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DISSENTING PROPOSALS RECEIVED FROM ASSOCIATES MEMBERS

(1)

Hon'ble Chairperson and Hon'ble Members

Delimitation Commission of India

Ashoka Hotel, 3rd Floor Chanakyapuri, New Delhi - 110021

SUBJECT

Delimitation of Parliamentary and Assembly Constituencies in respect of UT of Jammu & Kashmir. Draft Working Papers/Draft Proposal dated February 25th February, 2022 made available on February 26th, 2022.

IN THE MATTER OF

Dissenting Proposal / Objections to Draft Working Papers/Draft Proposal dated February 25th February, 2022 made available on February 26th, 2022.

BACKGROUND FACTS

- To understand objection to the very constitution of Delimitation Commission for Delimitation of Parliamentary and Assembly Constituencies in respect of UT of Jammu and Kashmir and to the Delimitation exercise undertaken by the Commission, a closer look at its recent history and background facts is necessary.
- The State of Jammu and Kashmir (now downgraded to a UT under a constitutionally suspect law impugned before Hon'ble Supreme Court) was on 15th August 1947, free from its Treaty obligations towards British and acquired status of an independent State. Its Ruler called Maharaja was repository of all legislative, executive and judicial powers under the Jammu and Kashmir Constitution Act, 1939. The Ruler did not join either of the two Dominions emerging on 15th August 1947 and instead nursed idea to stay independent with good relations with the both. He, however, on 27th October 1947 decided to accede to the Dominion of India on three subjects – defense, foreign affairs and communications, retaining jurisdiction over all the remaining subjects. The accession was accepted and so were the terms set out in the Instrument of Accession. The Constitution of India was in making and it was decided to incorporate in the Constitution, a provision to guarantee 'limited sovereignty' to Jammu & Kashmir promised while accepting accession. The constitutional guarantee came in shape of Article 370 of the Constitution. The Ruler on 17th November 1949 ratified the Constitution of India though only to the extent applicable to the State. Pertinent to note that on the date, the Constitution commenced only Article 370 and by virtue of it, Article 1 were applicable to the State. The Article 370 while laying down mechanism for distribution of powers between Union and State Governments also provided for a constituent assembly to draft separate constitution for the State, to inter alia delineate the jurisdiction of Union and State governments.
- The State Constituent Assembly was convened in April 1951. However, a few urgent constitutional matters like citizenship, monarchy, fundamental rights, residuary powers could not wait drafting and commencement of the State Constitution and required immediate resolution. The Union Government and State Government accordingly entered into an agreement known as Delhi Agreement 1952 dealing with all these important matters. The Delhi Agreement was approved by the Parliament on 7th August 1952 and the State Constituent Assembly on 18th August 1952. The Agreement while extending citizenship, fundamental rights, jurisdiction Supreme Court, Emergency Powers etc guaranteed residuary sovereignty or internal autonomy to the State. The State was guaranteed jurisdiction to legislate on all subjects not conceded to the Union. The Article 370 thus alone did not guarantee special constitutional status to Jammu and Kashmir but the special status or internal autonomy to Jammu and Kashmir was independent of Article 370 also guaranteed by Delhi Agreement 1952. The Constituent Assembly adopted the State Constitution on 26th November 1956. It came into force on 26th January 1957. The commencement of State Constitution was hailed by senior political leaders across the political spectrum. The State Constitution reiterated and provided for internal autonomy also known as special constitutional status to Jammu and Kashmir.
