

Constitutionality of the Reorganisation of Jammu and Kashmir

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Introduction

On 5 August 2019, it was history in the making, when the Indian government under the leadership of Prime Minister Narendra Modi reorganised the state of Jammu and Kashmir into (i) the Union Territory of Jammu and Kashmir with a legislature and (ii) the Union Territory of Ladakh without a legislature. The government, while taking this momentous step took into account two aspects; firstly the Ladakh Division of Jammu and Kashmir had a large but sparsely populated area with very difficult terrain. Moreover, the long pending demand of the people of Ladakh for a Union Territory status for the region was seen as ineludible for them to realise their aspirations. Secondly, the constant cross border terrorism in the existing State of Jammu and Kashmir also raised severe concerns regarding the internal security situation. This article, however, will deal with the question of the legal sanctity accorded while taking such a decision, delving into the legality concerning the reorganisation of the state of Jammu and Kashmir. The legal aspects which this article will consider are as under:

- A. Article 370 of the Indian Constitution
- B. The Constitution (Applicable to Jammu and Kashmir) Order, 1954 (C.O.48)
- C. The Constitution (Applicable to Jammu and Kashmir) Order, 2019 (C.O.272)

- D. Articles 2-3 of the Indian Constitution
- E. The Jammu and Kashmir Reorganisation Act, 2019

Article 370 of the Indian Constitution

Article 370 is part of Part XXI of the Constitution which provides for temporary, transitional and special provisions. The heading of this Article in the Constitution speaks for itself as it categorically states that this is only a temporary provision concerning Jammu and Kashmir. Article 370(1)(d) states that such of the other provisions of the Constitution shall apply concerning Jammu and Kashmir subject to such exceptions and modifications as the President may, by order specify. This provision then has two provisos with the first being that no such order, which relates to the matters specified in the Instrument of Accession of Jammu & Kashmir¹ referred earlier in Article 370(b)(i) shall be issued except in consultation with the State Government. The second proviso is that no such order which relates to matters other than those referred aforesaid shall be issued except with the concurrence of this government. This provision also states that no such order which relates to matters other than those referred to above shall be issued except with the concurrence of the State Government.

This Article defines the Government of the

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State of Jammu and Kashmir for the purposes of this very Article to be...

The person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated 5th March, 1948.

The Hon'ble Supreme Court of India in the case of *SBI v. Santosh Gupta*² ruled that the provisions of the Indian Constitution other than those covered by Article 370(1)(b) would apply to the State of Jammu and Kashmir subject to such exceptions and modifications as the President may by order specify in the exercise of power under Article 370(1)(d) as explained above.

Clause 3 of the Instrument of Succession governing the accession of Jammu and Kashmir to the Dominion of India³ stated that the Maharaja of Jammu and Kashmir accepted the matters specified in the schedules thereto as the matters concerning which the Dominion Legislature may make laws of the state of Jammu and Kashmir. As per this schedule, the matters with respect to which the Dominion Legislature could make laws of this State pertained broadly to (A) Defence, (B) External Affairs, (C) Communication and (D) Ancillary such as *inter alia* elections to the Dominion Legislature, subject to the provisions of the Government of India Act, 1935 and of any order made thereunder and jurisdiction and powers of all courts with respect to the aforesaid matters.

Therefore, as per the Santosh Gupta judgment, the provisions of the Indian Constitution other than those pertaining to the aforesaid matters as well as those matters in the Union and Concurrent Lists,

which in consultation with the Government of Jammu and Kashmir, are declared by the President to correspond to these matters specified in the Instrument of Accession, would apply to the State of Jammu and Kashmir subject to such exceptions and modifications as the President may by order specify in exercise of power under Article 370(1)(d). Article 370(3) gives the power to the President, who may notwithstanding anything in the foregoing provisions of this article, by public notification, declare that this Article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify. This clause also has a proviso which states that the recommendation of the Constituent Assembly of the State of Jammu and Kashmir shall be necessary before the President issues such a notification. Furthermore, as per Article 370(c), the provisions of Articles 1 and 370 would apply concerning the State of Jammu and Kashmir respectively as well in addition to the above.

