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Constitutional Amendment and Bifurcation of Jammu and Kashmir

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ABSTRACT

The article examines the bifurcations of the state of Jammu and Kashmir and the constitutionality of the action in light of the historical documents, the constituent assembly debates and the legal precedent. It also ventures into the proprietary of the government decision and its ramifications from the legal perspective and perspective of the stakeholders.

I. A BRIEF HISTORY OF ARTICLE 370:

Part XXI of the constitution of India is titled temporary, transitional and special powers. It starts with 369 through 394A. The unamended A370 is merely a modified form of the terms of the instrument of accession signed between Maharaja Hari Singh and the dominion of India in October 1947. Unlike the other princely states that had surrendered their sovereignty in favor of the Indian union by signing the instrument of accession, Kashmir tried to protect some aspects of its sovereignty. The power to negotiate for autonomy was derived from clause 7 of the instrument of accession that said that “*Nothing in this instrument shall be deemed to commit me in any way to acceptance of any future constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such constitution*”. The state in 1947 acceded only in respect of communication, defence and foreign affairs. The Delhi agreement of 1952 was the most important step in this direction. The representatives of the state and the Indian Union arrived at an agreement to endorse the main decisions of the Constituent Assembly of the State of J&K, which included things like vesting of residuary powers with the state (it vests with the union government for the rest of India), special arrangement in matters of domicile, state subject, state flag, Sadar-i-riyasat and article 352.

II. THE REASON FOR DISCRIMINATION:

Responding to the question by Maulana Hasrat Mohani as to why there was this discrimination between Kashmir and all other states, N. Gopalaswami Ayyangar said “The discrimination is

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due to the special conditions of Kashmir. That particular State is not yet ripe for this kind of integration. It is the hope of everybody here that in due course even Jammu and Kashmir will become ripe for the same sort of integration as has taken place in the case of other States. At present, it is not possible to achieve that integration...³ this clearly indicated that the intent of the makers was to make this provision temporarily to let the state ease into the union when the time was ripe.

Further, he continues, "...It is, therefore, necessary that the administration of the State should be geared to these unusual conditions until normal life is restored as in the case of the other States". AG Noorani in his book *Article 370: A Constitutional History of Jammu and Kashmir* says that the constituent assembly merely put the imprimatur of its approval to a draft agreed upon between the union and the state. A370 records a solemn compact. Neither side can amend or abrogate it unilaterally, except in accordance with the terms of that provision.

III. BIFURCATION OF STATES:

Article 3 of the constitution is titled "*Formation of new States and alteration of areas, boundaries or names of existing States*". The Parliament may make a law to alter, modify, diminish or increase the boundaries of states. And according to the 18th constitutional amendment Act, state for the purpose of article 3, state includes union territory, except for the proviso to the article.

When this article was debated in the constituent assembly, extensive deliberations took place on the question of the role of states in this decision making process. KT Shah moved an amendment to this article to vest this decision with the state as opposed to the centre for 2 main reasons, that it would then rightly reflect the will of those affected and the state would be better equipped to understand the situation prevailing locally. He therefore, proposed that assent must be sought from the affected state before making such a law. Dr. BR Ambedkar sought to make a distinction between the states and the provinces as the states were sovereign and must be taken into confidence before altering their sovereign territory. He suggested different approaches for the part I and part III states. Pundit Hriday Nath Kunzru modified Ambedkar's amendment. He insisted that the states and the provinces must be placed on the same footing. He reasoned that in the other parts of the constitution, they are treated in the same manner and therefore there was no need to treat them any differently in this matter. And the states do not exercise sovereignty in other part of the constitution and there is no reason why they should exercise it here. Pundit's version was initially adopted and at a later date, HV Pataskar moved

³ Constituent Assembly of India Debates, Volume 10, Date 17th Oct 1949

an amendment that in order to pass the law, it is to be passed by a majority of the members of the House of people representing the state. subsequently, the amendment was not adopted. The above discussion gives us a clear indication that sufficient deliberation went into the procedure of bifurcation with special reference to reconciling the interest of states and administrative convenience as perceived by the Union.

