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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

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ARTICLE 370: IS IT JUST A MATTER OF J&K ALONE?

An Analysis of the verdict of the Supreme Court in Re: Article 370 of the Constitution.

AUTHORED BY - PRABHJOT SINGH SETHI & NAVREET KAUR

INTRODUCTION

Mark Twain once said, “India is the cradle of the human race, the birthplace of human speech, the mother of history, the grandmother of legend, and the great grandmother of tradition”. To this we add, the state of Jammu and Kashmir as its crown. And the most startling fact is that the concerned state has been without any representative government since 2018. It is under the Presidential Rule and the concept of Democracy i.e. the government of the people, for the people, by the people, has been totally denied to the people of Jammu and Kashmir.

The hon'ble Supreme Court with its verdict in Re: Article 370 of the Constitution on December 11, 2023 has required the Union government to conduct elections by September 2024. It means still more than nine months to go before a state level democratic government would come to power in Jammu and Kashmir. “Statehood”, which the concerned state lost in the same process which leads to this amendment in Article 370, is still out of sight and the hon'ble Supreme Court has not directed the government to expedite the process in this direction. We know there can be a Union territory with an assembly as in the cases of Delhi and Puducherry, Jammu and Kashmir shall follow the same suit.

ARTICLE 370: THE HISTORICAL CONTEXT

The contentious legal provision of Article 370 of the Constitution of India, before its abrogation in 2019, accorded special autonomous status to Jammu and Kashmir, allowing the state to have its own Constitution, flag and control over its matters except defence, foreign affairs, and communications. It provides that the Parliament shall, after consultation with the state government of Jammu and Kashmir, have power to legislate on those matters specified in Union and Concurrent Lists, which correspond to matters specified in the Instrument of Accession and such other matters as the President

may specify. It also allows the President of India, after concurrence of the State Government, to decide the provisions of the Indian Constitution which could be applied to the State with or without modification, and such power can be exercised by passing the Constitution (Application to Jammu and Kashmir) Order. Further the provision itself can be amended or abrogated by the President of India on the recommendation of the State's Constituent Assembly. The words "consultation" and "concurrence" used in Article 370 signifies the intent of the drafters of the Constitution to ensure the retention of the State's autonomy, rooted in its colonial history and accession to India.¹

If we look back at the history which led to the passing of Article 370, it has relation with India's independence which took place in 1947. At that time, there were around 565 princely states who were integrating either with India or Pakistan, Jammu and Kashmir being the crown state of India was also having this option. But Raja Hari Singh, the then ruler of Jammu and Kashmir was highly ambitious. He neither wanted to integrate with India nor with Pakistan and wanted to stay as an independent nation. For the safety of its state, he entered into a standstill agreement with the Pakistani government and its premier Muhammad Ali Jinnah. As per this standstill agreement it was decided between Pakistan and Jammu and Kashmir that Pakistan would not integrate Jammu and Kashmir and would also not interfere in the internal matters of Jammu and Kashmir. The same proposal was made by Raja Hari Singh to the government of India. Vallabhbhai Patel, the then home minister of India clearly stated that there would be only one agreement between India and Jammu and Kashmir, which would be about signing of the instrument of accession in the favour of India. Since the first prime minister of India Pandit Jawaharlal Nehru was himself a Kashmiri Pandit, Vallabhai Patel, the first home Minister of India, did not press his demand. At the very same time in Jammu and Kashmir, a young leader came to the fore named Sheikh Abdullah. He was a confidant of Pandit Nehru. Sheikh Abdullah was running a party in Jammu and Kashmir named National Conference and this party had a good hold on the maximum population of Jammu and Kashmir. He even started the "Quit Kashmir" movement against Raja Hari Singh as he was a Dogra and the majority population of Kashmir was Mohammedan. Sheikh Abdullah and his party were also getting support due to uneven economic distribution in Jammu and Kashmir. The majority population was Mohammedan while the major chunk of the property and economic resources were controlled by Dogras and Kashmiri pandits. As

¹ EPW Engage, 'Article 370: A Short History of Kashmir's Accession to India' (6 August 2023) Economic and Political Weekly (Engage) <<https://www.epw.in/engage/article/article-370-short-history-kashmir-accession-india>> accessed 28 December 2023