The Constitution (Applicable to Jammu and Kashmir) Order, 1954 (C.O.48)

In exercise of the powers conferred by Article 370(1) of the Constitution, the President, with the concurrence of the Government of the State of Jammu and Kashmir, made the Order known as the Constitution (Application to Jammu and Kashmir) Order, 1954. This order provided for the provisions of the Indian Constitution which in addition to Article 1 and 370, would apply concerning the State of Jammu and Kashmir and also stated the exceptions and modifications subject

to which they would so apply. This order *inter alia* added sub-clause (4) to Article 367 whereby references to the Government of this State after 10 April 1965 would be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers.

The Constitution (Applicable to Jammu and Kashmir) Order, 2019 (C.O.272)⁴

In exercise of the powers conferred by Article 370(1) of the Constitution, the President, with the concurrence of the Government of the State of Jammu and Kashmir, made the Order known as the Constitution (Application to Jammu and Kashmir) Order, 2019 on 5 August 2019. This order came into force at once and thus superseded the aforesaid earlier order of 1954. As per this Order, all provisions of the Constitution as amended from time to time would apply concerning the State of Jammu and Kashmir. Further as per this order, there was an addition to Article 367 as far as its application in this State was concerned. These additions included *inter alia* in the proviso to clause (3) of Article 370 of the Indian Constitution, the expression “Constituent Assembly of the State referred to in clause (2)” would be read as “Legislative Assembly of the State”.

Articles 2-3 of the Indian Constitution

Article 2 provides for the Parliament to make a law to admit into the Union, or establish, new States on such terms and conditions as it thinks fit. Further Article 3 states that Parliament may by law *inter alia* form a new State by separation of the territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State as well as alter the

boundaries of any State. However no Bill for this purpose shall be introduced in either House of Parliament except on the President’s recommendation and unless, where the proposal contained in the Bill affects the area, boundaries or name of any of the States, the Bill has been referred by the President to the Legislature of that State for expressing its views thereon within such period as may be specified in the reference or within such further period as the President may allow and the period so specified or allowed has expired.

It is important to note that as per the Explanation I to this Article, the word ‘State’ as referred above concerning Article 3 includes a Union Territory except the aforesaid proviso. Moreover as per Explanation II to this Article, the power is conferred on Parliament to form a new State by separation of the territory from any State or by uniting two or more States or parts of States or by uniting any territory to a part of any State as well as alter the boundaries of any State, includes the power to form a Union Territory by uniting a party of an State or Union Territory to any other State or Union Territory.

The Jammu and Kashmir Reorganisation Act, 2019

The Jammu and Kashmir Reorganisation Bill, 2019 was introduced in the Rajya Sabha or Upper House of the Parliament of 5 August 2019 by the Home Minister, Shri Amit Shah. The Bill provided for the reorganisation of the state of Jammu and Kashmir into the Union Territory of Jammu and Kashmir (with a legislature) and Union Territory of Ladakh (without a legislature). Thereafter on 9 August 2019, the Jammu and Kashmir

Reorganisation Act, 2019 was enacted for the reorganisation of the existing State of Jammu and Kashmir and matters connected therewith or incidental thereto.⁵ These connected/incidental matters include inter alia (i) reorganisation of Jammu and Kashmir (Sections 3-4), (ii) provision of a Lieutenant Governor (Sections 5 and 58), (iii) Legislative Assembly of Jammu and Kashmir (Section 14), (iv) Council of Ministers (Section 53), (v) High Court (Sections 75-77), (vi) Abolition of Legislative Council (Section 57), (vii) Advisory Committees being appointed by the Central Government for various purposes including (a) distribution of assets and liabilities of corporations of the existing State of Jammu and Kashmir between the two Union Territories, (b) issues related to the generation and supply of electricity and water and (c) issues related to the Jammu and Kashmir State Financial Corporation (Section 85) and (viii) Extent of laws which includes 106 central laws that would be made applicable to the Union Territories of Jammu and Kashmir and Ladakh on a date notified by the central government as well as repeal of 153 state laws being repealed and 166 state laws that would continue to remain in force (Section 95).