- The Delimitation of Assembly Constituencies under the mechanism evolved to govern constitutional relations between Union and State fell within exclusive domain of the State. The Part VI of the State Constitution deals with 'The State Legislature - Composition of the State Legislature' Section 47(3) of the State Constitution reads: 47(1).....(2).....(3) Upon the completion of each census, the number, extent and boundaries of the territorial constituencies shall be readjusted by such authority and in such manner as the Legislature may by law determine; Provided that such readjustment shall not affect representation in the Legislative Assembly until the dissolution of the then existing Assembly.
- The State Legislature in exercise of powers under Section of 47 of the State Constitution enacted Jammu and Kashmir Representation of Peoples Act 1957. The Act provided for constitution of Delimitation Commission for Delimitation of the territorial constituencies upon completion of each census. In exercise of powers under the Jammu and Kashmir Representation of Peoples Act, 1957 the Delimitation Commission was constituted in 1963, 1973 and 1995, the Delimitation exercise made and Assembly seats delimited. In wake of amendment to Article 170 and addition of Proviso providing that the delimitation of Assembly Constituencies is not to be undertaken "until the figures for first census taken after the year 2026 have been published" identical amendment was made to State Constitution followed by amendment to Section 3 of the Jammu and Kashmir Representation Act, 1957. The delimitation exercise was thus like rest of country to be undertaken after 2031 census figures were available.
- The President on 5th August 2019 passed The Constitutional (Application to Jammu and Kashmir) Order C.O. 272 superseding the Constitution (Application to Jammu and Kashmir) Order 1954 and applying the Constitution of India in its entirety to the State. The Order C.O. 272 was followed by C.O. 273 declaring that all the clauses of Article 370 shall cease to be operative except the clause making all the provisions of the Constitution applicable to the State. The Rajya Sabha on 5th August 2019 passed Jammu and Kashmir (Reorganisation) Bill, 2019 bifurcating the State into two Union Territories. The Act was notified on 9th August 2019. The C.O. 272 of 5th August 2019, C.O. 273 of 6th August 2018 and Jammu and Kashmir Reorganisation Act, 2019 denuded the State of Jammu and Kashmir of its special constitutional status and downgraded and fragmented the State of Jammu and Kashmir into two Union Territories. The Jammu and Kashmir Reorganisation was also made a device to repeal a few hundred State laws including the Jammu and Kashmir Representation of Peoples Act, 1957 and application of more than a hundred Central Laws including The Delimitation Act, 2002 to the new Union Territory.
- All steps taken on 5th and 6th August 2019 namely C.O. 272, C.O. 273 and Jammu and Kashmir Reorganisation Act being grossly unconstitutional/trampling upon the letter and spirit of the Constitution and unable stand judicial scrutiny. The Orders and the Act have been questioned in as many 10 petitions most of these petitions filed in August 2019 itself, before the Hon'ble Supreme Court. The petitioners cogent and convincing constitutional grounds have questioned vires of the C.O.272 and C.O. 273 Orders and the Reorganisation Act 2019. The Hon'ble Supreme Court has been pleased to entertain and admit the Petitions and refer the Petitions to Five Judge Constitutional Bench of the Hon'ble Court. The Hon'ble Five Judge Constitutional Bench has ordered clubbing of all these petitions, heard the matter a few times but the hearing thereafter was not possible and got delayed due to covid -19 Pandemic. The physical hearing having been resumed, the matters are expected to become up and be heard in near future.