Sheikh Abdullah and Pandit Nehru shared socialistic ideologies, there was a silent political alliance between them. Meanwhile, on October 22, 1947, Pakistani Army in the camouflage of kabialis attacked Jammu and Kashmir. The entire state of Jammu and Kashmir was in distress and was in dire need of military assistance from India. Raja Hari Singh was repeatedly making requests to the Indian government for military assistance. Vallabhbhai Patel supported by Lord Mountbatten pressed their demand that military assistance would be provided only after signing of the instrument of accession in the favour of India by Raja Hari Singh. In the end Raja Hari Singh, agreed to sign the instrument of accession and on October 26, 1947, the instrument of accession was signed in the favour of India.²

As per the terms of instrument of accession, the matters related to international affairs of Jammu and Kashmir, defence and communication shall be dealt by the government of India and in the internal matters of Jammu and Kashmir the administration India shall not intervene. On October 27, 1947, when Lord Mountbatten replied to Raja Hari Singh on behalf of the government of India with respect to the letter sent by the Raja of Jammu and Kashmir which led to the signing of instrument of accession. Lord Mountbatten mentioned a popular mandate from the common masses on the instrument of accession. Since the entire independence movement of India was a democratic principle. This was a natural step from the administration of independent India. Like Operation Polo in case of Hyderabad and plebiscite in case of Junagadh are the other similar examples, which the administration of independent India followed to ensure compliance with the democratic principles. In case of Jammu and Kashmir, the popular mandate could be obtained when the territory of Jammu and Kashmir would be free from any external intrusion. On October 27, 1947 the Indian Army started its operation in Jammu and Kashmir. At this time the Pakistani intruders were controlling 650 square miles of territory of Jammu and Kashmir. When in October 1949, with the intervention of United Nations ceasefire was declared, the territory under the control of Pakistan was, almost 5100 square miles and almost 2,000,000 population of Jammu and Kashmir were under the control of Pakistan which was later on declared as a Pak Occupied Kashmir by India and Azad Kashmir by Pakistan. It is necessary to mention here that when Lord Mountbatten replied on behalf of the government of India, it was reassured that the instrument of accession would be taken as fully mature only after popular mandate by the people of Kashmir. The matter went to the United Nations when on the advice of Lord Mountbatten the first prime minister of India Pandit Nehru wrote a letter to the United Nations

² M.Laxmikanth, *Governance in India* (2nd edn, McGraw Hill Education India Pvt Ltd 2016) 16.1-16.3

stating Pakistan's illegal occupation be removed. Since the United Nations then was under the influence of the United States of America and Britain, the title of the letter was changed to a dispute between Pakistan and India with respect to Kashmir. And thereby even when the instrument of accession was signed in the favour of India. The territory became a disputed territory to the incorrect interpretation by the United Nations.³

The Indian government did not raise much objection to this as they were confident that the single largest and most popular party of Jammu and Kashmir is with them, that is the National Conference party of Sheikh Abdullah. Since the government of India was fully assured that in future they would go for popular mandate before declaring the instrument of accession as fully mature. When the constituent assembly was drafting the Constitution between 1947 and 1950, 12 representatives were sent by Sheikh Abdullah to see what special status would be provided to Jammu and Kashmir by the drafting committee. When voting on article 370 began, there was only one vote which was against its inclusion in the Constitution of India and that was of a Communist leader Hasrat Mohani. And thereby the inclusion of article 370 in the Indian constitution took place. International affairs, communication and defence related provisions of Jammu and Kashmir came under the control of the government of India and in the internal matters administration of Jammu and Kashmir was given complete autonomy. Like it was allowed to have its own flag, its own constituent assembly, its own constitution. The constituent assembly of Jammu and Kashmir accepted the provisions of article 370 of the Indian constitution and thereby also declared the relation between Jammu and Kashmir and India is irrevocable. It is important to mention here that it was made very clear from the very beginning that the provisions of article 370 are temporary and its provisions can be altered only with presidential reference and any new law enacted by the Parliament of India can be made applicable on Jammu and Kashmir with the same presidential reference. However, presidential reference was also required to have approval of the Jammu and Kashmir assembly. Thus there was a double check before any provision to be made applicable on Jammu and Kashmir. By 1953, the relation between Sheikh Abdullah and the government of India started to deteriorate. The government of India in 1953 replaced Sheikh Abdullah with Bakshi Ghulam Mohammad, who was a pro leader towards the government of India. From here on the mutual distrust between the administration of Jammu and

