State was under

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<sup>22</sup> INDIA CONST., art. 370, § 3.

<sup>23</sup> Madhav Khosla, *The constitutional questions that arise from the end of Jammu and Kashmir as a state*, THE PRINT (Aug. 5, 2019), <https://theprint.in/opinion/the-constitutional-questions-that-arise-from-the-end-of-jammu-and-kashmir-as-a-state/272689/>.

<sup>24</sup> Chandrachud, Abhinav, *The Abrogation of Article 370*, SSRN (Aug. 24, 2019), <https://ssrn.com/abstract=3448331>.

<sup>25</sup> Declaration Under Article 370(3) of the Constitution, C.O. 273, G.S.R. 562(E) (Aug. 6, 2019), <http://egazette.nic.in/WriteReadData/2019/210243.pdf>.

<sup>26</sup> Press Trust of India, *President’s Rule in J&K Extended for 6 more Months beginning July 3*, ECONOMIC TIMES (Jun. 12, 2019), <https://economictimes.indiatimes.com/news/politics-and-nation/president-rule-in-jk-to-be-extended-for-6-more-months/articleshow/69759938.cms>.

President's Rule and the Presidential Order abrogating Article 370 was passed without any mention of the requirement of the concurrence of the Legislative Assembly, which was not in existence at the time. It is to be noted that the Governor of a State is an agent of the President as the Governor holds his office at the pleasure of the President,<sup>27</sup> and he is not an elected representative of the people.<sup>28</sup> Thus, it can be inferred that through the Presidential Orders, the Government of India, confers upon itself, the right to repeal Article 370, without being in concurrence with the Legislative Assembly.

The Parliament of India subsequently passed the Jammu and Kashmir Reorganisation Act, 2019 which took away Jammu and Kashmir's statehood and made it a union territory. It also bifurcated the region of Jammu and Kashmir into 'Jammu and Kashmir' and 'Ladakh', wherein Ladakh was declared as an independent Union Territory.<sup>29</sup> The manner in which it was passed was filled with discrepancies. The bill was introduced without circulation in violation to Rule 69 of the Rajya Sabha.<sup>30</sup> Further, Jammu and Kashmir, prior to the bifurcation was divided into 6 Lok Sabha constituencies and 4 Rajya Sabha constituencies. This meant that under all circumstances, the State was not being represented by more than 6 people in the Lower House and more than 4 people in the Upper House out of strength of 543 and 250 respectively. Therefore, not more than 2% of the number of people taking decisions on the statehood of Jammu and Kashmir legitimately represented the political interests of the State of Jammu and Kashmir.

Since 5<sup>th</sup> August, 2019, Jammu and Kashmir has been in a state of emergency with the Central Government imposing Section 144 of the Code of Criminal Procedure, 1973 in parts of the state and shutting telephone lines and the internet for long durations of time.<sup>31</sup> Further many of the State's political leaders were put under house arrest under the Jammu and Kashmir Public Safety Act, 1978.<sup>32</sup> The Central Government's measures have been construed to indicate a tendency of curbing people's right to revolt and their freedom of expression.<sup>33</sup> Therefore, this becomes a crucial juncture at which whether the people of Jammu and Kashmir at all consent to this act of

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<sup>27</sup> INDIA CONST., art.156.

<sup>28</sup> INDIA CONST., art. 158, cl. 1.

<sup>29</sup> The Jammu and Kashmir Reorganisation Act, No. 34 of 2019, <http://egazette.nic.in/WriteReadData/2019/210407.pdf>.

<sup>30</sup> Maansi Verma, *Diminishing the Role of the Parliament: The Case of the Jammu and Kashmir Reorganisation Bill*, 54 ECON. & POL. WKLY. 45 (Nov. 16, 2019), <https://www.epw.in/engage/article/diminishing-role-parliament-case-jammu-and-kashmir>.

<sup>31</sup> Express Web Desk, *Explained: What is Section 144 of CrPC?*, THE INDIAN EXPRESS (Aug. 5, 2019), <https://indianexpress.com/article/explained/what-is-section-144-crpc-jammu-and-kashmir-5878543/>.

<sup>32</sup> Sruthi Radhakrishnan, *Explained: The Jammu & Kashmir Public Safety Act*, THE HINDU (Sept. 17, 2019), <https://www.thehindu.com/news/national/explained-the-jammu-kashmir-public-safety-act/article29438694.ece>.

<sup>33</sup> Meenakshi Ganguly, *India Failing on Kashmiri Human Rights*, HUMAN RIGHTS WATCH (Jan. 17, 2020), <https://www.hrw.org/news/2020/01/17/india-failing-kashmiri-human-rights>.



the Central Government is questioned and the necessity to reaffirm that the source of the government's power lies with the consent of the people becomes necessary.

