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## ARTICLE 370:A DISSERTATION ON THE PART OF THE GOVERNMENT:AN ANALYSIS WITH REFERENCE TO THE CONSTITUTIONALITY]

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**Abstract** - It is humbly submitted before the honorable supreme court of INDIA that the Presidential order to abrogate the article 370(3) is Constitutionally valid as in article 367 was modified by adding the subclause 4 by Presidential notification that the constituent assembly should be read as the legislative assembly, by which the powers which were vested earlier in the Constitution of state of Jammu & Kashmir directly passed to the parliament of union of INDIA. As far as the interpretation as described in Article 367 of certain clauses is concerned that constituent assembly here means the legislative Assembly of Jammu & Kashmir and since Jammu & Kashmir is under Presidential rule, all powers of state assembly vests with parliament so there is no requirement lies in the hands of the President to consult with the government of the state of Jammu & Kashmir as it is mentioned in the article 370(3) which specifically states that Presidential notification regarding the state of Jammu & Kashmir can only be issued with the consultation of the government of the state. Moreover there was also the President rule in the state of Jammu & Kashmir, due to which there was no need to consult with the government of the state. Moreover the Presidential rule imposed due to the surrender of the proclamation by the governor of the state of Jammu & Kashmir strictly confines the power of the governor to the parliament of the union of INDIA, that's why all the alterations and modifications made were absolutely Constitutional and valid in nature.

**keywords** - Constitutional, Arbitrary, Proclamation, Power.

### Whether the Presidential order is Constitutionally valid as per the provisions of the Constitution of INDIA ?

It the Presidential order to abrogate the article 370(3) is Constitutionally valid as in article 367 was modified by adding the subclause 4 by Presidential notification that the “ constituent assembly should be read as the legislative assembly”, by which the powers which were vested earlier in the Constitution of state of Jammu & Kashmir directly passed to the parliament of union of INDIA. As far as the interpretation as described in Article 367 of certain clauses is concerned that constituent assembly here means the legislative Assembly of Jammu & Kashmir and since Jammu & Kashmir is under Presidential rule, all powers of state assembly vests with parliament so there is no requirement lies in the hands of the President to consult with the government of the state of Jammu & Kashmir as it is mentioned in the article 370(3) which specifically states that Presidential notification regarding the state of Jammu & Kashmir can only be issued with the consultation of the government of the state. Moreover there was also the President rule in the state of Jammu & Kashmir, due to which there was no need to consult with the government of the state. Moreover the Presidential rule imposed due to the surrender of the proclamation by the governor of the state of

Jammu & Kashmir strictly confines the power of the governor to the parliament of the union of INDIA, that's why all the alterations and modifications made were absolutely Constitutional and valid in nature.

### **Whether the Presidential order was in violation of instrument of accession ?**

That Presidential order was not in a violation of the instrument of accession as it was specifically mentioned in the schedule of the instrument of accession <sup>1</sup>, that the parliament of the union of INDIA can only legislate the Constitution of the state of Jammu & Kashmir only on the matters of Defense , External Affairs & Communications .Though there are matters of defense, external affairs and communications in the state of Jammu & Kashmir which were at their par immense level to disturb the national and internal security of India, defense in the sense of Indo-Pakistani war, Pulwama attack were the remarkable events due to which there was a great disturbance in the internal territory of the nation .Due to all these reasons the Presidential order issued was absolutely Constitutional as well as it was not the violation of the instrument of accession.

### **Whether the action of President for the Infringement of fundamental right conferred in part iii is mentioned in the Constitution of the INDIA ?**

That violation of article 14, 19(1)(a)(g) ,20 and 21 are not violating the right of the people of INDIA specially in the state of Jammu & Kashmir basically the restriction which is imposed in the state of Jammu & Kashmir is reasonable restriction, which main aim is to ensure in the matter of safety, and peace of the territory of Jammu & Kashmir, to avoid the situation, which is happened in the year 2010 as necessary steps are taken by the government of the INDIA to insure the safe of the people the main contention of the curfew is not the violation of fundamental right. And moreover the rights are not suspended so the action of President to order the abrogation is Constitutionally valid as per law., and curfew is imposed by the magistrate as per section 144 of Crpc. the door of court is open to check the reasonableness of the imposition of curfew.

