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A Reflection on Possibility of Abrogation of Article 370 of the Indian Constitution

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Introduction:

On August 15, 1947, when India became independent, J&K was not a part of its territory. It was only by the Instrument of Accession, dated 27.10.47, signed by the Maharaja of J&K that the state acceded to the Dominion of India. By clause 3 the Maharaja accepted that the matters specified in the schedule are the matters with respect to which the dominion legislature may make laws for the state of J & K. The instrument further provided that the terms of instrument shall not be varied by an amendment to the Act or the Indian Independence Act, unless such amendment was accepted by the Maharaja. The instrument also clearly laid down that nothing in the instrument shall be deemed to commit the state in any way to the acceptance of any future Constitution of India. This instrument accepted only a limited number of matters -- Defence, External Affairs and Communications -- with respect to which the Indian legislature could make laws for J&K. This special relationship of J&K found its reflection in Article 370 of the Indian Constitution which laid down that notwithstanding anything in the Constitution, the powers of Parliament to make laws for the state shall be limited to those matters in the Union List and the Concurrent List, which, in consultation with the government of the state, are declared by the President to correspond to matters specified in the Instrument of Accession, and such other matters in the said lists with the concurrence of the state the President may by order specify. Thus by virtue of Article 370 Parliament can legislate for J&K on matters other than those mentioned in the instrument but only after obtaining the concurrence of the state of J&K. Thus J&K has special status, unlike the other states in India where Parliament can legislate on its own

on subjects mentioned in the Union and concurrent lists. It is no doubt true that Article 370(3)[1] provides that the President may by notification declare that this article shall cease to be operative, but the proviso clearly lays down a limitation that the recommendation of the Constituent Assembly of the state shall be necessary before the President issues such a notification. It is not disputed that the Constituent Assembly of J&K has never given any such recommendation. Constituent Assembly of Jammu and Kashmir was dissolved on 26 January 1957 and the Jammu and Kashmir Constitution came into effect.[2] The aim of the present write-up is mainly to explore and dwell upon the legal possibility of abrogation of Article 370 within the framework of the Indian Constitution.

(1) Original View of the Pioneer Campaigners of Abrogation of Article 370

Constituent Assembly of Jammu and Kashmir stands dissolved on 26 January 1957. Hence no occasion and question whatsoever of obtaining any recommendation of the Constituent Assembly of Jammu and Kasmir arise for any purpose. Presidential (i.e. Central Government) notification simpliciter would suffice to do away with Article 370 by invoking doctrines of impossibility of performance and executive necessity.

(2) Other Views

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[1] . Article 370 (3)- Notwithstanding anything in the foregoing provisions of this article, the President may, 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: Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

[2] . Rajindar Sachar (Retired Chief Justice of the High Court of Delhi), "Abrogation of Article 370 not possible", The Tribune, May 11, 2014

(i) Reconvene the Constituent Assembly of Jammu & Kashmir (consisting of surviving members, if any, of the erstwhile Constituent Assembly dissolved on 26 January 1957 and remaining vacancies duly filled through election based on adult suffrage) and persuade it to give a recommendation for the abrogation of Article 370 followed by requisite presidential notification in terms of Article 370(3).

(ii) The Parliament of India may bring out a Constitutional Amendment under Article 368 of the Constitution qua repeal of Article 370. It will be followed by a Presidential order to that effect in terms of Section 15, Part XX of the Constitution (Application to Jammu and Kashmir) Order, 1954 and it reads thus- to clause (2) of article 368, the following proviso shall be added, namely: — "Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under clause (1) of article 370."

In view of Article 370(1), such Presidential order may be issued only with the concurrence of Government of the State (i.e. the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Rayasat (now Governor) of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office).

(iii) According to Clause (1) (c) of Article 370, the only Articles of the Constitution of India which applied of their own force to the State were Articles 1 and 370. Clause (1) (d) of Article 370 provides that the other provisions of the Constitution of India applicable to the State could be determined by the President of India- in consultation re "matters specified in the Instrument of the Accession of the State" and - with the Concurrence re "other matters"- with the Government of the State. Exceptions and modifications could be made in the same manner and the provisions could be enlarged too. Power to modify includes a power to enlarge or add to an existing provision. Therefore, the term 'temporary' has been used in Article 370 so as to minimise the difficulty in the way of the amendment of the Constitution of India, whenever the necessity arises to modify or extend the scope of other provisions of the Constitution of India.

At the time of their accession, it was made clear to all Indian States that their internal autonomy would be safeguarded and they would not be obliged to accept the Constitution of India. But

whereas other Indian States lost their independence by supplementary instruments and by agreeing to the settlement of their constitutional position and powers by the Constituent Assembly of India, Kashmir chose to remain a unit of the Indian Federation only on the terms and conditions specified in the Instrument of Accession. The State, if it chose to assimilate its status to that of other Indian States, could do so by a supplementary instrument signed by the Sadar-i-Riyasat (as advised by elected Council of Ministers headed by Prime Minister i.e. elected government) on the recommendation of the State legislature. (Note: On April 10, 1965, the nomenclatures of Sadar-e-Riyasat (Head of the State) and Wazir-e-Azam (Prime Minister) changed to Governor and Chief Minister in State Constitution. From 17 November 1952 to 30 March 1965, Sh. Karan Singh was the head of State of Jammu and Kashmir. On 30 March 1965 he became first Governor of Jammu and Kashmir and remained in office till 15 May 1967). This legal position was set at rest by the Supreme Court of India in the case of Prem Nath Kaul v. the State of Jammu and Kashmir[3] wherein it was observed: "We must, therefore, reject the argument that the execution of the Instrument of Accession, affected in any manner the legislative, executive and judicial power in regard to the Government of the State, which then vested in the Ruler of the State." Again, the Supreme Court of India in the case of Rehman Shagoo v. State of Jammu and Kashmir[4] said: "When certain subjects were made over to the Government of India by the Instrument of Accession, the State retained its power to legislate even on those subjects so long as the State law was not repugnant to any law made by the Central Legislature."[5]