All this deliberation culminated in article 3 as it stands today. Therefore, it was a conscious decision of the makers to vest very wide powers with the union in the matter of territories of the states.

IV. THE STATUS OF ARTICLE 370:

The unamended article does not make reference to the complicated geopolitics prevailing at the time. The discussion in the constituent assembly relating to this discrimination of the state vis a vis other states, the involvement of the UN, the internal war-like situation were cited as a reason for the need of such provision. It was also made known that the government intended to hold a plebiscite to understand the will of the people in determining the future course of the relationship of the state with the Indian union, have no reference in the article. The article provides the procedure to apply or extend the provisions of the Indian Constitution, the Indian laws to the state and the seizure of the article itself, fully or partially, through a presidential order. One could argue that the very nature of the article is a deviation from the larger constitutional scheme of separation of powers. That article 370 lays down a procedure that effectively vests in the executive, the legislative and constituent powers of the state.

Regarding the temporary nature of the provision the court delved into this question in the case of *Prem Nath Kaul vs The State Of Jammu & Kashmir*⁴. The courts clarified that the provision was temporary and its future would be decided based on the decision of the constituent assembly of the state in determining the relationship of the state and the union. Subsequent rulings of the supreme court after the constituent assembly was dissolved gives us the idea that the court was of the opinion that, the final authority to determine the status of the relationship of the two entities was vested with the Constituent Assembly. The assembly itself was dissolved without making any recommendations regarding the scrapping or modification of 370 and plenary reading of the article does not suggest any other authority to have the right to exercise this power, therefore implicitly awarding permanency to the provision.

It is important to understand the importance of article 35A inserted by 1954 presidential order

⁴ Prem Nath Kaul vs The State Of Jammu & Kashmir, 1959 AIR 749 (India).

in this background. It is generally seen as a legislative action that gave a legal force to the Delhi agreement of 1952. It recognises a special kind of citizenship based on residence, and confers the state legislature with powers to make laws regarding these *permanent residents* to the disadvantage of other citizens of India and could not be subjected to the test of constitutionality. A permanent resident is a resident of the state as on may 14, 1954, who has lived in the state for at least 10 years, and acquired immovable property legally. The provision has been used aggressively by the state to bestow several benefits to its permanent residents. This provision is important as legally it has been cited as an important reason to do away with the special status altogether.

To sum up, Article 370 is the basis of the relationship of Indian union and the state. The presidential order of 1954 made it clear that the amendments to the indian constitution would not apply to the J&K, unless a presidential order extended it.

V. THE INSTRUMENT OF ACCESSION, THE INDIAN CONSTITUTION AND THE CONSTITUTION OF J&K:

Given an assumption that the Maharaja was sovereign, it implies the Maharaja entered into a legally binding sovereign contract. In international law, accession happens when there is a preexisting assent by a state to an already existing treaty. The instrument of accession was a legal contract codified under the GOI act, 1935. Similar contracts were signed by several princely states that retained their internal autonomy under the british suzerainty. The subjects over which the federal government retained control, such as foreign affairs and defence were mentioned in a separate schedule.

The Indian Independence Act, 1947, was to end the british suzerainty and restore complete sovereignty of the princely states. However, extreme internal and external pressure was placed on the states to join either dominion. Britain, India and Pakistan were of the opinion that the instrument of accession would be treated as sovereign binding contract and form *opinio juris* (a customary international law). The surrounding circumstances under which the Maharaja signed the instrument have always been raised as reasons to invalidate the accession. It is suggested that the indian troops had already landed, when the accession was signed. Therefore suggesting that such a treaty would be void if its conclusion has been procured by the threat or use of force.