³ Shekhar Bandopadhyay, *From Plassey to Partition: A History of Modern India* (Orient Longman Private Limited 2004) 227-262

Kashmir and the administration of India started. In 1954 with presidential order, the government of India started to apply many provisions of the Constitution of India over the state of Jammu and Kashmir.⁴ If we now straightaway talk about August 5, 2019 out of 97, subject matters of the union list of schedule seven of the Constitution of India 94 were already applicable on the state of Jammu and Kashmir and out of 395 articles of the Constitution of India 260 articles were applicable on the state of Jammu and Kashmir. In this background, it is also being said that article 370 was already getting a slow death, which was completely decimated by the NDA government in 2019. On August 5, 2019, the government of India using the presidential reference method nullified the provisions of the article 370, statehood from the state of Jammu and Kashmir was taken away. Two union territories were created : the union territory of Jammu and Kashmir & the union territory of Ladakh.

ABROGATION OF ARTICLE 370 AND THE ISSUES

CONCERNED

The thought of abrogation of Article 370 did not come not overnight but was reiterated time and again by Bharatiya Janata Party (BJP) in its election manifesto. The founder of “Jan Sangh”, which eventually became “Rashtriya Swayamsevak Sangh” and its political wing named “BJP” , Shyama Prasad Mukherjee from the very beginning was against the giving of any special status to the state of Jammu and Kashmir and prior to his death in 1953 he manifested his such stand many times.

In contemporary times, the stone for change was laid down in 2015, with the alliance of People's Democratic Party (PDP) and the BJP to form a government in the state of Jammu and Kashmir. But BJP withdrew its support in 2018 leading to the resignation of the Chief Minister Ms. Mehbooba Mufti, followed by the issuance of a Proclamation of Governor's Rule (under Section 92 of the Jammu and Kashmir Constitution) and successive imposition of President's Rule (under Article 356 of the Indian Constitution). On considering the report of the Governor, the President issued a Proclamation declaring the assumption of functions of the Government of state and the Governor by the President, and that of the State Legislature by the Parliament. This proclamation was approved by both the houses of the parliament on 3 Jan 2019. The President's Rule was again extended for 6 months on 3 July 2019. After this on 5th August 2019 the President, in the exercise of powers under Article 370,

⁴ Bipin Chandra, *History of Modern India* (Orient BlackSwan Pvt Ltd 2009)

issued a Constitution (Application to Jammu and Kashmir) Order, 2019 making all the provisions of the Constitution of India applicable to the State of Jammu and Kashmir, and also made an addition of Clause 4 in the Article 376, modifying the interpretation of the term "constituent assembly" to "legislative assembly", in the proviso to Article 370(3). The ultimate effect of these two changes was that the Parliament got the power to abrogate Article 370. Since the President's Rule was subsisting in the State, the Parliament in the exercise of its power of State legislature recommended the President to cease the operation of Article 370 and at the same time accepted the Jammu and Kashmir Reorganisation Bill, 2019 bifurcating the State into two Union Territories. Finally on 6 August, 2019, the President issued an order declaring the abrogation of Article 370.⁵

Subsequently a batch of petitions were filed in the Supreme Court challenging the validity of the legislative and executive actions of the government in abrogating Article 370. The key submissions of the petitioners were⁶ :

1. The state of Jammu and Kashmir possesses 'internal sovereignty' over its matters and has ceded only 'external sovereignty' through the Instrument of Accession.
2. The imposition of Governor's rule under section 92 of the Constitution of Jammu and Kashmir, without affording an opportunity to the other parties to form government was void.
3. The President's rule under Article 356 was imposed without placing the Governor's Report before the Parliament. Such unilateral exercise of power sets a dangerous Precedent and renders the federal structure susceptible to the whims of the political party in power.
4. Article 357(2) provides that the laws made by the Parliament or President during proclamation under Article 356 may be subsequently altered or repealed by the state legislature. Article 356 being a temporary provision, the Parliament cannot make irreversible changes in the exercise of powers under this Article.
5. Article 370 could only be repealed on the recommendation of the State's Constituent Assembly. However, after the enactment of the Constitution of J&K and consequent cessation of Constituent Assembly, the only method available to repeal Article 370 was the use of Article 368 followed by its extension to the state of Jammu and Kashmir by Article 370(1)(d).

