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## Judicial fragility in Kashmir – an unfortunate perplexity in the wake of Article 370.

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### ABSTRACT

*The recent orders passed in the case of Parimoksh Seth V/S State of J&K and Ors, instituted in 2015, and in the case of Ashok Kumar and others Versus State of J&K and others (2015), has exposed the fragility of the legal system in Jammu and Kashmir, due to the fact that the judiciary of the unfortunate area is under a dilemma wherein contradicting verdicts are common place. The judicial decisions rendered in the Valley, have especially been cited as examples of a judicial system mired in unfeasible myths, caused by previous government maladministration. This paper will inspect the judicial apathy towards a reformed State evolution, which is the need of the day.*

Order<sup>1</sup> dated 22nd July 2015, was passed by the High Court of Jammu and Kashmir, at Jammu, in the case of:

Parimoksh Seth V/s State of J&K and others<sup>2</sup>

Directing the Divisional Commissioner, Kashmir to file the appropriate response regarding the smuggling and slaughtering of bovine animals and subsequently their sale especially in Kashmir Valley. It appears that Mr. Vishal Sharma, learned AAG, has not communicated this order either to the Director General of Police or to the Divisional Commissioner Kashmir/Jammu for compliance. The honourable Court determined that appropriate response be filed by the Divisional Commissioner, Kashmir / Jammu in terms of order dated 22.07.2015. Further, The Director General of Police in the meantime was directed to ensure that appropriate directions are issued to all the SSPs/ SPs, SHOs of various police districts so that there is no sale of beef anywhere in the State of J&K and strict action is taken in the accordance with law against those who indulge in its.

By Order<sup>3</sup> dated 16.09.2015, High Court of Jammu and Kashmir at Srinagar, in the case of:

Prof. S.M. Iqbal Qadri V/s State of J&K and others<sup>4</sup>

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<sup>1</sup> WPPIL NO. 24/2014, MP NO. 28/2015

<sup>2</sup> The writ petition in this case was in the nature of a PIL, praying for an appropriate writ, order or direction in the nature of writ of mandamus commanding the law enforcement authorities to put in place a strong mechanism for prevention of cow slaughtering in the State of J&K, by directing all the concerned authorities to initiative serious punitive action as against all those persons who are involved in such criminal activity (among other remedies).

<sup>3</sup> OWP No. 1648/2015

The honourable Court stated that, “We would like to make it clear that if the State or Legislature contemplates or takes steps for scrapping or amending the provisions as are under challenge, the pendency of this writ petition shall not operate as a bar.”

The said provisions that were under challenging this case, were also in substance in the preceding case in Jammu. They are as follows:<sup>5</sup>

### **Section 298-A, Ranbir Penal Code**

298-A - Voluntarily slaughtering or Killing cow or the like animals:-

Who ever voluntarily slaughters or kills any bovine animal, [Whether domesticated or wild], such as an ox, bull, cow or calf, shall be punished with imprisonment of either description which may extend to ten years, and shall also be liable to be.

[Explanation- The expression ‘bovine animal’ does not include a Gond]

### **Section 298- B, Ranbir Penal Code**

298-B. Keeping in possession flesh of illed or slaughtered animals as mentioned in S. 298-A.

Whoever keeps in his possession flesh of any slaughtered animal mentioned in section 298-A above, knowing it or having reasons to believe that the flesh is of such an animal, shall be punished with imprisonment of either description for a term which may extend to one year and shall also be liable to fine which may extend to five hundred rupees.

### **Section 298-C, Ranbir Penal Code**

298-C. Killing or slaughtering he or she buffalo

Whoever voluntarily slaughters or kills any he or she buffalo shall be punished with fine which may extend to five times the price of the animal killed or slaughtered, as determined by the Court.

### **Section 298-D, Ranbir Penal Code**

298-D

Whoever-

- (a) Sells or has in his possession any untanned hide or meat or flesh of a God, or
- (b) Brings into or has in his possession, within any town, the carcass of a Gond,

Shall be punished with imprisonment of either description for a term which may extend to one month or with fine which may extend to two hundred rupees or with both.

