

INTERNATIONAL JOURNAL OF LAW MANAGEMENT & HUMANITIES

[ISSN 2581-5369]

Volume 3 | Issue 4

2020

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Kashmir Heaven Turned Amusement

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ABSTRACT

Territorial dispute over “Kashmir” had been subject of too many questions over a decade. A beautiful valley turned out to be a land for militants and terrorists. Imposition of Article 370 in the State which enriched the State with some temporary Provisions to safeguard the interest of the people turned out to be the greatest reason for misery itself. Pakistan has always shown interest in the valley, propaganda behind the notion of “free Kashmir” and misleading the youth for the same.

Revocation of Article 370 and introduction of The Jammu & Kashmir Reorganisation Bill 2019 in the state, legal effects of such bill and international stand on the Kashmir issue plays a vital role in India’s upcoming position in the world as a global leader. Effects of Article 370, acquiring permanent resident or dual citizenship while living under the Supreme Law of the Constitution which provides “equality before law” to all citizens.

Failure or ignorance of the Government, for the thirst of power could lead to situations which can divide one State from the Union of India. A provision which itself states to be “temporary” should have remained the same. Political party’s failure to take a strong stand on the subject which costs future of three generations of the state and the life of many soldiers as well.

It is certain, in any case, that ignorance, allied with power, is the most ferocious enemy justice can have.

-James Baldwin

I. INTRODUCTION

In 1947 British tyranny came to an end dividing the nation into two parts; India and Pakistan, the notion behind tossing Two Nation Theory was to give Muslims a country where they had the dominating power over the country to exercise their religious rights freely. Provinces in the region were given freedom either to join India or Pakistan. Sheikh Abdullah leader of Kashmir came up with a new notion of Three Nation Theory. The Princely state of Kashmir was under the reign of Raja Hari Singh who decided to be independent from both the countries. Within a

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short span of decision, Pakistani Army came knocking the door of invasion in Srinagar acquiring a major part of the region following which Instrument of Accession² was signed by Raja Hari Singh accepting the Republic of India. In which access to foreign affairs, defence, communication and ancillary rights were conferred with the Dominion of India.

Myth related to Article 370 being the sole basis of signing Instrument of Accession stands inaccurate as Instrument of Accession was signed in 1947 and Article 370 of the Constitution was introduced in 1952.

The agreement to divide colonial India into two separate states, one with a Muslim majority and one with Hindu majority, Sole purpose of Partition would have resulted in utter failure if the Princely States have acceded to the dominion of either Nation ignoring the geographical compulsions. Nations with irregular boundaries and internal affairs of any nation could have been run without the interference of the other.

Geographical compulsions were hard and had to be accepted. Sardar Abu Rab Nishar a member of coalition Cabinet of united India. Agreed to the factors of geographical compulsions and expressed for the same in the official records.

Princely state of Kalat of Baluchistan and Bahawalpur were not entertained by the Government of India for the political relations citing the geographical complications, similar conduct was expected by the Dominion of Pakistan but to the surprise Accession of Junagarh was accepted by Pakistan.

To which Government of India in a telegram on 11 September 1947 asked Government of Pakistan to reconsider its decision, treat Accession of Junagarh as provisional and solve the problem by a plebiscite. To which Pakistan replied by “the proposal to conditions and circumstances plebiscite should be held in any State or States” on 5th October 1947.

Following the attempt to invade the State of Kashmir. India conducted a Plebiscite in Junagarh in which the number of voters who polled was 190,870 out of a total of 200,569. Of these 190,779 voted for India and only 91 for Pakistan³. India made a similar offer to resolve the dispute of Kashmir in 1947, the offer was reaffirmed in 1948 and when U.N. Commission suggested plebiscite. Pakistan was in dilemma of success rate of Plebiscite in their favor. If the country was so sure of the people turning to their State what was the need to send the troops to the valley and the invasion of the state using armed forces and talking about “free Kashmir

² Instrument of accession- signed on 27 October 1947 between Inder Mahendra Rajrajeshwar Mahadhiraj Shri Hari Singh, ruler of Jammu & Kashmir and Mountbatten of Burma, Governor-General of India, Jammu & Kashmir accede to the Dominion of India for the matters specified under the schedule.

³ Official records from the Ministry of External Affairs

When the horrors inflicted by the invasion of October in the mind of Kashmiri were still fresh at no cost people of Kashmir would have voted in favor of Pakistan, which made State cause a delay in holding a plebiscite. Pakistan's interest in Kashmir was not to ascertain the will of the people or to ensure their well-being but purely possession of the State. The first term to conduct the plebiscite was the troops of Pakistani Army would withdraw from the state boundaries but the State in opposite seized every opportunity to seize more and more territory of Kashmir. With time and Indo-Pak relations degrading and wars between both the countries, it became almost impossible to hold the plebiscite.