⁵ *In Re : Article 370 of the Constitution* [2023] INSC 1058

⁶ *ibid*

The "concurrence" required under proviso to Article 370(1), for issuing an executive order, cannot be obtained by the President from the Governor replacing the elected government of the state. The passing of executive orders on recommendation of Parliament acting as a proxy for the State Legislature of J&K, modifying Article 367 to substitute 'Legislative Assembly' for 'Constituent Assembly' shows the colourable exercise of President's Power.

The submissions of the petitioners were replied to by the Government of India stating that Kashmir had only limited autonomy and never had any sovereignty with it after signing of the Instrument of Accession in October 1947. Article 370 being a temporary provision designed to aid the process of constitutional integration of J&K, its abrogation was necessary to bring residents of J&K at par with other citizens of the country and the only mechanism available to repeal Article 370 was itself provided in clause 3 of Article 370. Article 370(3) provides that the President may, by public notification, declare the date from which Article 370 shall cease to operate, provided that the recommendation of the Constituent Assembly of the State shall be necessary before the issue of such a notification. Once the State Constituent Assembly ceased to exist, the proviso to Article 370(3) itself ceases to exist, making the President the sole repository of powers, having the duty to exercise this power in the interests of the residents of the State even in the absence of a recommendation.

Further, the procedure adopted to repeal Article 370 reflects the participation of the entire nation through their representatives in the Parliament and the use of Article 367 to replace the term 'constituent assembly' with 'legislative assembly' was a legitimate rule, necessary to democratize the decision making process of the President. Therefore, there was nothing unconstitutional in orders passed by the President in the exercise of powers under Article 356 and the procedure adopted for abrogating Article 370.⁷

The key issues involved in this case are:

- Nature of Article 370 : Temporary/ Permanent.
- Constitutional validity of President Rule imposed on 19 December 2018.
- Amendment of Article 367 to abrogate Article 370.

⁷ ibid

- Constitutional validity of the procedure adopted for abrogation of Article 370 by the President in the exercise of power under Article 370(3).

VERDICT IN RE: ARTICLE 370 OF THE CONSTITUTION

The verdict on the challenge to Abrogation of Article 370 was given by five-Judge Constitution Bench, comprising Chief Justice of India Dr. DY Chandrachud, J. Sanjay Kishan Kaul, J. Sanjeev Khanna, J. B.R. Gavai, and J. Surya Kant. The observations made in this case are as follows:

1. Article 1 of the Indian Constitution declares India to be a Union of States and Article 370 itself reiterated the application of Article 1 to the State of J&K. Also Section 3 of the Constitution of Jammu and Kashmir declares J&K as an integral part of India.⁸ Therefore, after the execution of the Instrument of Accession and the adoption of the Constitution of India in 1949, the State of Jammu and Kashmir could not be said to possess sovereignty.
2. Referring to the landmark ruling of *SR Bommai v. Union of India* (1994) which dealt with the powers and limitations of the Governor under President's rule, it was observed that the exercise of power by the President under Article 356 must have a reasonable nexus to the object of the Proclamation and the exercise of such power by the President will not be rendered invalid merely on the ground of 'irreversibility' of the actions. Also the person challenging the exercise of power must prima facie establish that it is a mala fide or extraneous exercise of power. After a prima facie case is made, the onus shifts to the Union to justify that the exercise of power had a reasonable nexus with the object of the Proclamation.⁹
3. The historical context and the placement of Article 370 in Part XXI of the Constitution of India containing "Temporary, Transitional and Special Provisions" shows that it was a temporary provision.¹⁰
4. The exercise of powers under Article 370 (3) of the Constitution by the President to unilaterally notify that Article 370 ceases to exist was valid and there was no requirement for the President to secure the concurrence of the State government in this regard as mandated by the proviso to Article 370(1)(d).¹¹