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<sup>5</sup> That the State legislation in order to prevent the aforesaid illegal act of cow slaughtering has made the same as a criminal offence punishable under chapter XV offences relating to religion. Sections 295, 295A, 298A, 298-B, 298-C, 298-D of Ranbir Penal Code.

Explanation - The word ‘town’ for the purposes of clause (b) means a town or a locality which for the time being, is the headquarters of a Tehsil.

### **The corruption and slackness in the State administration of Jammu and Kashmir.**

Local J&K administration has prima facie failed to prevent the abovementioned sacrilegious acts due to which slackness and callous approach, has resulted in happening of more and more incidents of cow slaughtering in the state of J&K which has the impact of not only disturbing law and order, but also hurting the religious sentiments of a particular class of citizens. That after aforesaid two such incidents, strong protests, demonstrations including Bandh have been held in various parts of Jammu province against the aforesaid sacrilegious acts but despite all this, the State Administration is still in great slumber and has not woken up to swiftly act in the matter.

The smuggling of bovine animals in the State is rampant and the Government machinery including the Police agencies have failed to curtail such menace resulting in happening of aforesaid incidents. Those engaged in smuggling of bovine animals have a very close nexus with the concerned authorities as result of which they are easily let off and escape the consequences of their illegal action, which further emboldens them to carry out the aforesaid illegal activities without any deterrent. It had also come to the knowledge of the petitioner that meat of cow and other bovine animals are being sold openly in various parts of the State, with the State Administration watching all this as a mute spectator thereby encouraging such sacrilegious acts in the State, which have become common phenomenon by now.

The writ petition instituted by Prof. S. M. Afzal Qadri was seeking directions for declaring section 298-A, 298-B, 298-C and 298-D of the Ranbir Penal Code as ultra vires to the Constitution of India as well as to the Constitution of Jammu and Kashmir and accordingly to strike down the said provisions from the Ranbir Penal Code forthwith.

### **ATTEMPTS TO RECONCILE THE TWO JUDGEMENTS**

In an attempt to bring some order to a State where conflicting judgments are just a glimpse into the confounded situation of the administration, peculiar to Jammu and Kashmir, where a baffled state of law and order has prevailed since 1947, a special leave petition was filed in the honourable Supreme Court of India, raising the following substantial questions of law of great public importance for consideration of this Hon’ble Court:

- (i) Whether it is permissible for the two Coordinate Benches of the same Hon'ble High Court to render two mutually conflicting Judgments?
- (ii) Whether it is advisable in law to have two separate coordinate Benches of the Hon'ble High Court to adjudicate a lis which is similar in nature?
- (iii) Whether the principle of consistency and uniformity of Judgments mandate that the same bench entertain and adjudicate, two petitions on the same lis?

There is another recent case under the jurisdiction of the High Court of Jammu and Kashmir which deals with the issue of reservation in public employment.

*Ashok Kumar and others*  
*Versus*  
*State of J&K and others*<sup>6</sup>

The issues before the Court were whether reservation in matters of promotion (for S.C. and S.T category people) in public employment should be retained on the statute books of Jammu and Kashmir, as a welfare measure that is also prevalently applied Constitutionally to the rest of India.

Three provisions are in question at issue. Section 6 of the Jammu and Kashmir Reservation Act as well as sections 9 and 34 of the Jammu and Kashmir Reservation Rules.

They read as follows:

[Section 9- Jammu and Kashmir Rules] –

**Reservation in Promotion**

The available vacancies to the extent specified hereinafter shall be reserved in any service, class, category or grade carrying a pay scale the maximum of which does not exceed the pay scale of the post of Deputy Secretary to Government, for promotion from amongst the persons belonging to the Scheduled Castes, Scheduled Tribes and other socially and educationally backward classes:-

- (i) Scheduled Castes (SC) 4%
  - (ii) Scheduled Tribes (ST) 5%
  - (iii) Socially and Educationally Backward Classes:
    - (a) Resident of Backward Area (RBA) 10%
    - (b) Actual Line of Control 2%
    - (c) Weak and Under Privileged Classes 1%
- (Social Castes)

Rule 10 of the Jammu and Kashmir Rules 2005, prescribes “Roster for Promotions”. The Roster is intended to give effect to the reservations provided under Section 6 of the Reservation Act read with Rule 9 of Reservation of Rules. Rule 34 extends the reservation in promotions contemplated under Section 6 of the Reservation Act and Rule 9 of Reservation Rules, to promotions made on adhoc basis.

