

INTEGRATION BY DEGRADATION- A CONSTITUTIONAL ROUTE THAT IS UNCONVINCING

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ABSTRACT

The Jammu and Kashmir Reorganization Act was passed in August 2019, bifurcating the state into two Union Territories- The Union Territory of Jammu and Kashmir and the Union Territory of Ladakh. While the legality of abrogation of Article 370 of the Indian constitution has been open to a wide and never-ending discussion, the legal validity of dividing a state under Article 3 and degrading a state to the status of Union Territory has not been examined in detail. This article puts forth various arguments that contend that the legislative route taken to bifurcate and degrade the state of Jammu Kashmir into 2 separate Union Territories, is questionable and implausible.

INTRODUCTION

On the recommendation and request of the governor of the state of Jammu and Kashmir, on 5th August, 2019 a presidential order was passed revoking some provisions of the Constitution of India and applying the constitutional provisions of India to the state of Jammu and Kashmir and on the same day the Jammu and Kashmir Reorganization bill, 2019, bifurcating the state into two union territories was passed by the Parliament of India.

The procedure in which the Jammu and Kashmir Reorganization Act,2019 was enforced is unconstitutional due two main reasons:

Firstly, the state cannot be bifurcated under Article 3 of the Constitution of India without the concurrence of the legislative assembly, and

Secondly, it cannot be downgraded to the status of Union Territory under Article 3.

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BIFURCATION IS ULTRA VIRES ARTICLE 3

Article 3² states the following:

“3. Formation of new States and alteration of areas, boundaries or names of existing States: Parliament may by law

(a) form a new State by separation of 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;

(b) increase the area of any State;

(c) diminish the area of any State;

(d) alter the boundaries of any State;

(e) alter the name of any State; Provided that no Bill for the purpose shall be introduced in either House of Parliament except on the recommendation of the President 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 Explanation I In this article, in clauses (a) to (e), State includes a Union territory, but in the proviso, State does not include a Union territory Explanation II The power conferred on Parliament by clause (a) includes the power to form a new State or Union territory by uniting a part of any State or Union territory to any other State or Union territory.”

It is possible to bifurcate under Article 3 of the Indian Constitution. However, the legislative act will not be constitutionally valid if the bifurcation happens without the concurrence of the legislative assembly of the state. It is possible to bifurcate if and only the concurrence of the state legislative assembly is obtained (according to the 5th amendment).

It's been brought to attention that, when the President's rule was imposed in the State of Jammu and Kashmir, the reference to Assembly that is mentioned in the provision was suspended. This explains and serves as evidence to prove that the action of bifurcating the state is a mala-fide intention of trying to achieve some object indirectly. While Article 356 of the Indian Constitution empowers the Parliament to

² INDIA CONST. art 3

exercise the “powers” of a state legislature; which means normal functioning of the said state legislature, Article 3 provides for the President to seek “views” of state legislature before changes can be made in its status; which is the view of the people of that particular state expressed through the legislature and this power can’t be transferred in the Parliament.

The Supreme Court further clarified in *Babulal Parate v State of Bombay*[1961 AIR 884], where it asserted that:

“All that is contemplated is that parliament should have before it the views of the state legislatures as to the proposals contained in the Bill and then be free to deal with the Bill in any manner it thinks fit.”³

If the parliament chooses to have only its own views taken into consideration, the mandate of the proviso to Article 3 will be rendered null and void. So, the legislative action should be in place in order for the President of the country to seek views.

A STATE THAT IS DOWNGRADED TO A UNION TERRITORY

In seeking to downgrade the status of the state of Kashmir to a Union territory, The Jammu and Kashmir Reorganization Act, 2019 is ultra vires Article 3 of the Indian Constitution.

Since the coming into force of the Constitution of India, several reorganization of states have taken place and in none of the Reorganization Acts, the Acts have been enacted by the parliament without seeking the approval of the concerned state legislature and in the present case two union territories are created out of the State of Jammu and Kashmir during the President’s rule which is affront on the Constitution of India and its federal nature.

The erstwhile State of Jammu and Kashmir, though a State within the meaning of Article 1 of the Constitution of India, has been accorded a special status from the very beginning due to certain events that came about at the time when the then ruler of Kashmir acceded to the Indian Union.