(iv) It is no doubt true that Article 370(3) provides that the President may by notification declare that this article shall cease to be operative, but the proviso clearly lays down a limitation that the

[3] . AIR 1959 SC 749

[4] . AIR 1960 SC 1. Also see Sant Singh v. State (AIR 1959 J & K 35); Division bench judgment of J&K High Court re Bhupinder Singh Sodhi and Ors, Santosh Gupta v. Union of India and Ors (OWP No. 530 of 2007 and OWP No. 1031 of 2004), DOD 16/07/2015; Division bench (Justice Hasnain Massodi and Justice Janak Raj Kotwal) Judgment of J&K High Court on Oct 09, 2015

[5] . Adarsh Sein Anand (Former Chief Justice of India; Former Chairman, National Human Rights Commission; and Former Chief Justice of the J&K High Court), "Enactment and Scope of Article 370", The Tribune, 3 July 2014.

recommendation of the Constituent Assembly of the state shall be necessary before the President issues such a notification. It is not disputed that the Constituent Assembly of J&K never gave any such recommendation before its dissolution on 26 January 2016. In that view Article 370 cannot be withdrawn by Parliament purporting to exercise the power of amendment given by Article 368. That the power to amend the Constitution is not totally unfettered admits of no disputes vide the famous case of Keshvanand Bharthi, (1973) in which the Supreme Court held that a "Constitution like ours contains certain features which are so essential that they cannot be changed or destroyed"[6]

3. Some other Provisions in the Indian Constitution somewhat akin to Article 370

Article 371 provides for a special responsibility of the Governor for the establishment of separate development boards for Saurashtra and Kutch (in Gujarat) and Vidharba in Maharashtra for an equitable allocation of funds for the development of the area. (Also see Articles 371A(1)(b), 371C, 371H qua special responsibility of the Governors in the States of Nagaland, Manipur, Arunachal Pradesh respectively in certain matters). Articles 371A and 371G provide that no Act of Parliament in respect of the ownership and transfer of land shall apply to the States of Nagaland and Mizoram unless the Legislative Assemblies of Nagaland and Mizoram by resolutions so decide. The Articles 371A and 371G further provide that no parliamentary law- dealing with religious or social practices of Nagas/Mizos, Naga/Mizo customary law and procedure, administration of civil and criminal justice involving decisions according to Naga/Mizo customary law- unless the Legislative Assemblies of Nagaland and Mizoram by resolutions so decide. The traditional Naga practices bar women from inheritance.As per one of the study, a woman from Ao tribe can neither become a member of the traditional tribe/clan/village council nor inherit ancestral land, purportedly owing to her 'physical weakness'. According to the customary laws of the Chakhesang Nagas, when a married woman is caught in adultery, she must leave her husband's house with only her clothes she is wearing,

[6] . See Supra note 2

and pay a fine depending on the gravity of the situation. Whereas, if a married man brings his lover and creates disharmony in the family, he will have to give his wife half his property acquired during his marriage life. These provisions are identical, to some extent, to Article 370 of the Constitution regarding J & K. It may be pertinent to mention herein that In the USA such is the extent of State autonomy that an advocate getting his law degree from Washington University cannot as a matter of right practice in the State of New York.

4. Conclusion

The study brings out that there are myriad divergent view points on the legal possibility of abrogation of Article 370 on the touchstone of Indian Constitution. However, the Constituent Assembly which was convened on the basis of adult suffrage comprising the representatives of the people of the State and which represented the people of the entire State in unequivocal terms ratified the State's accession to India, through a well-considered resolution of the Constituent Assembly on February 15, 1954. The Preamble to the Constitution of Kashmir reads: "We, the people of the State of Jammu and Kashmir, having solemnly resolved, in pursuance of the accession of this State to India which took place on the twenty-sixth day of October, 1947, to further define the existing relationship of the State with the Union of India as an integral part thereof, and to secure to ourselves JUSTICE, social, economic and political;/ LIBERTY of thought, expression, belief, faith and worship;/ EQUALITY of status and of opportunity; and to promote among us all;/ FRATERNITY assuring the dignity of the individual and the unity of the Nation./ In our Constituent Assembly this seventeenth day of November, 1956, do hereby adopt, enact and give to ourselves this constitution." The people of the State of Jammu & Kashmir, thus, finally settled the controversy regarding accession through the Constituent Assembly comprising their elected representatives. Thus, in conclusion, it can be said without any

reservation that the Accession of Jammu and Kashmir State to India on October 26, 1947, is legally sound, constitutionally binding, irrevocable and final.[7]

[7] . Adarsh Sein Anand (Former Chief Justice of India; Former Chairman, National Human Rights Commission; and Former Chief Justice of the J&K High Court), "Accession of J&K, a constitutional view", The Tribune, 02 July, 2014.