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ABROGATION OF ARTICLE 370:

PARLIAMENT'S *BLITZKRIEG* TO FORGET A PAST PROMISE

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Jammu and Kashmir – a Princely State of serene beauty that later stood amidst our neighbour, culturing chaos and nourishing critical international attention. After a year-long confusion and turmoil, since the Indian Independence of 15th August 1947, the Princely State of Jammu and Kashmir acceded to India by an ‘Instrumentality of Accession’ on 27th October 1947.¹

On 5th August 2019, the storyline takes a deviation after seven decades by a few historic measures made by the Union Legislature and Executive. First, a Presidential Order to provide interpretation rules for provisions in the Constitution related to Jammu and Kashmir. Second, a Statute was brought forth bifurcating the then Union Territory of Jammu and Kashmir into Jammu and Kashmir, and Ladakh; Third, a resolution for repealing Article 370 of the Constitution of India that had given special status to Jammu and Kashmir.² To suppress any dissent and media coverage of what really happened at the state affected, the Centre immediately imposed internet breakage, communication clampdown, continuous blockade on the free flow of information by media, detention of opposing youth and political leaders, and imposition of s.144 CrPC.³ The methodology is identical to *Blitzkrieg* - an attacking scheme inculcating speed, vigour and surprise, used by the German military to win WWII, but this time, to win over the past and the future; to portray themselves as the leadership who corrected the historic blunder as they say to become ‘saviour’.

1. V.P MENON, ‘INTEGRATION OF THE INDIAN STATES P.P 397-400; Gandhi, Patel pp.442-444
2. Press Information Bureau Government of India, ‘Two Bills and Two Resolutions passed in Rajya Sabha unanimously; New Delhi; August 5, 2019
3. The Wire, ‘Crippling Communication Clampdown Takes a Toll on Kashmir’s Districts Reporters’; Majid Maqbool, October 26, 2019,

Brief Facts and Procedural History

The once scattered territories were unified as a single state by the *Dogra* clan from Jammu in the nineteenth century, who later conquered Ladakh in 1830s. They then conquered Kashmir Valley in 1840s. They moved into Gilgit by the end of the century. Thus the state of Jammu and Kashmir came into existence.⁴

In 1947 this princely state of 84,471 miles was ruled by Maharaja Hari Singh, a Hindu, who ascended the throne in 1925 to rule over a Muslim majority population (almost 53%). There was oppression, biased governmental appointments and other corruptions favouring Hindus. As his fourth and youngest queen complained, he just sits surrounded by fawning courtiers and favourites, and never really gets to know what is going on outside.⁵ Thus an All-Jammu-Kashmir Muslim Conference was constituted in 1932, which later came to be called National Conference with Sheikh Abdullah as its lead and included Hindus and Sikhs this time. It wanted to stand against the unaccountable nature of the Maharaja.⁶ The princely state was offered two choices- to join either India or Pakistan. As the state shared borders between the two dominions, the strategic importance was at its peak. On 15th July 1946, Maharaja stated that the Kashmiris would 'work out our own destiny without dictation from any quarter which is not integral part of the State'.⁷ Lord Mountbatten and even Mahatma Gandhi's visits failed absolutely. The situation got into utmost stress during October 1947, when tribes force of Pathans from Pakistan crossed the border, briskly made their way towards Srinagar and then to Uri, Mahuta and Baramulla.⁸

4. RAMACHANDRA GUHA , 'INDIA AFTER GANDHI', Chptr 4: 'A Valley Bloody and Beautiful' pp 60, Alastair Lamb, Kashmir: A Disputed Legacy, 1846-1990 (Karachi: Oxford University Press, 1992)
5. Karan Singh , 'Autobiography' revised edn (Delhi: Oxford University Press, 1994), pp 18-19
6. RAMACHANDRA GUHA , 'INDIA AFTER GANDHI', Chptr 4: 'A Valley Bloody and Beautiful' pp 61
7. RAMACHANDRA GUHA , 'INDIA AFTER GANDHI', Chptr 4: 'A Valley Bloody and Beautiful' pp 62
8. RAMACHANDRA GUHA , 'INDIA AFTER GANDHI', Chptr 4: 'A Valley Bloody and Beautiful' pp 64

They were armed with modern weapons, wore the battle dress of regular soldiers and used the tactics of modern warfare.⁹ The aim of the attack was to foment an internal revolution in Kashmir.¹⁰ On 24th October Maharaja wired Indian Dominion for military assistance. After a few Defence Committee meetings in New Delhi, listening to suggestions by Lord Mountbatten, that “it would be best to secure Hari Singh’s accession to India before committing any forces to his defence, otherwise Indian troops would be entering a foreign country”, V. P Menon took the flight to Kashmir where Maharaja had taken refuge. Maharaja agreed to accede at once. Menon took the signed Instrument of Accession back with him to Delhi.¹¹

