

JAMMU AND KASHMIR: AN INTEGRATION WITHOUT INTEGRITY

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to The Preamble, Union & its Territories and The Citizenship

Yesterday the Ministry of Law and Justice issued a notification titled The Constitution (Application To Jammu And Kashmir) Order, 2019 overriding the Order of 1954, and in effect scrapping Article 370 of the Constitution. Nowhere in the world of constitutional-democracies can one see an executive government passing orders to amend the Constitution. This order lacks legality as well as moral legitimacy. I concur with the President of the Jammu & Kashmir Peoples Democratic Party (PDP), Mehbooba Mufti's claim that the government's decision is illegal, based on insincere politics and constitutional abuse.

Let us backtrack to the political moves that have led to yesterday's notification: On June 20, 2018, under Article 92 of the Constitution of J&K, the State was placed under Governor's Rule after the Bharatiya Janata Party (BJP) withdrew support to its alliance partnership with the PDP. Six months later, in December 2018, Governor's Rule got converted into President's Rule (Article 356 of the Indian Constitution).

Let us be clear about the implications of these tactical manoeuvres of carefully transferring power from a democratically elected Assembly, to Governor's Rule and then President's Rule. It implies that all the powers of the Government of the State are now vested in the Governor under the superintendence of Prime Minister Narendra Modi. Given these conditions of severe democratic deficit, the government wrote up an order scrapping Article 370, sent it to itself for "concurrence", and had it signed by the President.

Let us then turn to Article 370(3) which lays down the procedure to amend or repeal Article 370. It states that the President may by notification declare that the article shall cease to be operative provided that it is confirmed by the Constituent Assembly of the State before the President issues such notification. It says that only with the prior consent of the Constituent Assembly of J&K the presidential order will be valid. But the Constituent Assembly framed the Constitution of J&K and got dissolved. How then must we interpret Article 370(3) if the literal interpretation is not useful? By reading it in terms of its legislative history.

N. Gopalaswami Ayyangar who introduced the provision in the Constituent Assembly of India on October 17, 1949 states: "We have also agreed that the will of the people through the instrument of the Constituent Assembly will determine the Constitution of the State as well as the sphere of Union jurisdiction over the State...the President may, on the recommendation of that Constituent Assembly, issue an Order that this Article [370] shall either cease to be operative, or shall be operative only subject to such exceptions and modifications as may be specified by him. But before he issued any order of that kind, the recommendation of that Constituent Assembly will be a condition precedent."

To make a complicated legal history short, there was an acknowledgment that the Constituent Assembly, as a representative of the people of J&K, had to give concurrence before a Presidential Order is passed. But how does the Home Minister Amit Shah read Article 370(3)? He has read down the words "Constituent Assembly" to mean "Legislative Assembly of the State"; having cleverly dissolved the Assembly and usurped its power, in effect it is the government that is giving solipsistic concurrence to itself. Such self-indulgent narcissism has led to short-circuiting the entire process in letter and spirit.

The reason the Notification lacks moral legitimacy is because of the way BJP has read down 'Constituent Assembly' to include even 'President's Rule'. More jurisprudentially, one needs to ask this: what is 'Constituent Assembly'? It is a body of representatives who are the embodiment of the 'constituent power' that is needed to co-constitute a nation-state into existence. So, at the core of constituent power is democratic consent. India derives its legitimacy from its Constitution, and the Indian Constitution in turn is legitimate because it is supported by a constituent power in the form of democratic consent. Where in Mr. Shah's interpretation of the words 'Constituent Assembly' is there even an iota of acknowledgment of a constituent power?

Article 370(2) clearly mentions that the concurrence of the State Government needed to be taken only before the Constituent Assembly was convened. There is no mention that the State Legislative Assembly will have these powers after the dissolution of the Constituent Assembly. To read it so is absurd. The Constituent Assembly as the embodiment of constituent power is what creates and authorises, gives birth and grants the power to the legislative assembly. There is no equivalence between a Constituent Assembly and Legislative Assembly. If at all the words 'constituent assembly' in Article 370(3) have to be read down, it has to be done in such a way that its core meaning is saved. For example, it can be read down as meaning a 'special majority' of the State Legislative Assembly constituted by free and fair elections.

The fact of the matter is that given the democratic deficit, the BJP knows well that legal manipulations are not enough to scrap Article 370. What it needs is the use of force, which is what it has been surreptitiously preparing for over weeks and months. The government has given Kashmiris two options: either assimilate into the mainstream, where mainstream is a code for Hindi, Hindu, Hindustan, or be banished, and evicted by force. That is the tragic state of affairs we have come down to in the name of national unity and integrity.

Salman Rushdie parodies the word 'integrity' in *Shalimar The Clown*: "The key to understanding this position was the word 'integral' and its associated concepts... the Indian effort was to preserve the integrity of the nation. Integrity was a quality to be honoured and an attack on the integrity of the nation was an attack on its honour and was not to be tolerated... Kashmir was an integral part of India. An integer was a whole and India was an integer and fractions were illegal. Fractions caused fractures in the integer and were thus not integral... When truth and integrity conflicted it was integrity that was to be given precedence." Mr. Shah conflates 'integrity' with 'integration'. Integration may involve forced homogenisation but integrity is moral disposition towards truth and honesty.

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