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<sup>6</sup> Date of Order – 09/10/2015.

SWP no.1290/2014, MP no.1685/2014

c/w SWP no.2777/2013, MP no.4089/2013

SWP no.1694/2006, MP no.4023/2010, 2119/2006

APSWP no.131-E/2004

SWP no.1006/2005, MP no.1114/2005

SWP no.1639/2003, MP no.1746/2003

SWP no.1497/2004

SWP no.1854/2004, MP no.1942/2004

SWP no.1619/2006, MP no.2010/2006

SWP No.213/2001, MP no.254/2001

SWP no.1583/2014 MP no.2093/2014

SWP no.1271/2014, MP no.1655/2014

SWP no.1816/2000,

SWP no.2096/2014, MP no.2822/2014

Section 6 of Reservation Act together with the Rules 9, 10 and 34 of Reservation Rules, therefore, embody a scheme for reservation in promotions.

The Hon'ble Justice Massodi stated that "the Court may not assume role of an appellate authority to look into and examine sufficiency of the material/data collected by the State<sup>7</sup> to justify reservation". Other Courts in the country have contrastingly allowed recurrent judicial review of the executive action performed.

It is ironic that Jammu and Kashmir is afforded the luxury of retaining laws that violate basic human rights and of repealing welfare regulation that promotes human rights enshrined in Part III of the Constitution of India, based simply on the fact that the executive has been performing the role of the Parliament for the last 65 years; and that this violation of the basic feature of 'Separation of Power on which our great democracy is based' should perpetuate without interruption. If anyone objects to the illegality of the functioning or makes propositions for justice they will be termed as fundamentalists, since contravening human rights legislation has always been permitted on the pretext of Article 370. All the laws that are considered as welfare legislation in the rest of India, lauded internationally as socially progressive, are considered ultra vires in Jammu and Kashmir as long as they are not applied to the State by Presidential Order. This case was no different.

In the abovementioned case, the learned Senior Advocate,<sup>8</sup> insisted that Jammu and Kashmir under the Indian Constitutional Scheme has status and powers, not available to any other States in the Union. He safely neglected to call the status 'special' because that would be a misnomer. While admitting that Jammu and Kashmir acceded to the Union of India in the exact same way as all other States of the Indian Union, the learned advocate contradicted himself by saying simultaneously that the it surrendered some powers in favour of the Union and not vice-versa; that while in case of other States, powers available and exercised are what have been conceded by the Union, in case of Jammu and Kashmir, powers are retained by it, except what have been surrendered to the Union. These are legally impossible propositions.

The learned Senior Advocate admitted that Jammu and Kashmir became a part of India by signing the Instrument of Accession; yet argued that Jammu and Kashmir State while acceding to the Union of India did not merge with it. He buttressed his argument by relying on Article 370, which itself acknowledges through Clause (1) sub clause (c), that Jammu and Kashmir shall be an integral part of the territory of India.

As per Article 16 of the Indian Constitution there should be no discrimination and assured equality in matters of public employment under the Union of India or any of its territories. It was argued by the learned advocate that contravening the principles laid down in this article is permissible because as he insisted - in view of the express embargo placed on application of amendment to a provision of the Constitution to Jammu and Kashmir, by proviso to Clause II, Article 368 of the Constitution, except in

<sup>7</sup> Implying judicial review of executive action.

<sup>8</sup> (advancing arguments in lead case)

accordance with mode and manner laid down therein, Clause (4A) and Clause (4B) to Article 16, would not be applicable to Jammu and Kashmir in as much as it is not applied to the State by a Presidential order, under Article 370(1) of the Constitution.

It is necessary to mention here that Article 16 (4A) and (4B) read as follows:

Article 16 <sup>9</sup>[(4A) : Nothing in this article shall prevent the State from making any provision of reservation <sup>10</sup>{in matters of promotion, with consequential seniority, to any class} or classes of posts in the services under the State in favour of the Scheduled Castes and the Scheduled Tribes which, in the opinion of the State are not adequately represented in the services under the State]

Article 16 <sup>11</sup>[(4B) Nothing in this Article shall prevent the State from considering any unfilled vacancies of a year which are reserved for being filled up in that year in accordance with any provision for reservation made under clause (4) or clause (4A) as a separate class of vacancies to be filled up in any succeeding year or years and such class of vacancies shall not be considered together with the vacancies of the year in which they are being filled up for determining the ceiling of fifty per cent reservation on total number of vacancies of that year.]