Thus, by virtue of the Instrument of Accession of Jammu and Kashmir, Shriman Inder Mahendra Rajrajeshwar Maharajadiraj Shri Hari Singh, Ruler of Jammu and Kashmir acceded to the Dominion of India. The major conditions made were that, the subject matter related to Schedule I (defence, external affairs, communications and ancillary matters including elections) can only be legislated by Dominion Legislature; the terms shall not be varied by any Amendment or Indian Independence Act, 1947 unless accepted by Maharaj by supplementary Instrument; land acquisition cannot be done by Indian Dominion, except for Schedule I but only on its own expenses; also, this Instrument is not a commitment to accept future Indian Constitution.¹² At dawn on the 27th October, the first plane left Delhi for Srinagar with troops and arms aboard and more than a hundred planes followed, carrying soldiers and supplies and bringing back refugees and the wounded.¹³

9. “Memorandum to the Security Council”, 1 January 1948. Choudhary (ed.), supra note 14, vol. 8, pp. 392-393

10. Ibid

11. V.P MENON, ‘INTEGRATION OF THE INDIAN STATES P.P 397-400; Gandhi, Patel pp.442-444

12. Instrument of Accession of Jammu and Kashmir signed on 27th October 1948.

13. S.N Prasad and Dharm Pal, History of Operations in Jammu and Kashmir (1947-1948) (New Delhi: Ministry of Defence, 1987) pp. 28f., 379

A temporary set up for Jammu and Kashmir in the Indian Constitution was suggested by B. N Rao due to three reasons. Firstly, the state was undergoing a war. Despite a UN Ceasefire Declaration, the state was suffering from abnormal and unusual times. Secondly, part of the state was still within the control of the rebels. Thirdly, the matter was taken up by the United Nations and not settled completely.¹⁴ But there was an issue whether a ruler could accede to a foreign nation without the consent of his people. From the memorandum to United Nations Security Council and many letters sent by the then Indian Prime Minister Jawaharlal Nehru to Maharaj, it is evident that Indian Dominion wanted to know the will of the people after invaders left the state and peace was restored.¹⁵ This was to be made through a plebiscite, which is a direct vote by the people of a country or region in which they say whether they agree or disagree with a particular policy. But it was never conducted.

Unconstitutional Ventures on 5th August 2019

The state of Jammu and Kashmir was under President's rule¹⁶ in accordance with Article 356 of the Constitution at the time of abrogation of Article 370 and bifurcation of state. Firstly, the President issued the **Constitution (Application to Jammu and Kashmir) Order, 2019** ("C.O. 272") under Article 370(1)(d)¹⁷ which stated that the "concurrence of the Government of the State of Jammu and Kashmir" is necessary. However, since the State was under President's rule, the concurrence was obtained from the Governor of Jammu and Kashmir acting on behalf of the President. The above order extended all provisions of the Constitution, as amended from time to time, to the State of Jammu and Kashmir and modified Article 367 of

14. K.M. Munshi, *Indian Constitutional Documents: Pilgrimage to Freedom* (Mumbai: Bharatiya Vidya Bhavan, 2013), vol. 2, at p. 434

15. Dr. Abhinav Chandrachud, 'THE ABROGATION OF ARTICLE 370' pp.7

16. <http://egazette.nic.in/WriteReadData/2018/194042.pdf>

17. INDIA CONST. art. 370, cl. 1.d.

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the Constitution in relation to the State by replacing the expression “Constituent Assembly of the State” with “Legislative Assembly of the State” in the proviso to Article 370 (3). Secondly, the Parliament issued another notification; **Constitution Order 273**¹⁸ declaring the cessation of Article 370 except an amended clause which provided that all provisions of the Constitution, as amended from time to time, and without any modifications or exceptions would be applicable to the State of Jammu and Kashmir. Thirdly, Parliament enacted **the Jammu and Kashmir Reorganization Act, 2019**¹⁹ which took away the statehood of J&K altogether and divided the state into two union territories: Jammu and Kashmir, and Ladakh; the former with a separate Legislative Assemblies and the latter without one.

The aforementioned events prompted to question on the constitutional validity of the nature of presidential rule, the procedure adopted by the parliament to abrogate Article 370 and the bifurcate the state during the operation of President's rule.