The following terms were set out in the instrument of accession:

1. Sets out the terms of the accession.

2. Consented to giving up certain functions in favour of the Indian union while preserving sovereign and territorial authority.
3. The terms can only further be modified by the consent of the ruler of the state.
4. Not to be deemed acceptance of any future Constitution of India,
5. Eminent domain over the lands in the state remained with the Maharaja.

In the letter of acceptance of the accession, Lord Mountbatten said that a plebiscite be held to permanently decide the status of the state once law and order was restored. Therefore, the arrangement as indicated by the instrument and the associated documents were not permanent.

The Jammu and Kashmir constitution in its preamble and the section 3 clearly envisages the position that Jammu and Kashmir is an integral part of India. It says that all the territories that were under the suzerainty of the ruler as of August 1947 would form Jammu and Kashmir under India. Therefore, the problem is that the Maharaja was not in control of the entire territory when he signed the instrument of accession.

Article 306A(during the drafting and debate) that later became article 370 made the following violations :

1. It was not to be deemed as an acceptance of Indian Constitution.
2. It negated the autonomy that was explicitly promised to the state of Jammu and Kashmir, beyond the scope of the instrument.
3. Proclaimed that the Indian Constitution would apply to the state and all inconsistencies would be void.

VI. THE PROCEDURE USED BY THE UNION GOVERNMENT:

Firstly, the concurrence of the state government U/A370 was read as concurrence of the governor in the absence of a popularly elected government. This is nothing new and has been done several times in the past. The constitutional order changes the following things:

1. It renders the entire 1954 order overruled.
2. Applies the Indian Constitution in its entirety to the state of Jammu and Kashmir.
3. Amends article 367 in which the phrase “this Constitution” is replaced by the phrase “this constitution as applied to Jammu and Kashmir”. The words “Sadr i Riyasat” and any reference to the word government will mean governor acting on the aid and advice of the council of ministers(these were pre existing changes that were remade due to the repeal of the 1954 order).

4. Article 370(3) was amended, the words 'Constituent Assembly' were replaced by 'Legislative Assembly'.

Secondly, a statutory parliamentary resolution was passed recommending the president to make a public notification, replacing the existing article 370 and thereby replacing it and applying the Indian constitution in its entirety to the state of jammu and kashmir. This was done with the understanding that the Constituent Assembly was now replaced by the Legislative Assembly and thus, becoming the only body empowered to make such changes. In the event of the president's rule applied to the state, the powers of the Legislative Assembly is vested in the parliament. Along with this, a reorganisation bill was tabled that created 2 union territories. The union territory of Jammu and Kashmir was to retain a legislative assembly while Ladakh wouldn't have a Legislative Assembly. This was also not unconstitutional as the basic order of 1954 was disbarred and thus Article 3 was made applicable to Jammu and Kashmir.

Thirdly, another constitutional order was passed effectuating the changes set out in the parliamentary resolution, ceasing the operation of article 370 and the 1954 order.

VII. POWER OF EXECUTIVE AND ITS INHERENT LIMITATIONS:

In *Samatha vs state of AP*⁵, the court held that legislative power exercised by the constitutional executive has certain inherent limitations. From the perusal of Article 370 it is quite clear that it lays the final decision with the people of Jammu and Kashmir. article 370(2) expects the decision to be laid before the constituent assembly of the state. Therefore, reserving it for the consent of the people of the state. So this puts an implied check on the President's amending power by making it contingent on the consent of the people of Kashmir. The instant presidential order repels all prior orders thereby ending the status accorded to the state. And it does so without the will of the kashmiri people. This is against the "...solemn pledge made by people of the country through duly elected Constituent Assembly to people of Jammu and Kashmir that the powers of the Union would be restricted to subjects mentioned in the Instrument of Accession and such constitutional provisions, as are extended by the President in consultation with or concurrence of Government of Jammu and Kashmir and that the State shall have autonomy as regards all other matters⁶".

VIII. CAN 370 AMEND OTHER PROVISIONS OF THE INDIAN CONSTITUTION:

In the discussion of constituent power or the power to amend the constitution, the following

⁵ *Samanth v State of AP* (1988) 3 SCC 433 (India).

