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"Scrapping Article 370 – A Constitutional Fraud"

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"Where freedom is menaced or justice threatened or where aggression takes place, we cannot be and shall not be neutral"
-- Jawahar Lal Nehru

"All this debate about article 370 started when, it was proposed to be inserted in Constitution of India, by Gopala Swami Aiyangar, as article 306-A in Constituent Assembly claiming it to be as a positive part of this constitution and will serve as a link between government of India and People of J&K, and also it will bring peace in the valley of J&K, but nothing turned right. Right from the addition of this article till now, a lot of terrorist activities took place and hampered peace over there and lives of a lot of people including residents as well as Indian soldiers were lost. Due to these reasons, In 2019, decision was taken by the present BJP government that Article 370 needs to be removed in order to take J&K within full control of Indian government and try to make it a safer place for all living there. It was done by a Constitutional Order, vide C.O. 272. But the issue arose, that whether what was done is right or not and secondly, the way in which it was done was right or not? We all know that "WE THE PEOPLE OF INDIA" gave this constitution to us in order to regulate rights and duties of each and every citizen, making it the Supreme Law of the Land. Thus constitution being the supreme law of the land, it must be complied with strictness and judiciary must look after it."

ARTICLE 370 & ITS INTERPRETATION

So, in order to start the debate about what has been done is right or wrong, we have to start by looking into the constitution, and see what it says about the relation of Indian government with the people of J&K. So starting with Article 370 of the Indian Constitution, it says:

*"[**370. Temporary provisions with respect to the State of J&K.—**(1) notwithstanding anything in this Constitution,—*
(a) The provisions of article 238 shall not apply in relation to the State of J&K;
(b) the power of Parliament to make laws for the said State shall be limited to— (i) 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 governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and (ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify. Explanation.—For the purposes of this article, the Government of the State means the person for the time being recognized by the President as the Maharaja of J&K acting

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on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;
(c) the provisions of article 1 and of this article shall apply in relation to that State; (d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify: Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State: Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.
(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.
(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."

Firstly, by applying rule of literal interpretation, it is clear that article 370(1) (d) gives constitutional authority to the president-by-order- to amend or modify the application of all the provisions of the constitution in relation to the state of J&K except article 1 and 370. Thus, article 370 nowhere gives power to the President of India to amend or modify itself. Further, Privy Council in one of its judicial precedent has held that, "where 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 are necessarily forbidden."[1] Thus, following this ruling of Privy Council, it is clear that article 370 can only be amended by the method given, that is, by taking prior permission of constituent Assembly. This ruling of Privy Council is clearly backed by judgment of Court of chancellery, in the case of **Taylor v. Taylor**[2]; where also it is clear recognized rule that, "where a power is given to do a certain thing in certain way that thing must be done in that way or not at all".

Secondly, during, debates around Draft article 306A (and later article 370) on 17 October. Shri Gopalaswami Ayyangar, the mover of the article, made it clear that the terms of the relationship between the State of J&K and the union of India could only be altered following the method set down in clause 3 of the article. At this juncture, only two things can be done. Firstly, the provision of Article 370 may be seen as permanent and cannot be removed by a Presidential

[1] Abdul Nazeer v. Emperor, AIR 1936 PC 253
[2] 1 Ch. D. 426, (at page 431)

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order because there is no Constituent Assembly to take consent from and secondly, parliament of India can remove 370 but at least take the legislative assembly into count without any tricks.

Constitutional order passed by president of India, vide C.O.272, says that power is exercised under clause 1 of Article 370, which uses "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:", in this behalf, reliance must be placed on the meaning of the term 'modification', which was laid down by the Honorable Supreme Court in the case of **Puranlal Lekhpal v. President of India**[3], as, "the modification envisaged in article 370(1) did not mean amendment of the constitution for the purpose of application to that state and would not certainly include such amendment as would make a radical alteration in the provisions of the constitution, in this connection, court relied on the observation of Kania, CJ and Mahajan, J; in **In re The Delhi Laws Act**[4], Kania, CJ observed that the meaning of the word modify seems to have held that the word 'modify' as used in the context in which he was speaking only implied alteration without radical transformation. Mahajan, J., also said that the word 'modification' used in the context before him did not involve "any material or substantial alteration". Thus, the present Constitutional order does not comply with the meaning of the term "modify" as laid down by the honorable Supreme Court.

Similarly, the word "modification" means "the action of making changes in an object without altering its essential nature or character; the State of being thus changed; partial alteration". Stress is being placed on the meaning "to alter or vary without radical transformation"; but that is not the only meaning of the words "modify" or "modification". The word "modify" also means "to make partial changes in" and "modification" means "partial alteration". And further adding to this point, the **BLACK'S LAW DICTIONARY**[5], defines the term 'modification' as to alter or to change in its incidental or subordinate features. Thus, here president removing whole article 370 does not come within the ambit of partial change, and does not comply with the meaning of 'modification' as laid down by different judgments or as given in various definitions. Making C.O. 262 unconstitutional in the light of constitutional principles and various judicial precedents laid down by the apex court.