In 1954 a presidential order was issued in consultation with state's Constituent Assembly, operating Article 370 in the Constitution of India. The Article itself states to be "temporary" state's constituent assembly dissolved itself without recommending the abrogation of Article 370.

II. ARTICLE 370

On 14th May 1954 Presidential order passed provided autonomous status of Jammu & Kashmir, to have its own Constitution. Article 370 was temporary⁴ solution for time being in reference with the Constituent Assembly, but without the abrogation of article, Constituent Assembly dissolved itself.

(a) of Clause (1) of the Article prohibited application of article 238 of the Constitution (The States in Part B of the First Schedule) in the state of Jammu & Kashmir. Article 238 was later repealed by the seventh amendment in 1956.

(b) of Clause (1) limited the power of Parliament to make laws in the state, matters in correspond to Instrument of Accession should be dealt by Dominion of India.

(c) of Clause (1) states the provision of article 1 of the Constitution to apply in to that State, which makes Kashmir part of Union of India

Thus even before the revocation of Article 370 Kashmir was an internal matter of the country.

(d) of Clause (1) states exceptions and modifications of other provisions of the Constitution of India in relation to that state as the President may order. Clause (2) of the article empowered the Constituent Assembly⁵ to frame its own Constitution.

⁴ Substituted by the Constitution (Thirteenth Amendment) Act, 1962, S. 2, for "TEMPORARY AND TRANSITIONAL PROVISIONS" (W.E.F.1-12-1963).

⁵ Explanation.— For the purposes of this article, the Government of the State means the person for the time being recognised 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. (Ministry of Law Order No. C.O. 44, dated the 15th November, 1952). *Now —Governor

The Constitution of Jammu & Kashmir⁶ derive its force from this clause.

(3) States that provisions of this Article shall cease to be operative by the order of the President, provided a recommendation of Constituent Assembly is necessary for any such order.

PERMANENT RESIDENTS

Part III of the Constitution of Jammu and Kashmir, 1956 defines permanent residents as:-

Every person who is deemed to be, a citizen of India under the provisions of the Constitution of India shall be permanent resident of the State, if on 14th May 1954.

(a) he was a State subject of class I or class II⁷: or,

The permanent residents of the state shall have all the rights guaranteed to them under the Constitution of India.

III. EFFECTS OF ARTICLE 370

This provision enriched the permanent resident of the dual citizen within the territory of India which limited the power of ordinary Indian citizen over the permanent resident of Jammu and Kashmir.

Permanent resident has the right to move to any place within the territory of India and settle in any part thereof but any citizen for any State has no right to acquire permanent residence in the state of Kashmir.

Any woman marrying any citizen other than the permanent resident deprives her right in the State which is not applicable for the man residing in the state which is violation of Article 14⁸ & 15⁹ of the Constitution of India as well as the violation of Part III of the Constitution of Jammu & Kashmir.

As no other individual than permanent resident was capable of purchasing land, it prohibited the establishment of any industries or other institutions, thus development got stagnant which led to the unemployment in the valley.

⁶The Constitution (Application to Jammu and Kashmir) Order, 1954, published by the Ministry of Law vide Notification No. C.O. 48, DATED 14-5-1954, Gazette of India, Ext., Pt. II, S 3, P. 821, as amended from time to time.

⁷ The expression "State subject of Class I or Class II" shall have the same -meaning as the State Notification No I-L/84 dated the twentieth April. '1927 read with State Notification No 13/L dated the twenty- seventh June 1932.

⁸ The State shall not deny to any person equality before the law or the equal protection of the laws within the territory of India.) The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

⁹ The State shall not discriminate against any citizen on grounds only of religion, race, caste, sex, place of birth or any of them.

Unemployment of youth resulted in the corrupted minds, which eventually resulted in stone pelting in the region sponsored by the Pakistani authorities. The minds were by the notion of “free Kashmir”. The youth with no guidance and political parties to remain in power kept misguiding the population of the valley which always resulted in the imposition of restriction in the valley. Restrictions which were initially imposed to maintain peace eventually resulted in more anger and hatred towards the Government of India, which resulted in the youth turning out to be militants. This worsened the situation; more restrictions were imposed for the matter of security which turned the life of the people living in the region into misery. Schools were affected so was the employment which was generated out of local business, which led to the complete failure in the living of Kashmiris.

Article 370 was imposed for the people of Kashmir but it became the actual reason for the misery of the people in the region.