In answer to the contentions of the above said learned senior advocate, the learned Senior Additional Advocate General disputed petitioners' claim that Section 6 of the Reservation Act 2004 had been enacted and Rules 9 and 34 of the Reservation Rules 2005, have been made, without any background study. Learned counsel insisted that only after the State Government was satisfied that Reserved Categories on the basis of available data are not adequately represented at different levels in Government employment, that it made a provision for reservation in promotions. Insisting that reservation made would neither discourage, disregard or dampen merit, the learned Senior Additional Advocate General pointed out that the reservation under the present legal framework is restricted up to the level of Deputy Secretary or the post with equivalent grade, whereafter the promotion is made purely on basis of merit and seniority, without any reservation in favour of any of the Reserved Categories.

After this, the learned Senior Advocate appearing for private respondents, per contra, insisted that as State of Jammu and Kashmir in terms of Article 1 Constitution of India is part of the territory of India, amendments made to Constitution of India from time to time would be *ipso facto* applicable to Jammu and Kashmir also, and at least, there should be no doubt about automatic application of amendment to a Constitutional provision that has already been applied to the State. For instance, since Article 16 of the Constitution stands already applied by the Constitution (Application to Jammu and Kashmir) Order 1954, subsequent amendment to Article 16 by adding Clause (4A) in Clause (4B) would be applicable to the State even in absence of a Presidential order under Article 370 of the Constitution.

## Conclusion

<sup>9</sup> Inserted by the Constitution (Seventy-seventh Amendment) Act, 1995, sec.2, (w.e.f. 17-6-1995).

<sup>10</sup> Substituted by the Constitution (Eighty-fifth Amendment) Act, 2001, sec.2, for "in matters of promotion to any class" (w.r.e.f. 17-6-1995).

<sup>11</sup> Inserted by the Constitution (Eighty-first Amendment) Act, 2000, sec.2, (w.e.f. 09-06-2000).

This is just one of the many disputes over the laws and constitutional application in Jammu and Kashmir that is not hinged in legislative ambiguity but in the conflict of interests of those in the corridors of power.

Whenever there is a case of how the laws in Jammu and Kashmir are ultra vires the basic human rights laws, the defence is that the law may very well violate human rights because it is in accordance with Article 370. But according to international court judgements, any law which contravenes Human Rights is not maintainable; it must be struck down.<sup>12</sup>

Furthermore isn't it ironic that every time any case comes up regarding a law being discriminatory or unfair, the judiciary is made to hear lengthy pleadings which include the Instrument of Accession and the process of integration of Jammu and Kashmir with the Union of India way back in 1947? The abovementioned case was regarding reservation in matters of promotion; is it fair or unfair. This did not call for a debate on the integration of the State with India and the like. The second case mentioned in this paper witnessed a call to allow the free sale of beef on the basis of protecting the fundamental rights guaranteed by the Constitution of India, irrespective of their application to Jammu and Kashmir through Presidential order. The third case has an inherent plea to let the Constitutional / human rights of scheduled caste and scheduled tribe people be trampled upon, on the pretext that the fundamental rights guaranteed by the Constitution of India in that regard, have not been made applicable to Jammu and Kashmir through Presidential order. When in fact the fundamental right concerning SC and ST has been extended to Jammu and Kashmir through Presidential Order, however, the amendment to the said provision has not been expressly extended by Presidential Order. Albeit, the contention of many legal luminaries, is that once a provision is applied to Jammu and Kashmir, the successive amendments to the same will ipso facto be applicable thereto.

Why can't any law be judged in the state of 'Jammu and Kashmir' on the basis of purely its merits without giving it loopholes based on the fact that Article 370 allows morally questionable laws to exist despite being blatantly unjust?

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<sup>12</sup> As per *Keshawanand Bharti versus State of Kerala*, 1973.