Analysis in the Light of the Aforesaid Legal Provisions

As per the Presidential Order of 2019, all provisions of the Indian Constitution as amended from time to time would now apply concerning the State of Jammu and Kashmir subject to the exceptions and modifications as specified in this order in exercise of the power under Article 370(1)(d). The exceptions and modifications

specified therein include the concurrence of the Legislative Assembly of the State of Jammu & Kashmir in the light of the proviso to Article 370(3) while passing such order. Concerning the reorganisation of the State into the Union Territories of Jammu & Kashmir and Ladakh respectively, Article 3 of the Constitution categorically permits that the Parliament may by law i.e. the Jammu & Kashmir Reorganisation Act, 2019, form a new Union Territory by separation of the territory from any State.

Therefore there is no illegality in there being two separate Union Territories of Jammu & Kashmir and Ladakh and all provisions of the Indian Constitution applicable to them. There has been no abrogation of Article 370 of the Constitution, though some of its provisions have been removed. Article 370 was brought in at a time when the Indian Constitution was not fully implemented in the state of Jammu & Kashmir. Based on the instrument of accession, certain powers were given to the erstwhile State of Jammu & Kashmir but there was a power reserved to apply the Indian Constitution over some time by Presidential Orders to this State. However, this provision was only temporary and not permanent in nature.

The Presidential Order of 1954 had introduced the fundamental rights with ifs and buts to this State. However, the Presidential Order of 2019 has now taken this away and the entire Indian Constitution is now applicable to Jammu & Kashmir. As far as the reorganisation of states is concerned, it has been happening in India all along. Examples of such reorganisation include the formation of new States of Chattisgarh, Uttarakhand and Jharkhand and

more recently, the formation of the State of Telangana. The President has to send the recommendation of the State to the Union and then the Union Parliament passes the reorganisation law. In the case of Jammu & Kashmir, as the Assembly had been dissolved, the Parliament seized the powers and acted as a State Assembly as per Article 356(1)(b). This article states that the President while proclaiming an emergency on account of the failure of the constitutional machinery in the State, may declare that the powers of the Legislature of the State shall be exercisable by or under the authority of Parliament.

Thereafter, it sent the recommendation and reorganisation bill and Parliament acting as the Parliament passes it. There is nothing illegal about it. In fact reorganisation of Jammu & Kashmir and substitution of the 1954 Presidential Order with the 2019 Presidential Order have nothing to do with each other. Even without reorganising the State as per Article 3 of the Constitution, the Presidential Order could have still been substituted as per Article 370(1)(d). In the present scenario,

there has been no amendment to the Constitution. By way of the Presidential Order of 2019, the government has introduced the whole Constitution to Jammu & Kashmir instead of introducing it in bits and pieces as was the case when the Presidential Order of 1954 was in force.

Conclusion

In my view, the exception to the fundamental rights which had been created has been taken away and the fundamental rights have been given full play in Jammu & Kashmir. This only strengthens and does not violate the basic structure doctrine as laid down in the Keshavanand Bharti case⁶. The governance of the two newly created union territories will now presently be in the hands of the Centre through their respective governors. A major surgery of attaching a body part rather than detaching it has been done and that the erstwhile state of Jammu and Kashmir (Now the Union Territory of Jammu and Kashmir and the Union Territory of Ladakh) is now fully integrated with India.

References:

- 1 *Instrument of Accession of Jammu and Kashmir dated 26th October 1947 by Hari Singh, Maharaja Dhiraj of Jammu and Kashmir and by Mountbatten of Burma, Governor-General of India accepted on 27th October, 1947.*
- 2 (2017) 2 SCC 538.
- 3 Ibid.
- 4 *Ministry of Law and Justice (Legislative Department), Notification dated 5th August 2019, G.S.R (E).*
- 5 *Received the assent of the President on 9th August 2019, published in the Gazette of India, vide Extra., Part II, Section 1, No. 53, dated 9th August 2019.*
- 6 *Keshavnanda Bharti v. the State of Kerala, AIR 1973 SC 1461*