Presidential order purportedly passed under article 370(1) of constitution is ultra-vires the authority conferred by that article. This is because, firstly, presidential order incorrectly invoke article 370(1)(d) to effectively amend the proviso to article 370(3); secondly, the concurrence in question is insufficient constitutional foundation upon which to base a presidential order of this

[3] AIR 1961 SC 1519
[4] [1951] 2 SCR 747
[5] Page 1155, Black's Law Dictionary, Revised 4th Ed.

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nature; thirdly, the power under article 370(1)(d) does not contemplate the whole application of ―all the provision of the constitution at present and in perpetuity to ―apply in relation to the State of J&K and fourthly, even if order was otherwise valid, insofar as it seeks to amend article 370(3), it is legally invalid, as the legislative assembly of the State of J&K has no power under the constitution of J&K to bring about an amendment to any provision under the constitution of India. Because the clause (2) of the presidential order purports to amend article 367 of the constitution however, the effect of these amendments is to bring about changes in text of article 370 of the constitution, via article 367. In particular, sub clause (d) of clause 2 of the presidential order stipulates that ―in proviso to clause 3 of the article 370 of the Constitution; the expression ―*constituent assembly of the State referred to in clause (2)* shall read ―*legislative assembly of State*. It is respectfully submitted that the presidential order, in effect, amended article 370; it is well established principle under the **doctrine of colorable legislation** that, ―*what cannot be done directly cannot be done indirectly*. If therefore article 370 cannot be amended through a presidential order, neither can it be removed or amended through the device of inserting a new proviso into article 367, in relation to the State of J&K.

ACT PASSED BY INDIAN GOVERNMENT NOT WITHIN THE AMBIT OF CONSTITUTION

In order to downgrade the status of the State of J&K into a Union Territory (with legislature), the Impugned Act is ultra vires of Article 3 of the Constitution of India which authorizes the formation of new States, and the alteration of areas, boundaries or names of existing States, but it does not authorize the degradation of status of an existing State into a Union Territory. This is made even clearer by Explanations I and II to Article 3, where 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 or Union Territory. Thereby it is submitted that the constitutional scheme of Article 3 doesn‘t allow formation of a union territory through bifurcation but only through unification.

It is respectfully submitted that degradation is not allowed in the constitutional text and spirit as it drastically reduces the powers of its democratically elected government and leads to extinguishment of democratic institutions like Legislative Council. A perusal of Part VIII of the Constitution read with Article 3 makes it clear that union territories have considerably fewer powers than States. This is further stipulated by Article 1 of the Constitution of India which provides that India is a union of States not a potential union of territories as ―States are constituent units of the Indian Union and are sovereign in their spheres (as specified by Dr. Ambedkar in the Constituent Assembly Debates) as well as held by Honorable Supreme Court in case of **S R Bommai v. Union of India**[6]. There is no precedent of a State being converted into a

[6] (1994) 3 SCC 1

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union territory and a union territory with a legislature being created without a constitutional amendment.

Article 3 should be read in conjunction with Article 2 of the Constitution, which provides Parliament the power to admit new States into the Union. Our Constitution prescribes only the addition of new States, on such terms as Parliament may prescribe and not the destruction of such States. If a State has been "extinguished" because of reorganization under Article 3, its component parts have either been made States in their own right or have been merged with other States.

It is submitted that the application of Article 3 and other provisions of the Constitution of India to State of J&K through Presidential Order CO 272 is itself invalid for want of concurrence of the State legislature as provided by proviso to 370(1) (d). Perusal of the constitutional scheme and other laws shows that the extension of the application of provisions of the Indian Constitution to State of J&K require concurrence instead of mere consultancies as implicit in following laws :

1. Article 370(1)(d) proviso requires concurrence in place of consultation.
2. Article 7 of the Instrument of Accession actually says: ―Nothing in this instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future Constitution.
3. The proviso to Section 147 of the Constitution of J&K States that no legislative assembly can alter Articles 3 and 5 of the Constitution and that there can be no amendment to the provisions of the Constitution of Indiana applicable to the State.
4. 1954 Presidential Order provided that "Provided further that no Bill providing for increasing or diminishing the area of the State of J&K or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of that State‖.
5. In Constituent Assemble debates Prof. K. T. Shah[7] said that ―Any question which relates to the alteration of the present units, their territories, boundaries or name, should begin with the people primarily affected, and should not come from the authority or power at the Centre. The authority at the Centre obviously is not familiar with local conditions; or they may have other outlook, may have other considerations, other reasons, for not accepting or agreeing to such a course.

So, the Parliament vis-a-vis the governor cannot provide concurrence but it has to be State Legislature representing the interest of the local people. Hence the bifurcation of State of J&K by application of the Article 3 is invalid as Article 3 itself is inapplicable on State of J&K.

[7] CONSTITUENT ASSEMBLY DEBATES, VOLUME VII, Wednesday, the 17th November, 1948.

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Moreover, article 3 itself has a constitutional safeguard in form of the proviso which 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 the State expressed through the legislature and this power can't be transferred to the Parliament. Parliament can certainly pass a law on any matter in the State list or pass the budget of the State when the State is under president‘s rule. But so far as expressing the views of the legislature on a Bill which affects the area, boundaries or name of any of the States is concerned – which is not a part of the powers of the legislature – parliament cannot deputize for the State.