⁸ ibid [149]

⁹ ibid [229]

¹⁰ ibid [514 (e)]

¹¹ ibid [514 (h)]

5. The amendment of Article 370 using Article 367 is ultra vires because when a procedure is prescribed, it has to be followed. Use of an interpretation clause to bypass the procedure laid down for amendment is not permissible.¹²

The Bench unanimously upheld the Union government's action of abrogating Article 370 and the constitutional validity of J&K Reorganisation Act, 2019. While upholding the creation of union territory of Ladakh, a direction for restoration of statehood of Union territory of J&K and conduct of assembly elections by September 30, 2024 was also passed.¹³

ANALYSIS

The hon'ble Supreme Court with its verdict delivered on 11 December 2023 has reaffirmed the landmark doctrine of "Technicality cannot come in the way of legality". The apex court while endorsing the stand taken by the government of India clearly stated that the appropriate procedure adopted for amendment of Article 370 would be the use of Article 368 read with Article 370(3) while the Union of India used the interpretation clause related Article 367 with Article 370 to take the action of August 5, 2019. As per hon'ble Supreme Court, such an action was technically invalid, however, the developments that took place on the ground in the state of Jammu and Kashmir after the Abrogation of Article 370 justified the exercise of powers by the President. Quoting the statement of Minister of State for Home Affairs, Shri G. Kishan Reddy, "*With the conduct of elections of Panchayati Raj Institutions, the 3-tier system of grassroot level democracy has now been established in Jammu and Kashmir.*"¹⁴ Further the instances of stone pelting, ambush attacks on the defence forces has substantially reduced. So it can be said that the de facto situation in J&K has considerably improved, which the apex court while passing this verdict evidently acknowledged.

The decision of the Court legitimised some facts and created suspicion with respect to others. On one side it clearly legitimised that in the Indian democratic setup, the heavier democratic powers lie with the Union of India but at the same time it has left the entire discussion around Article 370 not only related to the state of Jammu and Kashmir but also to every Indian state where the party in rule is

¹² ibid [514 (g)]

¹³ ibid [514 (n)]

¹⁴ Government of India, 'Impact of Abrogation of Article 370 On J&K' (3 February 2021) Ministry of Home Affairs <<https://pib.gov.in/Pressreleaseshare.aspx?PRID=1694784>> accessed 28 December 2023

different from the party which is having majority in the Parliament of India. Justice Sanjiv Khanna in his concurring version stated, "*Conversion of a State into Union Territory has grave consequences, amongst others, it denies the citizens of the State an elected state government and impinges on federalism.*"¹⁵ Though the restoration of statehood of J&K is assured by the union of India, the precedent set by the Court has created a fear in the minds of other states.

It is to be noted that India has, in toto, four thousand one hundred and twenty six members of legislative assemblies and Eight hundred members of the parliament. As the number of representatives at the state level are five times more in number in comparison to the central representatives, it is an axiomatic fact that the lesser the numbers of representatives the lesser the momentum of grievance redressal. The representatives of the state governments being directly elected and more in number, play an important role in building a good democratic setup in the country. Therefore, the honourable Court should have set some guidelines for the future with regard to any such step by the government of India with respect to taking away the statehood of a state.

CONCLUSION

Scott Pruitt, the former attorney general in the USA once stated "Federalism is not when the Union dictates to the rest of the country what should occur in their jurisdictional area". Even when Bhagat Singh, Mahatma Gandhi and other revolutionaries were fighting for the cause of Independent India, they had this fear in their minds that the white masters might not be replaced by the brown masters. Such action by the Union be it clamping down of the Presidential rule in the entire country in 1970's by the Indira Gandhi government or without common consensus taking away the statehood of a state for so long as in the case of Jammu and Kashmir, the spirit of federalism gets highly affected.

The hon'ble Prime Minister of India Sh. Narendra Modi recently stated that "Federalism is no longer the fault line of Centre-State relations but the definition of a new partnership of Team India. Citizens now have the ease of trust, not the burden of proof and process. Businesses find an environment that is open and easy to work in." We as the citizens of India can really hope for the true federalism being shown not merely in words but also in actions by the present and future governments.

¹⁵ *In Re : Article 370 of the Constitution* [2023] INSC 1058