#### **IV. INTERPRETATION OF THE ABROGATION OF ARTICLE 370 AND THE JAMMU AND KASHMIR REORGANISATION ACT, 2019 IN LIGHT OF THE THEORY OF THE CONSENT OF THE GOVERNED**

In this section, the author seeks to interpret Article 370(3) of the Indian Constitution and the Jammu and Kashmir Reorganisation Act, 2019 based on the theory of the consent of the governed.

In interpreting the law, the framers of the law are given utmost importance.<sup>34</sup> The legislative intent of the members of the Constituent Assembly and the Parliamentarians cannot be questioned and serves as a guiding force to the interpretation of the law of the land. The Constituent Assembly, during the framing of the Preamble, included the phrase "We, the People of India" to show that the source of the authority vested in the government came from the people of India. Dr. B.R. Ambedkar explained the importance and the meaning of these terms in the Preamble specifically to assert that the power and the authority of making and adopting the Constitution of India was vested in the people of India and it was from the people that such power to enact and implement the Constitution was derived.<sup>35</sup> Thus, the Indian Constitution through its Preamble and the intent of the Constituent Assembly clearly displays an intention to follow the theory of the consent of the governed wherein the people of the nation are considered the source of authority for all laws and thus their consent to the laws is of primal importance. The idea of a democracy rooted in the people is the lens through which the Indian legal framework is viewed and the Constituent Assembly through its proceedings has immortalised such intent unambiguously. The consent of the governed, that is, the people of India, is thus necessary to impose any political obligation upon them.

The consent of the governed, as discussed above, comes into play when a set of individuals are affected by certain laws and embrace certain political obligations consequently, which gives rise to the question, that is, whether they consented to the law or the objective behind the law, in the first place.

In this case, the people of the State of Jammu and Kashmir, by virtue of the existence of Article 370, were given a special status in the legal framework of India. Despite being a part of the Union

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<sup>34</sup> MAXWELL ON THE INTERPRETATION OF STATUTES, 28 (P. St. J. Langan ed., Lexis Nexis, 12<sup>th</sup> ed. 1976).

<sup>35</sup> CONSTITUENT ASSEMBLY DEBATES, *speech by* DR. B.R. AMBEDKAR 10 (Oct. 17, 1949), [https://www.constitutionofindia.net/constitution\\_assembly\\_debates/volume/10/1949-10-17](https://www.constitutionofindia.net/constitution_assembly_debates/volume/10/1949-10-17).

of India, they were subjected to certain beneficial application of the law. However, such special status was not the product of the whims and fancies of certain past governments. The historical background of the accession of Jammu and Kashmir plays a key role in determining the significance of restoring a situation of effective consent of the governed in Jammu and Kashmir.

The transfer of power in Kashmir is peculiar and does not resemble other cases of transfer of power during the Independence. Post-independence, Kashmir was attacked by tribesmen and other armed groups.<sup>36</sup> The then ruler of Kashmir, Raja Hari Singh requested for military aid from India in return of the Instrument of Accession in favour of India on the condition that the Government of India would be in control of only defence, external affairs and communications.<sup>37</sup> All other sectors were to be under the domain of the king under the Jammu and Kashmir Constitution Act, 1939.<sup>38</sup> The terms under the Instrument of Accession of Jammu and Kashmir were debated upon when the Constituent Assembly of India was drafting the Constitution of India.<sup>39</sup> According to Jai Shankar Agarwala, “*Article 370 was necessitated to accommodate the then prevailing legal status of the Jammu and Kashmir State in the body of the Constitution of India.*”<sup>40</sup>

Another tangent that affected the accession of Jammu and Kashmir was the United Nations which give international exposure to the conflict seeking satisfactory resolution to the dispute.<sup>41</sup> Gopalaswami Ayyangar, a member of the Drafting Committee of the Constitution argued that, “*will of the people through the instrument of the [J&K] Constituent Assembly will determine the constitution of the State as well as the sphere of Union jurisdiction over the State.*”<sup>42</sup>

Additionally, it should be noted that Article 370 is preceded by the heading “Temporary provisions with respect to the State of Jammu and Kashmir”.<sup>43</sup> Thus, it can be surmised that the framers of the Constitution of India were hopeful that this conflict would be put to rest and the State of Jammu and Kashmir would be amicably integrated in the Union of India.

Even though the argument that Article 370 is a temporary provision has been taken to justify the abrogation, the context in which such temporary character was put on this provision has been

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<sup>36</sup> Jai Shankar Agarwala, *Article 370 of the Constitution: A Genesis*, 50 ECON. & POL. WKLY. 16 (Apr. 18, 2015), <https://www.epw.in/journal/2015/16/commentary/article-370-constitution.html>.

<sup>37</sup> *Id.*

<sup>38</sup> *Id.*

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> Amitabh Mattoo, *Understanding Article 370*, THE HINDU (2019), <https://www.thehindu.com/opinion/lead/understanding-article-370/article11640894.ece1>.