IV. CONSTITUTIONALITY OF REVOCATION OF ARTICLE 370

Article 370 was revoked by Government of India on 5th august 2019, 72 years after the dispute, for such action to be enforced with full efficiency force was deployed in the region to maintain regional stability and peace, which is being cited as violation of Humanitarian rights and fundamental rights of the people of Kashmir

Article 370 was to be dissolved with the recommendation of the “Constituent Assembly” of the State of Jammu and Kashmir. The Constituent Assembly dissolved itself without the abrogation of the said article thus for this article, the Government of the State means a person recognised by the President on the recommendation of the legislative assembly of the state as “Sardar-i-Rayasat ”acting on the advice of the council of Ministers. Now “Governor”.

The legislative assembly of Kashmir was elected in 2014, the tenure of legislative assembly of Kashmir is of six years but on 21 November 2018 Assembly was dissolved by the Governor, after the coalition government of PDP-BJP failed, Though PDP came to an alliance with the opposition Party NC(National Conference), it was not accepted by the Governor. The Governor later stated the order was passed in exercise of the powers conferred upon him by clause (b) of sub-section (2) of section 53 of the Constitution of Jammu and Kashmir, other reasons were also cited in reference to security scenario of the region, though stable Government was in need for supportive environment for security forces.

At the time of the revocation of Article 370, there was no Legislative Assembly in function though the consent of the “Governor” as the consent of the Assembly was taken into account.

Article 368 empowers the Parliament to amend the Constitution and procedure thereof. Clause 5 of the article states “*for the removal of doubts, it is hereby declared that there shall be no limitation whatever the constituent power of the Parliament to amend by way of addition variation or repeal the provisions of this Constitution under this article*”.

Thus the bar to amend article 370 lies in itself, while revoking the article recommendation of the legislative assembly was not taken into account, but consent of Governor was treated alike.

The legislative assembly of Jammu and Kashmir enjoys autonomous power more than any other legislative assembly of any other state in the Union of India, Revocation of article would have curtailed the power of the state government to some extent, which no ruling party would accept which is not related with the welfare of the people but for personal greed of the regional parties.

Democracy means “rule by people” where people exercise their voting right and elect the government, but there is no such interpretation to democracy which gives away the right to choose the boundaries of the State, thus concluding violation of democracy by not giving right to people to choose before the revocation of article has no legal grounds. The citizens of the valley are free to choose their representative, which is sole to democracy.

V. KASHMIR : INTERNAL MATTER OF INDIA

Article 1 of the Constitution of India states “India that is Bharat shall be a Union of States, The territories thereof specified in the First Schedule”¹⁰ The State of Jammu and Kashmir is specified in entry 15 of First Schedule of the Constitution.

Preamble of Constitution of Jammu and Kashmir states the relationship of the State with the Union of India as an integral part thereof¹¹. Both the parties recognised each other as an integral part of each other, revocation of article 370 is an internal matter of the country which leaves no space for any third party to interfere in the matter. Thus the revocation of article 370 solely is no ground for the violation of any international law or any treaty by the Government of India.

THE JAMMU & KASHMIR REORGANISATION BILL 2019

The bill was introduced under Article 3¹² and Article 4¹³ of the Constitution, interpretation of article restricted the alteration of the State of Jammu and Kashmir, the restriction was based on the temporary status given to the state under article 370, without repealing the article 370 an d introducing bill in the Parliament would have been resulted in challenging the constitutionality of such bill.

Jammu and Kashmir Reorganisation Act consists of 103 sections and 5 schedules signed on 9th August 2019 which is to be enacted from 31 October 2019. Act divided the State into two Union Territories, Formation of Union Territory of Ladakh without legislature¹⁴ it comprises of namely Kargil and Leh districts¹⁵ and formation of Union Territory of Jammu and Kashmir with legislature¹⁶ it comprises of Kupwara, Baramulla, Srinagar, Budgam, Pulwama, Anantnag, Doda, Udhampur, Kathua, Jammu, Rajouri and Poonch districts¹⁷. Union Territory without legislature implies that the Central Government directly administers the territory or territory without the Legislative assembly similar to the Union Territory of Chandigarh. Union Territory with Legislation implies that the territory with legislative assembly it is though under the control of Central Government but there will be elected assembly with the Chief Minister for the territory similar to the Union Territory of Delhi.

Before the revocation of article 370 laws enacted by the Central Government for the territory of India were not applicable for the state of Jammu and Kashmir, Now the fifth schedule of the Reorganisation Act ensures 106 Acts by the Central Government apply to both the Union Territories.