THRESHOLD OBJECTIONS

- The Hon'ble Delimitation Commission cannot lose sight of the fact that the application of law under which the Commission is constituted and the law the Commission is to apply and whereunder the Commission derives its powers are constitutionally suspect law inasmuch their vires or constitutionality is under judicial scrutiny of the topmost Constitutional Court of the Country. The fundamental principles of Constitutional ethics, morality and propriety in a Constitutional democracy governed by rule of law like ours require all the limbs of the State, all the State functionaries and government and semi-government statutory bodies and institutions including this Hon'ble Commission not to implement, act upon or exercise powers under a law under judicial scrutiny, the

constitutional validity and vires whereof are being examined by the Hon'ble Supreme Court. The Hon'ble Chairperson of the Commission as known legal luminary of the Country having adored the Bench, is well aware of basic principle that implementation of law impugned before the Hon'ble Supreme Court on the ground of ultra vires and unconstitutionality and under scrutiny by the constitution bench is to be avoided as its implementation while under challenge may border on disregard and preempt the verdict. The Hon'ble Commission therefore in our humble opinion must not go ahead with present Delimitation exercise and wait for the judgment of Hon'ble Supreme Court.

- The Hon'ble Commission constituted under Delimitation Act, 2002 is called upon to delimit the constituencies of the Union Territory of Jammu and Kashmir in accordance with Jammu and Kashmir Reorganisation Act 2019. Hon'ble Commission may kindly appreciate that petitions pending before the Hon'ble Supreme Court would amongst others call for answer to the questions. Whether downgrading a State and dividing a State into two or more Union Territories is permissible under the Constitution. We need to be reminded that under the Constitution of India is a Union of States. Whether dismembering a State would result in loss of its status and identity – a far serious issue for the federal character of the Country, held to be basic structure of the Constitution by the Hon'ble Supreme Court and therefore would be impermissible and unconstitutional. Whether it was permissible for the President to suspend, in exercise of extraordinary and emergency powers under Article 356, Article 3 provision 1 and 2 when the suspended provisions were unrelated to carrying on smooth administration during the presidential rule. Whether the constitutional safeguards and constitutional procedure involved in exercise of powers under Article 3 were adhered to and strictly followed, if at all the division and downgrading of the State is assumed though not admitted to be possible. Whether repeal of the Jammu and Kashmir Representation of Peoples Act, 1957 was in accordance of law and whether application of Delimitation Act 2002 to Jammu and Kashmir was permissible under law. Whether Jammu and Kashmir Reorganisation Act 2019 has been passed in violation of the Constitution.
- The above and all like questions that may arise before the Hon'ble Supreme Court while hearing the Petitions, are important jurisdictional question that go to the root of the matter and the Hon'ble Commission taking due note of these important issues, must stop proceeding with the exercise and await judicial verdict in the batch of Petitions impugning the C.O. 272 of 5th August 2019, 6th August 2019 and Jammu and Kashmir Reorganisation Act.
- The Constitution of Jammu and Kashmir (State Constitution) has been framed by a duly convened Constituent Assembly in exercise of constituent power. The Constitution cannot be abrogated by the Parliament or any other authority. The State Constitution is in existence as on date. It provides for delimitation after the figures of first census after 2026 are published. The Jammu and Kashmir Representation of Peoples Act 1957 also provides for delimitation after 2031 census figures are published. The delimitation of Assembly Constituencies and Parliamentary Constituencies in the Country is to be done after the figures of first census after 2026 are published. Looking from any angle, therefore the delimitation exercise is to be deferred till 2031 census figures are published. There is no reason to single out Jammu and Kashmir for delimitation exercise, when the underlying logic and all relevant factors advocate such exercise to be deferred till 2031 census figures are published. What is good for entire Country must be good for Jammu and Kashmir as well. The Commission must take due cognizance of this fact more so when the Commission has itself deferred delimitation exercise in Assam.
- The argument advanced to justify the Delimitation exercise more than a decade ahead of the rest of the Country is that the Jammu and Kashmir Reorganisation Act 2019 provided for increase in number of seats and as 7 increased seats were to be allocated it was necessary to embark on such exercise. The argument is specious to say the least. The Andhra Pradesh Reorganisation Act 2014 provided for increase of 50 Assembly seats in case of Andhra Pradesh and 34 Assembly seats in case of Telangana. The increase did not prompt delimitation exercise and the Assembly elections were held without fresh delimitation exercise. There is no proposal to go for any delimitation exercise ahead of the delimitation in the Country after census figures of 2031 census are available. In Assam elections were held without delimitations though the process was initiated with constitution of the Delimitation Commission. Against said backdrop, the right course would be to stop the delimitation exercise and commence it alongside such exercise in the Country after the figures of first census after 2026 are published as provided in Article 170 and envisioned in Section 47 of the State Constitution. The election to the Assembly in Jammu and Kashmir may be held as in case of Andhra Pradesh, Assam and Telangana, as per the existing delimitation. The course would also be one warranted and more than that advisable due to pending challenge to the 5th and 6th decisions before the Hon'ble Supreme Court. The Parliament in its wisdom decided to defer delimitation in entire country until 2031 census figures are published and the decision was not revised even when there were reasons as in case of Andhra Pradesh and Telangana to give it a second look, therefore same criteria must be followed in case of Jammu and Kashmir.

DETAILED OBJECTIONS

- The objections are submitted without prejudice to our consistent stand that as constitutional validity of the Jammu and Kashmir Reorganisation Act 2019, C.O. 272, C.O. 273 and other measures taken in August 2019, are under challenge and their constitutional validity being examined by the Constitution Bench of the Hon'ble Supreme Court the present Delimitation exercise would amount to implementation of a law under judicial scrutiny and the Delimitation exercise is to be stopped till the judicial verdict is rendered by the Hon'ble Court. It is submitted that the response to Paper 1 and Paper 2-B have gone unaddressed and only cosmetic changes have been made in the Draft Proposal. Hence the objections already submitted are to be reiterated in addition to the fresh response.

