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Article 370 and Indian Asymmetric Federalism - A view through the prism of Basic Structure Doctrine

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ABSTRACT

India is a Union of States, this shows that it is federal. Though it is not ideally a federal country, it has certain features incorporated that make it a federal one. Therefore, India is Quasi-federal in nature. Further, it also has asymmetric federal features i.e. the constituting units of a federation have unequal power in the political, fiscal and administrative spheres. The best example for this would be State of Jammu & Kashmir (now Union territory) which is a de jure asymmetrical arrangement in India due to the existence of Article 370 of the Constitution. J&K choose to remain a unit of Indian federation only on the terms and conditions specified in the instrument of accession. The State of J&K has been accorded asymmetric status under Indian federalism because of the peculiar circumstances under which it acceded to the union of India.

Keywords: Asymmetric, federal, accession, Constitution

I. INTRODUCTION

It's not only Kashmir; Indian Federation is based on four kinds of asymmetries. First, there is universal asymmetry affecting all states e.g. representation in Rajya Sabha to states, second, there is specific asymmetry concerning the administration of tribal areas, intraregional disparities etc, third kind of asymmetry in Indian federalism relates to a special kind of federating units called Union Territories and the fourth is special asymmetry relating to states of J&K, Nagaland and Mizoram (art 370, 371A, 371G)².

The mainstay of this essay is if this asymmetric federalism guaranteed under the Constitution is the basic feature of the Constitution and if it is so then the abrogation of Article 370 has violated our basic structure of the Constitution which is impermissible as per the Apex Court of India.

¹ Author is a student at Presidency University, Bangalore, India.

² *Federalism in India: A critical appraisal in journal of business management & social sciences research (JBM&SSR) by Dr chanchal kumar, vol 3,no 9, sep 2014 p-36,37*

II. THE BIRTH OF ARTICLE 370: JAMMU & KASHMIR AND ASYMMETRIC FEDERATION:

The State of Jammu & Kashmir enjoys far greater status than other states within the quasi-federal constitutional set up of India. Post-Independence, at the time of accession, it was made clear to the States that their internal autonomy would be governed by the Indian Constitution and they would be obliged to adhere to the Indian Constitution. However, Jammu & Kashmir decided to remain the unit of Indian federation only on the terms and conditions as specified in the Instrument of Accession signed by Maharaja Hari Singh in Oct 1947.

“Maharaj Hari Singh in Kashmir inherited a unique conundrum: he was a Hindu, but held dominion over a Muslim majority. Besides, his was the only princely state bordering both India and the newly born Pakistan, giving rise to the possibility of accession to either nation. Further complicating the already tense birth of two nations was Maharaj Hari Singh’s open discussion of an independent Kashmir, which only served to confuse and delay the question of the state’s accession.”³

However, after an uprising against the ruler in Poonch⁴ and an invasion by a Pathan tribal militia from Pakistan, Maharaja Singh decided to turn to India for military assistance and executed an Instrument of Accession to India. The accession was executed with the expectation that a plebiscite or referendum would be conducted to determine the final status of the state.

The State of J&K was accorded asymmetric position under Indian federation because of the special circumstances under which the state acceded to India. The special position was accorded to the state Maharaja Hari Singh acceded to India on three subjects viz defence, foreign affairs and communication. Sardar V Patel, the then home minister and the person who played an important role in the integration of princely states declared in the constituent assembly of India that “given the special problem with which the J&K government is faced, we have made special provisions for the continuance of the state with the union on the existing basis”. The special provisions were that of Art. 370 and the existing basis were the instruments of accession.⁵ Hence, in such a way the Article 370 came into existence.

³ *The Fate of Kashmir, Stanford Journal of International Relations, by Vikas Kapur & Vipin Narang, 2006*

⁴ *The forgotten Poonch uprising of 1947*

⁵ *Article 370 and the Asymmetrical Federalism of India in International Education & Research Journal by Bashir Ahmad Wagay, Vol. 4, Pg.No.31, May 2018*

III. LEGAL AND CONSTITUTIONAL STATUS OF JAMMU AND KASHMIR BEFORE ABROGATION OF ARTICLE 370:

The autonomy as discussed above was granted under Article 370 of the Indian Constitution, titled “**Temporary provisions with respect to the State of Jammu and Kashmir.**” This provision restricted both the applicability of the Indian Constitution to the state and the powers of the national government within the state to limited domains such as defence, foreign affairs and communications.⁶ Other matters in the legislative subject lists can apply to Jammu and Kashmir only with the “concurrence of the Government of the State” through a presidential order.

Consequently, the state of Jammu and Kashmir enacted its Constitution, which was formally adopted by a Constituent Assembly on November 17, 1956, and entered into force on January 26, 1957.

