

A DILUTION THAT FALLS SHORT OF THE LAW

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

The manner in which Article 370 was substituted by the Centre to carve up Jammu and Kashmir is fraught with several loopholes and challenges. Technically, Article 370 has not been abrogated. Rather, vide Constitution Order No. 273 dated August 6, 2019, "Declaration under Article 370(3) of the Constitution", the existing Article 370 has been substituted by a new paragraph whereby all provisions of the Constitution of India, as amended from time to time, without any modifications and exceptions, have been made applicable to Jammu and Kashmir. This action of the President which amounts to the virtual abrogation of Article 370 in its essence is a matter of legal and political debate.

As the first step toward achieving its goal, the Centre issued a fresh Constitution (Application to Jammu and Kashmir), Order 2019 one day earlier on August 5, 2019. This superseded the Presidential Order of 1954 purportedly with the "concurrence of the Government of State of Jammu and Kashmir", thus paving the way for the virtual abrogation of Article 370 the following day. The important aspect of this move was to substitute the expression "Constituent Assembly of the State" with the expression "Legislative Assembly of the State" in proviso to Article 370(3). Under the existing Article 370(3), it had been provided that the President could abrogate or amend Article 370 on the recommendation of the Constituent Assembly of the State which had ceased to exist in 1957.

The Centre made this amendment in proviso to Article 370(3) as a part of a well-conceived strategy. The strategy was that after such substitution, the powers of the Legislative Assembly would be used by Parliament during President's Rule. Parliament would then recommend abrogation of Article 370 to the President, which it has done leading to the issuance of C.O. No. 273 dated August 6, 2019, virtually abrogating Article 370.

Now if it is shown that the amendment made in proviso to Article 370(3) is illegal, the consequent action of the President in issuing of C.O. No. 273 would also become illegal.

The order dated August 5, 2019 had been issued by the President purportedly with the "concurrence of the Government of State of Jammu and Kashmir" as required under Article 370(1). The Government of the State had been defined in Article 370(1) itself, read with C.O. No. 44 dated November 15, 1952 as a person recognised by the President "on the recommendation of the Legislative Assembly of the State" as Sadar-i-Riyasat of Jammu and Kashmir acting on the advice of the Council of Ministers. The expression 'Sadar-i-Riyasat' was substituted by 'Governor' in 1965.

If this was the definition of the "Government of State" in Article 370(1), the order dated August 5, 2019 cannot be said to have been issued with the concurrence of the Government of the State. The simple reason is that the Governor who is said to have given the concurrence as Government of the State was not a person recognised by the President "on the recommendation of the Legislative Assembly of the State" as Governor of Jammu and Kashmir as required under law. Therefore, the order dated August 5, 2019 has not been validly issued.

Otherwise too, the August 5, 2019 order is illegal as it has the effect of amending Article 370 as well which could not have been done. The reason is that while exercising powers under Clause (1) of Article 370, the President is not competent to amend Article 370 itself; and his powers are confined only to amending the "other provisions of the Constitution" in their application to Jammu

and Kashmir, meaning thereby provisions other than Articles 1 and 370. This is clear from the conjoint reading of sub-clauses (c) and (d) of Article 370(1). Consequently, the amendment introduced in proviso to Article 370(3) vide the order dated August 5, 2019 whereby the expression "Constituent Assembly of the State" has been substituted by the expression "Legislative Assembly of the State", is bad in law on this basis also.

Since the amendment made in proviso to Article 370(3) is illegal, the consequent action of the President in issuing the C.O. No. 273 virtually abrogating Article 370, based upon a recommendation made by Parliament which in turn became possible due to the said illegal amendment, is also rendered illegal.

Apart from the issue of the legality or otherwise of the order virtually abrogating Article 370 in its essence, another question which arises is whether it was at all required to be done, weighing its likely adverse effects. The true nature of Article 370 as it existed is best exemplified by the then Home Minister Gulzari Lal Nanda's statement in Parliament on December 4, 1964 just a few months after Nehru's death. Nanda had said, "May I submit that Article 370 is neither a wall nor a mountain, but that it is a tunnel. It is through this tunnel that a good deal of traffic has already passed and more will. There is no wall between Jammu and Kashmir and India. At the most, you can say it is some kind of movable partition. We can move it on our own. There is nothing coming in the way."

And the noted journalist B.G. Verghese had once asked, "If Article 370 vests the people of Kashmir with a certain sense of identity and autonomy within the ambit of federal relations, how is India diminished or endangered in any way?" The virtual abrogation of Article 370 will leave indelible scars on the psyche of the vast population inhabiting the strategically located territory of India; otherwise there had been practically nothing 'special' about Kashmir's 'special status' for all the years that have passed by.

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