ASSEMBLY CONSTITUENCIES

- The Delimitation of territorial constituencies after regular intervals is integral part of democracy. The democracy has its edifice on equal representation to the people in law making institutions, their equal participation through their representatives in decision making and in governance. The Delimitation exercise having regard to its importance in strengthening democracy must be fair, objective and impartial. To ensure fairness, objectivity and impartiality it is important to strictly adhere to the legal frame work, prescribed criteria and in case no criteria is prescribed to lay down criteria in accordance with the settled guidelines and apply the criteria prescribed or laid down as the case may be, uniformly and not selectively. The present Delimitation exercise, it is painful to point out, is neither in tune with the Constitution nor in consonance with law. The criteria, be it allocation of 7 increased Assembly constituencies or delimiting the constituencies and drawing boundaries of the constituencies is arbitrarily fixed and selectively applied.
- The fundamental principle behind any delimitation exercise is to ensure that every constituency has as far as possible equal population. The determining criteria therefore is population with contiguity, connectivity, communication, convenience, compact area as other considerations. This is the position emphasized in the Constitution and is a detailed reference to which has been made in response to Papers 1 to 6 and are requested to be read with these objection/dissent. However, be it the allocation of additional seats or delimiting of the Assembly constituencies these principles have been very conveniently ignored. The proposal to allocate one of 7 increased Assembly seats to Kashmir as against entitlement of 4 – 1 each for Anantnag, Budgam, Kupwara and Srinagar is bound to create inequality and disagreement between the regions.
- It becomes necessary to revisit the statistics highlighted in previous response. The total population of Jammu and Kashmir as per 2011 Census is 1,22,67,348. The population of Kashmir Division according to Census figures is 68,88,829 and population of Jammu Division is 53,78,519. The average population per Assembly Constituency works out to be 1,36,304. The number of Assembly Constituencies to be allocated to Kashmir Division on the basis of 2011 Census figures and average population per Assembly Constituency must be 51 (50.54) and to Jammu Division 39 (39.45) respectively. The number of Assembly Constituencies proposed to be allocated to Kashmir Division is 47 or 4 less than the Assembly Constituencies it deserves to have allocated and the number Assembly Constituencies allocated to Jammu is 43 or 4 more than due having regard to the population of the Division and the average population per Assembly Constituency.

Constituency. The Kashmir Division with 56.15% of the total population gets only 52.22% of the Assembly Constituencies and Jammu Division with 43.84% of the population gets 47.77% of Assembly Constituencies. The Kashmir Division notwithstanding more population get practically disenfranchised.