⁶ *Union of India v Naveen Jindal* (2004) 2 SCC 510 (India).

must be enquired into:

Firstly, it must be examined if the Legislative Assembly of Jammu and Kashmir have constituent powers. In this regard, the constituent powers must be distinguished from legislative powers. In *Abdul Qayoom Khan vs state of jammu and kashmir*, the court has clearly mentioned that despite the constituent power being mentioned in article 368 of the indian constitution, the state legislature of Jammu and Kashmir does not have the constituent power, as section 147 of Jammu and Kashmir doesn't use such a phrase. Assuming that the state legislature does have constituent powers, such power is not equivalent to the constituent power of the constituent assembly itself. The power of the constituent assembly while drafting the constitution is unlimited. However, once the constitution is made, this power is limited by the basic structure of the constitution and the amending power does not go beyond the limits of the basic structure of the constitution. In the same case, the court also noted that constitutional autonomy granted to the state was also a basic feature of its constitution. The above observations were made in respect to the sixth amendment Act of the Jammu and Kashmir Constitution. However, the court did not declare it unconstitutional and instead left the decision to the judiciary.

Secondly, we must examine if the provisions of article 370 can be used to amend the provisions of article 367. Here again, the observations made by Jammu and Kashmir High Court in *Mohd. Maqbool Damnoo v State of Jammu and Kashmir*⁷ are very relevant. In that case the office of *sadr i riyasat* was replaced by the governor, the very nature of the office was altered and thereby affecting the constitutional autonomy and residual sovereignty granted to the state. The sixth amendment act of the Jammu and Kashmir constitution was declared to be clarificatory in nature. However, the High Court was of the opinion that it was not a mere change of nomenclature. Also, the presidential order draws its power from article 370(1), that deals with the power of parliament to make laws for the state. But it cannot be extended to amend the other provisions of the state. Any such changes would require the 2/3 rd majority as mandated by Article 368.

IX. COLOURABLE EXERCISE OF POWER; A FRAUD ON THE FEDERAL POLITY OF INDIA:

The most common arguments raised against the recent move is that such an action should not be a colourable exercise of power or a unilateral executive decision. Federalism is part of the basic structure of the Indian constitution. The court in *SR Bommai vs Union of India* has in para

⁷ Abdul Qayoom Khan Vs State of J&K 1972 SCR (2) 1014 (India).

13 stated “Democracy and federalism are the essential features of our Constitution and are part of its basic structure. “⁸.The doctrine of colourable legislation delves into the question of competency. If the doctrine is further simplified, it simply stands to say “that which cannot be done directly, should not be done indirectly”. Article 370 empowers the president to amend the provision of the Constitution as applicable to Jammu and Kashmir. Assuming the propriety of the Constituent Assembly being replaced by the Legislative Assembly, would the parliament and the union government be exercising their powers well within the constitutional limits of federalism? The doctrine does not go into the legislative intent of the federal legislature. It simply makes an enquiry into whether legislative competence of the state legislature is being encroached upon. In the instant situation, the power to make recommendations that was originally with the constituent assembly was now vested with the state legislature. There is a fixed life span for a law made in this manner , that is, under the president's rule. But the presidential order as a result of the statutory parliamentary resolution and therefore the bifurcation shall not be put to the test on the floor of the Jammu and kashmir assembly. Thereby permanently doing something that the parliament was not originally competent to do.

X. CONCLUSION :

The move the union government *prima facie*, seemed to fit snugly within the legal and constitutional contours. However, several questions can still be raised in respect of its propriety based on the doctrine of colourable exercise of power, the use of article 370 to amend other sundry provisions of the constitution, the inherent limitations on the executive power to legislate, the blatant violation of the terms of the instrument of accession and the absolute lack of regard for the will of the kashmiri people.

⁸ SR Bommai vs Union of India AIR 1994 SC 1918 (India).