Explanation I In this article, in clauses (a) to (e), State includes a Union territory, but in the proviso, State does not include a Union territory

Explanation II The power conferred on Parliament by clause (a) includes the power to form a new State or Union Territory by uniting a part of any State or Union Territory to any other state or Union territory.

The Bifurcation of the state into two Union territories was established, such step was taken in consideration as the districts in the valley are more prone to the internal disturbances, on the other hand Ladakh region has no such disturbances including the people welcomes the notion of development and do not consider them any different from the Union of India article 370 proved to worsen the situation of the Ladakh region as the issue of underdevelopment was faced by the region, other included the geographical reason as both the countries, India and Pakistan has indulged in various wars, Kargil is a region which holds boundary of the country, which needs to be accessed with full efficiency at any point of time and as the internal disturbances prevailed in the state, Central control over the region ensures the safe holding of the boundaries of India.

VI. INTERNATIONAL VIEW ON THE MATTER

India sought resolution of the UN in 1948 after the disturbance erupted in the area, resolution

39 was passed in the matter and United Nation Commission for India and Pakistan (UNCIP) was established to observe a ceasefire.

India and Pakistan signed the Karachi agreement in 1951 to establish a ceasefire line to be supervised by observers.

Resolution at the initial level sought to withdrawal of Pakistani troops and Nationals from the valley and the assistance provided by the Pakistani army to the local militants followed by the withdrawal of Indian troops leaving behind only army of 21000 to maintain the security of the valley, but Pakistan refused the resolution citing distrust towards the Government of India.

Later resolution 47, adopted on 21 April 1948, was also passed in the subject matter which soughed similar ways as of resolution 39 and demilitarize the area but both countries raised an objection to the resolution. Mediation was accepted by both countries and accepted the ceasefire in 1949.

India had developed distrust over the UN as the ceasefire which was to be observed by the UN had failed which resulted in the war of 1971 resulting in Shimla Agreement¹⁸ in 1972 defining the Line of Control¹⁹. Mediations eventually failed thus lastly it was concluded that both the parties must solve the dispute by themselves.

VII. PAKISTAN'S INTERFERENCE IN THE REGION

Kashmir is the main reason of dispute between both the countries, The first war was initiated by Pakistan to gain control of the state to which Ruler of Kashmir signed Instrument of Accession and accepted the Dominion of India.

Pakistan later launched "Operation Gibraltar" in 1965 to infiltrate militants and army dressed as locals into the region to which India launched full-scale military attack, and a ceasefire was declared after seventeen days of the war.

In 1999 Pakistan tried infiltration in the Kargil region to which India held its boundaries with full efficiency and eventually international pressure on Pakistan to withdraw forces from Indian Territory resulted in Pakistan rejecting the troops as their army and rejecting the bodies of the Pakistani army as well, which later raised protest and outrage within the country.

Pakistan's entire claim to the valley is based on the factor the valley comprises of a majority of Muslim population and rights of the minority in the state are not taken into consideration thus their human Rights are violated on the ground of religion.

Revocation of Article 370 has resulted in the restlessness of the country, as the hopes of acquiring the region die with the revocation, the infiltration and corruption of minds due to

unemployment would lead to failure. Elections and race to remain in power is based on the political party's view on Kashmir issue, the people of Pakistan vote on the basis of political party's views regarding the valley, party permanently loses the issue will no longer remain in power, thus the concern of the Government is not about the population of the region but to remain in power. Kashmir was the reason for the downfall of Ayub Khan's government after the Tashkent Agreement¹⁹. Thus no political party wants the same circumstance when in power.

VIII. CONCLUSION

Stating the valley's suffering is based on Muslim community being majority is inaccurate as around 60000 Hindu and Sikh families were forced to leave the valley and the horrors of evacuation still haunt the people who fled the State. Constitution of India grants equality to all, laws which are made for India as whole did not apply to the State which fails the sole of equality though article 14 allows reasonable classification, with time 370 no longer can be a reasonable classification as it questions the unity of the country.

Any treaty or instrument cannot supersede the Constitution, thus Instrument of Accession does not stand above from the Constitution. Failure of the government to make a strong decision resulted in chaos for 72 years. Article 370 was itself the reason for the disturbance and all the chaos in the valley which also resulted in underdeveloped Ladakh region, the opportunity of employment and development never reached the region and infiltration from the neighboring country is also one of the major reason of unstable situation. Article 370 is one of the major reason of infiltration as the youth or individual with corrupted minds resides in the region which supports the infiltration and such concentrated population in a particular area is the reason of failure to maintain peace.

Article 370 is revoked, restrictions are imposed in the valley, it will take some years for the situation to be entirely normal in the region, as restrictions lead to the suffering of people to some extent but suffering for short period of time is way better than suffering of a lifetime.