- The categorization of the Assembly Constituencies in three group with +10%, average and -10% advocated in Paper I with 136304 as average population of an Assembly Constituency and 10% +/- deviation has been grossly violated. The Draft proposal makes deviation of up to -67%. In Kashmir Division 5 of the 10 districts have been placed in +10% category whereas in Jammu Division only 2 of the 10 districts have been categorized as +10% meaning that in 5 of 10 districts as against 2 districts of Jammu division the average population per Assembly Constituency would be 149835 as against overall average of 136304. In Kashmir Division only 1 district has been categorized as -10% whereas in Jammu Division 4 have districts been placed in -10% category implying that in Jammu Division 4 territorial areas get Assembly Constituencies though their population is less than average. The device is used to reduce the number of Assembly Constituencies in Kashmir Division and increase the number in Jammu Division, in the proposal. A hard look at proposed parameters is at this stage called for.
- The proposal as regards Samba district and Kulgam district as already submitted is totally indefensible and warrants a closer look. The Samba district with a population of 3,16,031 and an area of 915 sq. km is proposed to be allocated 3 Assembly Constituencies with average population of 105344 i.e 31 thousand below the average and even 22 thousand below the -10% category and with the average of 305 sq Km per Assembly Constituency. Samba district surprisingly is shown as +10% category district in Paper-1 but the criteria actually applied does not match the given parameters. Kulgam district with the population of 4,24,484 is proposed to be allocated 3 Assembly Constituencies with average of 1,41,495 i.e. 5,181 above the average and with average area of 1003 sq Km per Assembly Constituency. The Kund, WaltangoNaar – the avalanche prone area, by and upper areas of D.H. Pora are tough terrain areas and large segment of the population residing in these areas suffers immense hardship. All these factors warranted Kulgam district to be placed in -10% category. Instead of this, the number of Assembly Constituencies has been reduced from 4 to 3 resulting in grave injustice to the district.
- The Hon'ble Commission has in the first place arbitrarily devised some unknown criteria while apportioning and identifying increased 7 seats and selectively applied the criteria so fixed and thereafter allotted seats compromising the fundamental principle of population as the main criteria. The increased seats have been arbitrarily allotted even in violation of -10% and +10% of the average criteria fixed and notified in Paper -1. The criteria provided that while 136304 would be average population of an Assembly Segment, -10% allowance would be given having regard to tough terrain, lack of connectivity, hardship faced by people. In such cases Assembly Constituency would be allotted for population 10% below the average. The parameters or indicators of criteria were not made known to the associate members. However, the decision as regards allocation of increased 7 seats in the ratio of 1:6 though arbitrarily and ignoring our objections, was taken before Paper-1 was circulated and response invited from associate members the comments/objection filed on December 31, 2021 though cogent and convincing were ignored. The arbitrary allocation of increased seats for reasons other than contemplated under law and logic, have made now huge violation of fundamental principles of a delimitation exercise unavoidable.
- The population as the first and foremost criteria of delimiting the Constituencies continues to be ignored in the draft and not given the importance it deserves. The deviation in population ranges from 56077 more than average of 136304 in case of 41-Dooru to 85025 less than average in case of 50-Padder. There are 6 Assembly segments with less than 100,000 – 1 lac population (Padder, Inderwal, Shri Mata Vaishnav Devi, Bani, Basohli, and Kishtwar) in Jammu Province while number of such constituencies is three (Gurez, Kannah and Kunzer). Likewise there are 20 Assembly segments with population of more 1,50,000 in Kashmir Provinces while number of such Assembly segments is 8 in case of Jammu province. TwentyFour constituencies in Kashmir Province have more than average population of 136304 while population of only eight constituencies in Jammu Province exceeds the average population of a constituency worked out by the Hon'ble Commission. The population of Dooru almost equals population of three constituencies – Padder, Shri Mata Vaishnav Devi and Bani constituencies of Jammu. While a little less 2 lac population of Dooru will have one member in Assembly an almost equal population from aforementioned 3 constituencies shall have three members in the Assembly. The people of Dooru therefore cannot not be equal stakeholders in decision making and equal participants in governance. The Working Papers 1-6 script a storey of disempowerment and disenfranchisement of Kashmir and far flung unattended areas of Jammu. The revised draft does not at all address these gross discrepancies.
- The Draft Proposal made available on 26th February does not at all consider the response to Paper 1-6 submitted on 14th February 2022. When district and not State as envisioned in Article 81(2)(b) is taken as a unit, Anantnag, Budgam, Kupwara and Srinagar Districts having regard to the population and criteria of +/-10% fixed by the Hon'ble Commission, deserve to be allotted an extra Assembly segment each out of the seven increased seat while Rajouri, Poonch and Doda in Jammu province is to get one each. The Hon'ble Commission without any reason ignoring the just claim of Anantnag, Budgam, Srinagar and Poonch has unjustifiably allotted one each from the increased seats to Reasi, Kathua, Samba, Udhampur, Kishtwar when the criteria laid down did not make the Districts eligible for increase. Baramulla with 100 km long LoC does not get an extra seat having regard to the hardship faced by the population living along the LoC, while a suburban industrialised district with 900 sq km total area gets an extra Assembly segment in the name of proximity to International Border.
- While to illustrate departure from law the 85 – Rajouri, 90- Mendhar and 88- Poonch Haveli were quoted as ready examples and the deviations pointed out have been corrected, yet from the closer look at the Working Papers 2-6 would reveal that in most of cases geographical compactness, facilities of communication and convenience to the public spelt out in Section 60 (supra) have not attracted any consideration. The constituencies have been demarcated, areas joined and areas annexed with least regard for these factors and for reasons other than permissible under settled norms. To point out Anantnag west has annexed with it Imoh PC and Sahib Aabed previously part of now

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