That the Presidential order to abrogate the article 370(3) is Constitutionally valid as in article 367 was modified by adding the subclause 4 by Presidential notification that the “ constituent assembly should be read as the legislative assembly”, by which the powers which were vested earlier in the Constitution of state of Jammu & Kashmir directly passed to the parliament of union of INDIA .As far as the interpretation as described in Article 367 of certain clauses is concerned that constituent assembly here means the legislative Assembly of Jammu & Kashmir and since Jammu & Kashmir is under Presidential rule , all powers of state assembly vests with parliament so there is no requirement lies in the hands of the President to consult with the government of the state of Jammu & Kashmir as it is mentioned in the article 370(3) which specifically states that Presidential notification regarding the state of Jammu & Kashmir

<sup>1</sup> A. **Defense** :

- 1.The naval military, air forces of the dominion and other armed forces raised or maintained by the Dominion : any armed forces , including forces raised or maintained by an acceding state , which are attached to or operating with the armed forces of the Dominion.
- 2.Naval,Military, and Air Forces works , administration of cantonment areas.
- 3.Arms, firearms: ammunition.
- 4.Explosives.

can only be issued with the consultation of the government of the state. Moreover there was also the President rule in the state of Jammu & Kashmir, due to which there was no need to consult with the government of the state.

Moreover according to the provision of article 368, parliament has the power to amend the Constitution.

Therefore in the case of Shankari Prasad Singh Deo v Union Of India<sup>2</sup>, in that case the validity of the Constitution especially the inclusion of Articles 31A & 31 B, was challenged in a petition under Article 32. It was alleged inter-alia that as Article 13(2) prohibited making of laws abridging the fundamental rights, it prohibited such abridgement even such amendment because an amendment was also a law. Rejecting the argument the court held that the power to amend the Constitution including the fundamental right was contained in article 368 and the word “law” in article 13(2) did not include in amendment of the Constitution which was made in the exercise of constituent and not legislative power later several other amendments made in the Constitution of which the fourth and the seventh amendments related to part 3 of the Constitution.

Moreover as there was the issue that the preventive detention done was invalid in nature so in the case of Sampat Prakash v State of J&K<sup>3</sup> the main argument of the petitioner was based on the fact that the article 35(c) of the Jammu and Kashmir Constitution is initially introduced by the Constitution (application to Jammu & Kashmir order, 1954, had given protection to any law relating to preventive detention in Jammu and Kashmir against invalidity on the ground of infringement of any one of the fundamental rights guaranteed by the part 3 of the fundamental rights of the Constitution. This argument was rejected by the supreme court relying mainly on clause(3) of article 370, which lays down that article 370 would cease to be operative or would be operative only when the President issues notification on the recommendation of the state, it was found that no requirement was there of the consultation of the state government.

As well as in the case of Mohd Maqbool Dammno v State of J& K<sup>4</sup>, the petitioner challenged the validity of his detention under the Jammu & Kashmir Preventive detention (Amendment) Act, 1967 on the ground that this act is invalid, as it has not been assented to by the Sadar-i-Riyasat of the state. On 16 November 1952, the President had made an order substituting another Explanation for the existing one in clause (1) of Article 370 as “For the purpose of this article, the Government of the state means the person for the time being recognized by the President on the Recommendation of the Legislative Assembly of the state as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the council of ministers of the state for the time being in office.” Acting under Article 370 (1) the President with the concurrence of the government of the state of Jammu & Kashmir made the Constitution (Application to Jammu and Kashmir) Second Amendment Order act 1965 to the effect the references to the Sadar-i-

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<sup>2</sup> Shankari Prasad Singh Deo v Union Of India, (AIR 1951 SC 458)

<sup>3</sup> Sampat Prakash v State of J&K, (AIR 1969 SC 1153)

<sup>4</sup> Mohd Maqbool Dammo v State of J& K, (AIR 1972 SC 963)

Riyasat of the state shall be construed as reference to the governor of the state. According to the counsel on behalf of the petitioner neither the state assembly nor the President were competent to impair the functioning of the Sadar-i-Riyasat of the state shall be construed as a reference to the governor of the state.