Regarding the abrogation of Article 370, clause 3 of the same provided that the recommendation of the Constituent Assembly of the State shall be necessary before the President issues such a notification. Further, in *State Bank of India v. Santosh Gupta*, (2017)²⁰, the Supreme court reiterated that the President cannot issue an order ceasing to make Article 370 operative without the recommendation of the Constituent Assembly of J&K. However, the President did not obtain the recommendation of the Constituent Assembly of J&K to modify the definition of “Constituent Assembly of the State” in the proviso to Article 370(3) of the Constitution. The C.O. 272, which sought to change the definition of “Constituent Assembly of the State” of J&K in Article 370(3) of the Constitution by adding a

18. <http://egazette.nic.in/WriteReadData/2019/210243.pdf>

19. Jammu and Kashmir Reorganisation Act, 2019, No. 34, Acts of parliament,

20. *State Bank of India v. Santosh Gupta*, (2017) 2 SCC 538.

clause to Article 367 of the Constitution is illegal. Article 370(3) says that Article 370 itself cannot be modified without the recommendation of the “Constituent Assembly of the State”. By changing the definition of “Constituent Assembly of the State” in Article 367, the President has, in effect, modified Article 370 without the recommendation of the Constituent Assembly of the state.²¹ Moreover, a constituent assembly was a political body made to draft a constitution while a legislative assembly was elected by the people and had to strictly work within the confines of the Constitution. Thus, the Indian parliament, under the current constitutional framework, could not convert itself into a Constituent Assembly. Since October 1947, the underlying understanding between India and J&K was that the Instrument of Accession was the basis of J&K's accession to India and that no change would be made to it without the consent of the people. Notwithstanding, the Government of India has altered the constitutional position of J&K without the elected representatives of state. For this reason, the President's declaration under C.O. 273, which relies on the resolutions of both houses of parliament instead of the state legislature of J&K, violates the spirit of Article 370 of the Constitution.

Correspondingly, the amendment of Article 370 through Article 367 is invalid. A simple amendment to Article 367, instead of following the process under Article 368, provides incentives to executive to carry out substantive amendments under the guise of amending the definition clauses which would result in grave repercussions for the democratic set up of the country. This backdoor amendment without the invocation of Article 370(3) had been executed as Article 370 could not have been amended directly without the recommendation of the Constituent Assembly of J&K. This clever movement by the parliament shall be read together with the swift dissolution.

21. The Abrogation of Article 370 , Dr. Abhinav Chandrachud , <https://ssrn.com/abstract=3448331> .

of the legislative assembly of the state to infer the politically motivated objective behind the act.

With regard to the imposition of President's rule in the state, it was in light of a political crisis in the State due to the majority government losing its support in the Assembly and the incapability to form an alternate government commanding the confidence of the Assembly. However, abrogation of article 370 and bifurcation of the state on account of curbing terrorism and promoting full integration of Jammu and Kashmir falls outside the scope of intended objective of the proclamation which was a political crisis in reality. Therefore, the President and Parliament have acted beyond the scope of their constitutionally-prescribed powers in relation to Article 356.²² The Jammu and Kashmir Reorganisation Act, 2019 is constitutionally invalid. The Supreme Court has said that India is "an indestructible Union of destructible units."²³ The court has also held that Parliament cannot merely change the boundaries of a state but also "extinguish a State".²⁴ However, under the 1954 Presidential order, before exercising any powers under Article 3 of the Constitution in Jammu Kashmir, Parliament was required to secure the consent of the state legislature there. Therefore, the act of repealing the 1954 order without the concurrence of the state legislature shall be rendered unconstitutional. Curtailing fundamental rights (Part III) of the Constitution by restricting communication, assembly, free movement, information and others in the name of sovereignty and integrity of the country reminds Lord Acton's words, "All power tends to corrupt and absolute power corrupts absolutely".

22. The Abrogation of Article 370 And Bifurcation Of Jammu And Kashmir – A Bridge Too Far , Kashish Mahajan, IJCL, NALSAR,

Available at: https://ijcl.nalsar.ac.in/wpcontent/uploads/2020/08/9IndianJConstL106_Mahajan.pdf

23. Raja Ram Pal v. Hon'ble Speaker, Lok Sabha, (2007) 3 SCC 184.

24. Kuldip Nayar v. Union of India, (2006) 7 SCC .

Conclusion

The matter is currently pending before the Hon'ble Supreme Court of India. It is the need of the hour to put an end to the never-ending disputes regarding the permanence of Article 370 post the dissolution of Constituent Assembly and to declare a valid successor to the same. Besides, it is pertinent to define the scope and extent of President's rule in relation to Article 356 in this context. In the exercise of Constitutional interpretation, intentions of the Constitutional drafters, wherein the citizens submit their last hope, shall not be sidelined at any cost.