It was held by Supreme Court that, "if there are a constitutional safeguard inhibiting the constitutional authority from doing an act, such safeguards cannot be allowed to be defeated by adoption of any subterfuge, and that would be 'clearly a fraud on the constitution." Held in **K.C. Gajapati Narayan Deo v. State of Orissa**[8].

A study of the Constitution's text, structure, and history indicates that Part XVIII powers are granted for a specific purpose (i.e., to ensure stable continuity of administration) until an elected government can be restored. It is a well-established proposition of administrative and constitutional law that the purpose for which a power is granted also places limitations upon its exercise. Consequently, it is clear that this very articles that authorize and regulate President's Rule (Articles 356 and 357) place implied limitations upon its exercise. One, of those limitations is that the President cannot bring about fundamental and permanent alterations to the very structure — and federal architecture of the concerned State, in a manner that cannot be undone or reversed by a subsequent elected government. Article 357(2) makes this understanding explicit when it States that legislation enacted under emergency powers can be altered, repealed or amended by a competent legislature or other authority. Article 250(2) States that laws made by Parliament on matters in a State List during an emergency shall cease to have effect after expiry of 6 months after the proclamation ceases to operate**.**

What this constitutional scheme emphatically does not envisage is that the situation of President's Rule is used to cut down and diminish the powers of the State legislature itself (that is temporarily not in existence), in a manner that what is done cannot be subsequently "altered or repealed or amended", as that power has been taken away from the competent body altogether. In effect, this would amount to the President and Parliament (acting as substitutes for the State legislature and executive) to permanently bind the hands of future State parliaments, by bringing about an alteration to their constituent powers themselves. It is a well-established principle that a law-making body cannot undertake an action that binds its successor; any such attempt is ipso facto void.

[8] AIR 1953 SC 375

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Also, the abolition of legislative council of the State of J&K without strictly complying with the procedural norms as laid down in Art. 169(1) (that is the resolution of two third members of legislative assembly i.e. without broad consent of people) is itself ultra vires the Constitution and void.

VIOLATION OF BASIC STRUCTURE

It was held that Democracy and federalism are the essential features of our Constitution and are part of its basic structure[9]. Justice R.F. Nariman recorded in paragraph 2 of his judgment in **SBI v. Santosh Gupta**[10] that State of J&K is indisputably a part of the federal structure of India, but has been accorded a special provision due to historical reasons. Furthermore, as Nariman J. went on to note in paragraphs 11 and 12 of the same judgment, the legislative relations between the State of J&K and the Union of Indiana, within the framework of Article 370; conform to the principles of federalism as laid down in **West Bengal v. Union of India**[11]. Degradation of State into union territories is an affront to the principle of federalism.

It is respectfully submitted that the model of federalism followed by our Nation is sui generis[12]. It is sui generis in the sense of being a pluralistic federation, where different constituent units of the federation can have a different relationship with the Union, based upon their terms of accession, historical, social, political, and cultural circumstances[13]. This is reflected in Articles 371A to 371J, which provide a special status - in different respects - to the States of Nagaland, Mizoram, Manipur, Maharashtra, Karnataka Sikkim, and others. It is clear that the principle of pluralistic federalism would be set at naught if one of the two parties to the federal relationship (i.e., the Union) can unilaterally amend the terms of their relationship, without even passing through the rigors of the amending process under Article 368. The federal relationship of such State with the Union of India is at a federal balance, which can be amended but not damaged or destroyed, as part of the basic structure of the Constitution.

It is respectfully submitted that the crucial right at stake here is the right to representation, and to be governed by one's elected representatives, as set out by this Honorable Court in **NCT of Delhi v. Union of India**[14]. Consequently, having once achieved the degree of representation offered by Statehood, the peoples of a State cannot be retrograded to the lesser degree of representation offered by a Union Territory. With the passage of the impugned act the political aspiration and right to be represented in parliament of people of Ladakh is substantially reduced

[9] S.R. Bommai v. UOI, (1994) 3 SCC 1
[10] (2017) 2 SCC 538
[11] (1964) 1 SCR 371
[12] Durga Das Basu, Constitution of India. 9th Ed., p. 622.
[13] R.C.Poudyal v. UOI, 1994 Supp 1 SCC 324
[14] (2018) 8 SCC 501

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as previously it had 4 MLA and 2 MLC of which they are now stripped off denying democratic representation. This betrayal of the democratic aspirations of the people is a negation of the democratic principle which runs through our Constitution.

CONCLUSION

From the above discussion it can be clearly concluded that what was done was right but the procedure adopted was not correct. Procedure was clearly given in Article 370 and it must be harmoniously constructed with the Constitution of J&K and Constitution of India. Though we all know that plebiscite at this point is not possible practically, but consent of people of J&K was mandatorily required in order to scrap Article 370, it could also be taken through the representatives of the peoples or we can say the MLAs. Hence, it can be clearly concluded from here that the Act passed in order to remove article 370 from the Constitution of India was a clear Fraud on constitution and must be struck down by the Judiciary.'