According to the counsel on behalf of the petitioner, neither the state assembly nor the President were competent to impair the functioning of the Sadar-i-Riyasat unless the Constitution of India was amended under article 368 and 370(3) or a fresh constituent assembly was convened to amend the explanation. This argument was not accepted by the Supreme Court. Sikri CJ on behalf of the court, explained that the essential feature of Article 370(1) merely recognized the Constitutional position in the state. The Chief Justice had no difficulty in holding that Article 370(1) (B) and (D) places no limitation on the framing or amendment of the Constitution of Jammu & Kashmir. It was pointed out that despite the changes in the designation and the mode of appointment of the Head of the State, the Constitutional position in the state remains basically the same and the governor is the successor to the Sadar-i-Riyasat and can validly exercise his powers as Head of the State.

But in this particular case there was Presidential rule imposed on the state of Jammu & Kashmir due to which there was no need to consult with the governor of the state, with the reference to the case of *Mohd. Maqbool Dammno v State of J & K*, therefore the Presidential action taken as well as the Presidential notification published was completely correct in its own relevancy.

Moreover Article 356 carries the marginal heading "Provisions in case of failure of Constitutional machinery in states". But neither clause (1) nor for that matter any other clause in the article employs the expression "failure of Constitutional machinery". On the other hand, the words used are similar to those occurring in article 355 namely, "a situation has arisen in which the government of a state cannot be carried on in accordance with the provisions of this Constitution". If the President is satisfied that such a situation has arisen, whether on the basis of a report received from the governor of the state or otherwise, he may, by proclamation, take any or all of three steps mentioned in sub-clauses (a), (b) and (c). It would be appropriate to read the entire clause (1) of article 356 at this stage:

- (1) If the President, on receipt of a report from the governor of a state or otherwise is satisfied that a situation has arisen in which the government of the state cannot be carried on in accordance with the provisions of this Constitution, the President may by proclamation-
  - (a). assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by the Governor or anybody or authority in the State other than the Legislature of the State.
  - (b). declare that the powers of the legislature of the state shall be exercisable by or under the authority of parliament.

(c). make such incidental and consequential provisions as appear to the President to be necessary or desirable for giving effect to the objects of the Proclamation, including provisions for suspending in whole or in part the operation of any provisions of this Constitution relating to anybody or authority of the state: Provided that nothing in this clause shall authorize the President to assume to himself any of the powers vested in or exercisable by a High Court or to suspend in whole or in part of the operation of any provision of this Constitution relating to High Courts.

Clause (2) says that such a proclamation may be revoked or varied by a subsequent proclamation. Clause (3) provides a check upon the power contained in Clause(1). It says that every proclamation under this article shall be laid before each house of parliament and shall, except where it is a proclamation revoking a previous proclamation, cease to operate at the expiration of two months unless before the expiration of that period it has been approved by resolutions of both Houses of Parliament. Clause 4 provides that “ a proclamation approved by both the houses of parliament shall, unless revoked, cease to operate on the expiration of a period of six months from the date of issue of such proclamation .This provision to clause 4 empowers such Proclamation to be extended , beyond six months subject to the approval of Parliament for a further period of six months at a time subject to an outer limit of three years. The second provision to clause 4 provides for a period of specific situation which it is not necessary to refer to for the purpose of this paper. Moreover in this case on the failure of the Constitutional machinery of the state of Jammu & Kashmir. The governor of state of Jammu & Kashmir passed a notification to the President, by which all the powers of the governor passed to the union government and the parliament of the state of INDIA and they finally abrogated the article 370 subclause (3) as well as added clause 4 to article 367 that “ constituent assembly should be read as the legislative assembly of the state”, which was absolutely Constitutional in nature because all the process done with the reference of the Constitutional provisions of INDIA.