Nevertheless, the most perplexing part of Article 370 is Clause (3) of Article 370 which gives the President the power to declare that this article “shall cease to be operative or shall be operative only which such exceptions and modifications.”

On that account, Kashmir is one of the states like any other yet with the asymmetric privilege in the Constitution of India.

IV. ASYMMETRIC STATUS OF JAMMU & KASHMIR IS ONE OF THE FRAGMENTS OF BASIC STRUCTURE:

The Doctrine of Basic Structure is an innovation in the Indian Constitutional Law made by the Hon’ble Supreme Court more than four decades ago in the case of **Keshavananda Bharati vs. the State of Kerala**⁷. This doctrine elucidated that the certain parts and provisions of the Constitution cannot be altered by way of amendments it transforms the basic structure of the Constitution developed by the Constituent Assembly.

Firstly, while the Article 370 is in the chapter named “Temporary Provisions”, a plethora of Supreme Court cases such as *Sampat Prakash vs. State of Jammu & Kashmir*⁸, *State Bank Of India vs Santosh Gupta And Anr*⁹., characterized that it as having permanent and continuous existence. Thus, the Court has observed that the provision will cease to have effect only when the President makes a public notification to the contrary, *subject* to the condition laid down in

⁶ Article 370(1), Constitution of India, 1950

⁷ 1973 (SUP) SCR 0001 SC

⁸ AIR 1970 SC 1118

⁹ (2017) 2 SCC 538

clause 3 – i.e. recommendation of the Constituent Assembly for J&K – being fulfilled.

Further, the High Court of Jammu & Kashmir¹⁰ held as follows-

The provision cannot be abrogated even using the amending powers of the Parliament under Article 368. The reference to Article 368 and the fetters on it is indicative of how a lot of people have come to view Article 370 as a basic feature of the Constitution.

Hence, this permanent status given by the Courts to Article 370 is one of the reasons for elevating its status of being a basic feature of the Constitution.

Secondly, In Bommai case¹¹ Sawant and Kuldeep Singh, JJ., have observed: “*Democracy and Federalism are essential features of our Constitution and are part of its basic structure.*”

While federalism is itself considered as a basic feature of the Indian Constitution, the asymmetries in the federalism must also be given the status of the basic feature. Like how the Quasi-federal structure of the Constitution is accepted as the basic structure, an asymmetric relationship is an essential feature of Indian Federalism and thus consequently a basic feature.

The Supreme Court itself in various occasions held that constitutional interpretation has to be done keeping in mind the constitutional values that the text seeks to achieve, thus Article 370 is a part of federalism which is the basic structure of the Constitution in light of the Constitutional principles embodied in the Constitution by founding fathers of the Constitution.

V. CONCLUSION

The Indian Constitution is a facsimile of asymmetric federalism, where several states are treated differently with respect to others. This unequal status between various states is ingrained in the Constitution. One of the important paradigms of unequal status is the State of Jammu and Kashmir. Article 370 is a reflection of the Instrument of Accession signed between the Indian government and Maharaja Hari Singh. Jammu & Kashmir acceded to India under the guarantees provided by the Constitution of India. It is the Constituent Assembly, which incorporated Article 370 in the Constitution, providing a Constitutional basis for the relationship of the state with the union. On account of this, Jammu & Kashmir was accorded an asymmetric status. This asymmetric status can only be withdrawn

Further, the Apex Court on many occasions upheld the sanctity of Article 370 and also declared that it possesses permanent status making abrogation impossible. To abrogate the

¹⁰ *Ashok Kumar & Ors. Vs. State of Jammu & Kashmir*,

¹¹ *S.R. Bommai v. Union of India AIR 1994 SC 1918*

Article, it is indispensable to consult and get acceptance from the Jammu & Kashmir's Constituent Assembly. Since the Constituent Assembly of Jammu & Kashmir was dissolved. Besides, the basic structure doctrine applies to the current matter, even though the amendment to Article 370 was brought about via a Presidential Order. If Parliament's power to amend the Constitution under Article 368 is subject to the basic structure test, then any amendment brought about via a presidential order must surely also be subject to the test.

On account of these rationales, eventually, it is the obligation upon the government to obey the Constitutional principles and procedures concerning Article 370 and its abrogation. The way the abrogation has been done shows the blatant executive overreach. This stunt of the government should not be given blanket protection from judicial review just because the abrogation doesn't fall under Article 368.

Article 370 is an example of governmental overreach which has usurped the role of the Union Parliament and the State Parliament of Kashmir thus, has infringed the basic structure of the Indian Constitution thereby, making the repeal unlawful. Ultimately, the Supreme Court must consider the Constitutional history of Article 370 as an impression of the Instrument of Accession, thereby declaring the Presidential Order as Unconstitutional.