<sup>42</sup> *Id.*

<sup>43</sup> INDIA CONST., art. 370.

forgotten. Article 370 was framed in the backdrop of political and social volatility and insecurity. The special status acted as a safeguard provision to ensure that the conditions of accession of Jammu and Kashmir would not be revoked without the consent of the people of Jammu and Kashmir. Further, Article 370 meticulously places the phrase “in concurrence with” with respect to the Government of the State and the Constituent Assembly of Jammu and Kashmir to signify the importance of the assent of these institutions before any modification is effected on the status of Kashmir’s territorial and political sovereignty. This specifies the relevance of the consent of the governed in this situation.

The reorganisation legislation which has revoked Jammu and Kashmir’s statehood, as discussed in the previous section, was passed in haste without complying with the rule of circulation in the Lok Sabha.<sup>44</sup> The constitution of the Lok Sabha reveals that not more than 2% of the representatives of the people of the State of Jammu and Kashmir could have been involved in such reorganisation legislation that reduced a Jammu and Kashmir from being a state to a Union Territory as explained in Part II of this essay. This has resulted in people, completely dissociated from J&K’s political landscape and unaccountable to its masses, playing a chief role in distorting the sovereignty of the State of Jammu and Kashmir.

Even though the constitution of the Lok Sabha with only a certain number of seats allocated to a state is an acceptable practice in representative democracies, it must not be forgotten that giving the right to decide upon the statehood and sovereignty of a particular state, to an unrelated third party, here being the representatives of other states, goes against the very spirit of democracy stemming from the consent theory of political obligation. Thus, even though only 2% of the people representing J&K is an acceptable constitutional procedure, in this unique case of deciding statehood, the consent of the governed, i.e., the people of J&K must be given primacy in deciding upon such a legislation.

The Presidential Orders, systematically abrogating Article 370 and the special status given to the State of Jammu and Kashmir, and the Jammu and Kashmir Reorganisation Act, 2019 may be argued to be *prima facie* legal as it may not violate the letter of the law given in the Constitution of India.<sup>45</sup> However, its legality should be checked on the touchstone of the consent of the people of Jammu and Kashmir. The Constitution-makers foresaw a future wherein the people of Jammu

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<sup>44</sup> Maansi Verma, *supra* note 30.

<sup>45</sup> Press Release, *Soli Sorabjee: Abrogating Article 370 is constitutional, detaining leaders disturbing*, ECONOMIC TIMES (Aug. 11, 2019), <https://economictimes.indiatimes.com/news/politics-and-nation/soli-sorabjee-abrogating-article-370-is-constitutional-detaining-leaders-disturbing/articleshow/70622834.cms?from=mdr>.

and Kashmir would be governed by a government of their choice, which forms the essence of a democracy. Even though a literal interpretation of the amended Article 367 and Article 370(3), as well as the powers given to the Parliament to enact the Jammu and Kashmir Reorganisation Act, 2019, make such governmental actions legal, a purposive interpretation needs to be undertaken keeping in mind the consent of the governed, i.e., the people of Jammu and Kashmir in this case.

Following Locke's consent theory of political obligations, the idea of the consent of the governed applied in the Indian context could be construed as taking the majority opinion with respect to the entire Indian population. However, here the operative word is 'governed', that is, on whom the laws impose a political obligation. In this case, the abrogation of Article 370 and the enactment of the Jammu and Kashmir Reorganisation Act, 2019 affect the political rights of the citizens of Jammu and Kashmir. Therefore, the consent and the majority opinion of the people of Jammu and Kashmir should be sought. It is therefore argued that 'governed' is a dynamic concept which differs on the basis of the legislation that is being interpreted and the stakeholders it seeks to affect through its execution.

## V. CONCLUSION

The application of the theory of the consent of the governed in a twenty-first century democracy poses various tactical hurdles. The modus operandi for obtaining consent and the logistical issues associated with obtaining consent for a different set of governed for every legislation or government action is problematic. However, the aim of the author in proposing the implementation of such theory is to view laws and their interpretation thereof in reference to the democracy that is India and the democratic goals that were envisioned by the forefathers of our Constitution.

The objective that interpretation of these laws using the theory of the consent of the governed seeks to fulfil is that the stakeholders of a particular situation get to decide the political obligation that is imposed on them by virtue of a law or government action. The abrogation of Article 370 withdrew the historic special status that was given to Jammu and Kashmir due to its volatile geopolitical situation without consulting or taking into consideration the majority opinion of the people affected by such decision. Interpreting the validity of the Presidential Orders as well as the Jammu and Kashmir Reorganisation Act, 2019 in light of the theory of the consent of the governed will restore the democracy that the people of Jammu and Kashmir had consented to while acceding to the Union of India, thereby giving their consent for the social contract of the Indian political society.