Moreover according to the case of State of Rajasthan v Union of India<sup>5</sup>: A Constitutional controversy of great significance Art 356 was raised in State of Rajasthan v Union of India

When the general elections for Lok Sabha were held in the country in 1977, after the lifting of the emergency in 1975, the congress party was badly routed in several states by the Janata party which won a large number of seats in the Lok Sabha and thus formed the government at the Centre. In these states Congress ministries were functioning at the time and they still had some more time to run out for completion of the full term.

The central Home Minister, Charan Singh wrote a letter to each of the chief minister of these states suggesting that he should seek dissolution of the state legislature from the Governor and obtain fresh mandate from the electorate. The state of Rajasthan filed an original suit in the supreme court against the union of India under Art 131 praying the court to declare these directives of the Home Minister as Unconstitutional and illegal. It was argued that the letter in question was a prelude to the invocation of art 356 in these states and that the dissolution of the state legislatures on the ground mentioned in the said

<sup>5</sup> State of Rajasthan v Union of India, ( 1977) 3 SCC 592: AIR 1977 SC 1361)

letters was a prima facie outside the purview of art 356 . in substance , the suit was designed to forestall the invocation of Art 356 in the several states.

The supreme court however dismissed the suit unanimously. The broad position adopted by the court was that it could not interfere with the Centre 's exercise of power under Art 356 merely on the ground that it embraced " political and executive policy and expediency unless some Constitutional provision was being infringed.

Moreover Art 74(2) disables the court from inquiring into " the very existence or nature or contents" of ministerial advice to the President. Art 356 makes it impossible for the Court to question the President's satisfaction on any ground unless and until resort to Art 356 in a particular situation shown to be so " grossly perverse and unreasonable " as to constitute " patent misuse of this provision or an excess of power on admitted facts,

that Presidential order was not in a violation of the instrument of accession as it was specifically mentioned in the schedule of the instrument of accession <sup>6</sup>, that the parliament of the union of INDIA only on the matters of Defense , External Affairs & Communications can do the alterations as well as modifications in the article 370.

As we always know that the state of Jammu & Kashmir is a sensitive area always it was in the matters related to the concept of Defense as the particular territory has always been the Centre of attraction of all the conflicts and disputes that took place in the past history of India either it may be the sudden outcasting of the Kashmiri pandits, terrorism attacks as well as paying the role of loophole in the India's strong Defense mechanism there need to be the great urgency of the abrogation of article 370(3).As well as the Presidential order issued was completely Constitutional in its own nature because in the instrument of accession only it is mentioned that the parliament of the union of INDIA has the complete rights to legislate the Constitution of state of Jammu & Kashmir only on the matters of Defense, External affairs & Communications.

It is humbly submitted before the honorable supreme court that the action of President is not breach of contract into the instrument of accession , Article 370 is an article under part XXI of the Constitution of India. This generally deals with the "Temporary, Transitional and Special provisions" and is a temporary provision that commits to providing special autonomous status to the union of INDIA state of "Jammu & Kashmir". As well as it is mentioned in the schedule of the instrument of accession.

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<sup>6</sup> A. **Defense** :

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- 2.Naval,Military, and Air Forces works , administration of cantonment areas.
- 3.Arms, firearms: ammunition.
- 4.Explosives.