Moreover, Union Territories have always been the creations of Constitutional Amendments and have never been created under the plenary power of Article 3.

³ *Babulal Parate v State of Bombay*, 1961 AIR 884

A rule was laid out in Nazeer Ahmed's case⁴ where it was held that, "because it is a well-established principle that where a power is given to do a certain thing in a certain way the thing must be done in that way or not at all. Other methods of performance are necessarily forbidden."⁵ Article 3 authorizes the formation of new states, but it conspicuously doesn't authorize the degradation of the status of an existing state into a Union Territory. In seeking to downgrade the status of State of Jammu and Kashmir into a union Territory, the Jammu and Kashmir Reorganization Act is ultra vires Article 3 of the Indian Constitution. Explanations I and II to Article 3 reassert the fact that a state cannot be downgraded to a Union Territory. In the explanations it is clearly stated that the word "state" is to be read to include a "union Territory", and parliament's power is deemed to include "the power to form a new State or Union Territory by uniting a part of any State or Union territory to any other State into a Union Territory." The constitution clearly envisages the power to only form new states/ Union territories by uniting and not by dividing. Article 3 bestows a wide range of powers concerning the inter-se alteration of states and the inter-se alteration of Union Territories, but the article doesn't authorize the degradation of the status of a State into Union Territory. In this case, it is very evident that two union territories are formed by separating a state and hence, is ultra vires Article 3 as it requires union of a part of any State or Union territory to any other State into a Union Territory.

This interpretation is further supported by the principle of non-retrogression set out by the Hon'ble Supreme Court in Navtej Johar v Union of India⁶. According to this principle, "the state should not take measures or steps that deliberately lead to retrogression on the enjoyment of rights either under the Constitution or otherwise."⁷ The crucial right at stake in this case is the right to representation and to be governed by one's elected representatives as set out by the apex court in Nct of Delhi v Union of India⁸. Furthermore, the people of a state cannot be retrograded to the lesser degree of representation offered by a Union Territory after having once achieved the degree of representation offered by statehood.

ARTICLE 1 LOOSES ITS MEANING

⁴ Nazeer Ahmed v King Emperor, 1927 AIR All 730a

⁵ Nazeer Ahmed v King Emperor, 1927 AIR All 730a

⁶ Navtej Johar v Union of India, 2018 AIR SC 4321

⁷ Navtej Johar v Union of India, 2018 AIR SC 4321

⁸ Nct of Delhi v Union of India, 2018 SCC Online SC 661

If the bifurcation of the state is constitutionally valid under Article 3 then, Article 1 which declares India to be a Union of States loses its meaning. This is because of the fact that if the parliament can by law convert a State into a Union Territory, it carries with it the implication that it can and has the power to downgrade all States to Union Territories. Article 3 speaks of the changes that can be made in the area, boundary or names of the states and the formation of new states. Hence, under Article 3, states have to remain states, maybe in a larger size or a smaller size, or may be with a new name or a new boundary.

Further, Article 1 of the Constitution of India stipulates that, “India, that is Bharat, shall be a Union of States.” Article 1(3) of the Constitution further stipulates that “the territory of India shall comprise – (a) the territories of the States; (b) the Union territories specified in... the First Schedule...”⁹ Hence, with respect to Article 1 “states” and “union territories” are to be treated differently. However, it should be noted that states remain constituent units of the Union of India. Article 3 cannot be read to grant the power to the Union to convert the status of states into Union Territories, as this power carries with it necessary implication that the Union could-if it chose- convert India into a “Union of Union Territories” instead of a “Union of States.” The framers of the constitution could not have- and did not- vest so wide or untrammelled a power in the Indian government.

This interpretation of Articles 1 and 3 is fortified by the holding of the Hon’ble Supreme Court in *S R Bommai v Union of India* [1994 AIR 1918] , where it has been asserted that “the courts should not adopt an approach, an interpretation, which has the effect of or tends to have the effect of whittling down the powers reserved to the states... let it be said that federalism in the Indian Constitution is not a matter of administrative convenience, but one of principle- the outcome of our own historical process and a recognition of the ground realities.”¹⁰

CONCLUSION

It may be incorrect to say that the Reorganization Act is in itself invalid. However, India claiming to integrate Jammu and Kashmir by degrading its status from statehood to Union Territory remains unconvincing.

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