First of all the state of Jammu & Kashmir acts as a indoor to the external terrorism that always hampers the national security of the union of INDIA, due to which mainly the unity and integrity of the nation is targeted and as per the schedule of the instrument of accession it is strictly mentioned in the instrument of accession that when there is any point in the defense issues of the state of Jammu & Kashmir than the dominion legislature of INDIA has the complete power to amend the laws with respect to the state of Jammu & Kashmir. Moreover keeping the traces of the past from the indo- Pakistani war of 1947-1948 sometimes known as the First Kashmir war was fought between INDIA & Pakistan over the princely state of Jammu & Kashmir .It was one of the four greatest wars that was fought between INDIA and Pakistan .Pakistan precipitated the war after Independence by launching tribal lashkar from Waziristan, the future of which hung in balance to capture the state of Jammu & Kashmir. Pakistan always tried all the bad and unfair tactics disturbing the defense machinery of the union of INDIA as well as the unity and integrity of the nation. Again on 14 February 2019 , a convoy of vehicles carrying security personnel of the Jammu & Kashmir Srinagar National Highway was attacked by a vehicle – borne suicide bomber of Lethpora in the Pulwama district, Jammu & Kashmir Dharmnagar. The attack resulted in the death of 40 Central Reserve Police Force personnel and the attacker . The responsibility for the attack was claimed by the Pakistan based islamist- militant group Jaish-e-Mohammad. The attacker was Adil- Ahmad Dar a local from Pulwama District and a member of Jaish -e-Mohammad. INDIA has blamed Pakistan for the attack. Mainly these were the main reasons where the state of Jammu & Kashmir was continuously disturbing the defense mechanism of the INDIA , that's why it was mandate for the parliament to abrogate the article 370(3) irrespective of the instrument of accession which seems to be absolutely Constitutional as well as valid in nature.

Secondly , due to the attacks made in the state of Jammu & Kashmir as well as the disturbance of the defense mechanism of the union of INDIA it was always a great question mark on the point of the external affairs <sup>7</sup> of the state, because always the external affair keeps the purview of international relations as well as territories between the nations. By these attacks the image of INDIA was somewhat ruining due to the Article( 370) special status of state of Mannsoul, with the great mention of the provision to do modification in the Constitution of state of Jammu & Kashmir by the INDIA parliament as mentioned in the instrument of accession, it was absolutely Constitutional as well as valid in nature.

Finally, coming to the points of communication<sup>8</sup> lines , at the time of protests , rebellion communication lines always served as the linking path among the disturbing elements who always tried their level best to disturb the internal

#### <sup>7</sup>B External Affairs

- 1.External Affairs , the implementing of treaties and agreements with other countries , extradition including the surrender of criminals and accused persons to parts of his majesty's Dominion outside India.
- 2.Admission into, and emigration and expulsion from India including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India or subjects of any acceding state : pilgrims to places beyond India.
- 3.Naturalisation.

#### <sup>8</sup>Communications

- 1.Posts and Telegraphs , including telephones , wireless , broadcasting and other like form of communication.
- 2.Federal Railways : the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fares , station and service terminal charges, interchange of traffic and the responsibility of the administration of such on railways as carriers of

peace of the state-because as reported from the incidents of the past always the communication lines served as the linking agents in the concepts of disturbing the peace of the state. Due to all these reasons the Presidential order to abrogate the article 370(3) was absolutely right as well as purely Constitutional & valid in nature.

Moreover due to the prevalence of the extraordinary situation of giving rise to the conflicts and disputes in the territory of the state of Jammu & Kashmir the blackout of the communication lines were absolutely Constitutional as well as valid in nature because whatever done was with the due process of law trying to give emergence to maintain the balanced peace and harmony at the disputed territory.



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goods and passengers , regulating of minor railways in respect of safety the responsibility of the administration of such railways as carriers of goods and passengers.

3.Maritime shipping and navigation including shipping and navigation on tidal waters admiralty jurisdiction.

4.Port Quarantine.

5.Major ports, that is to say the declaration and delimitation of such ports and the constitution and powers of Port authorities therein.

6.Aircraft and air- navigation : the provision of aerodromes , regulation and organization of air traffic and aerodromes.

7.Light house, including light ships beacons and other provisions for the safety of shipping and aircraft.

8. Carriage of passengers and good by sea or air.