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## Case Comment: The President of India vs Berubari Union Exchange of Enclaves (1960)

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### INTRODUCTION

In the modern world, it is not very uncommon among countries to have territorial disputes, especially ones that share close territorial borders with non-friendly countries. One such country is India. India, with its historical developments such as the existence of large empires that extended its border from down south of the South-Asian peninsula to the far north of the Indian Subcontinent in the Himalayas and horizontally from the east in modern-day Myanmar to the west in Iran, has resulted in long and widespread boundaries. Before India became the modern-day democracy it is today, Indian territory was under the control of the British empire, the end of which led to its partition due to reasons such as communal tensions and partition politics of the Muslim League.

The borders, however, it can be argued, were not drawn scientifically and lacked a certain precision, making a case for future disputes between the two neighbours, India and Pakistan. The Boundary Commission, a consultative body established in July 1947 to make recommendations regarding the division of the Punjab and Bengal regions of the Indian

subcontinent between India and Pakistan before each of those countries gained independence, drew the Radcliffe line. The commission was headed by Sir Cyril Radcliffe and comprised four members of the Indian National Congress and four members of the Muslim League. It was established by Lord Mountbatten, the final viceroy of British India.<sup>1</sup>The Radcliffe line, which divided India and Pakistan, left inaccuracies in the borders, which remained to be solved by both countries. Agreement by both countries on one such inaccuracy led to a crucial ruling of the apex court of India on the Constitutional validity of such agreements in *The President of India v Berubari Union Exchange of Enclaves*.<sup>2</sup>

## FACTS OF THE CASE

Sir Cyril Radcliffe's Boundary Commission, decided on the final adjustment of borders between India and Pakistan, following which the boundaries of former Bengal and Punjab were partitioned. This arrangement had certain lacunae, which led to claims and counterclaims by both the countries in the subcontinent on each other's territories. Under the original order of the Boundary Commission, the Berubari Union no. 12 was a part of the State of West Bengal which was a Part A State post the adoption of the Constitution in January 1950 and was governed as a part of India. However, both the Indian and Pakistan governments later agreed on a pact for the exchange of certain territories under the Nehru - Noon agreement in 1958 between the Prime Ministers to resolve disputes. Under the said agreement, it was arranged that the territories of Berubari Union No. 12, in the district of Jalpaiguri in West Bengal was to be divided into equal parts between India and East Pakistan.

The territory had been under the administration of India's West Bengal state since independence, and no claim was raised on it until 1952. The agreement to give land to Pakistan raised concerns in the political sphere of West Bengal, and this led the President of India to evoke the powers enshrined in him under Article 143(1), allowing him to seek advice from the supreme court to save future litigation on the matter<sup>3</sup>. The matter of contention was not merely political

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<sup>1</sup> 'Boundary Commission' (*Britannica*) <<https://www.britannica.com/topic/BoundaryCommission>> accessed 04 January 2023

<sup>2</sup> *In Re: Berubari* 1960 (3) SCR 250

<sup>3</sup> Constitution of India 1950, art 143

but also constitutional, since, for the first time since independence, India was to cede its territory to some other nation, even if so, in exchange for a similar amount to be received. The president asked the following three questions, which form the basis of the pronouncements made in the case<sup>4</sup>: -

*“(1) Is some kind of legislative action necessary for the implementation of the Agreement relating to the Berubari Union?*

*(2) Does a law of Parliament **need** to be made about article 3 of the Constitution **sufficient** for the purpose, or an amendment of the Constitution be made by article 368 of the Constitution, in addition, or the alternative?*

*(3) Is a law of Parliament relatable to article 3 of the Constitution **sufficient** for implementation of the agreement relating to the **exchange** of enclaves, or is an amendment of the Constitution by article 368 of the Constitution necessary for the purpose, in addition, or the alternative?”*

## LEGAL ISSUES

- Does the executive, in the exercise of its sovereign powers, have the ability to make an order for the cession of territory from the Union of India?
- Does Article 3 of the constitution allow the cession of territory from the Union of India?
- Is legislation made by the parliament necessary for the cession of territory to another country?
- Is such legislation sufficient for the cession of territory, or an amendment in the constitution is requisite to make the cession or exchange of territories?

## OBSERVATIONS OF THE SUPREME COURT

The Attorney General, representing the Government of India, primarily argued that the said agreement was not a cession or alienation of territory to another nation but rather a correction or an exercise in the correct ascertainment of the boundaries of India. Due to this reason, there exists no requirement for legislation to be brought expressly for the said matter. This reasoning was outrightly declined by the apex court, and it was quoted that the agreement is one by which

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<sup>4</sup> *In Re: Berubari* (n 2)

a portion of India's territory was ceded to Pakistan. Therefore, the question referred to should be considered on the basis that it involves the cession or alienation of a part of India's territory.<sup>5</sup>

An important observation made by the supreme court was about the preamble of the constitution, which stated that the concept of sovereignty, which the constitution's preamble enshrines in the people of India, does allow the parliament to make laws regarding alienation or cession of territory, and it does not stop it from making amendments to the constitution regarding cession of territory, for the preamble is not a part of the constitution.

Another important observation made by the supreme court in the case was regarding the application of Article 3 of the constitution, which empowers the parliament to change the boundaries of the states and union territories. The court observed that clause (c) of the article only gives the parliament the power to diminish the territory of the state<sup>6</sup>, but it does not empower the parliament to cede the territory of the state. However, the parliament, under the powers conferred to it in Article 368<sup>7</sup>, can amend the constitution to give effect to agreements in case of territorial matters.

## DECISION

After paying heed to all the arguments in the case and ascertainment of the facts, the supreme answered the three questions made by the president as no, yes, and yes, respectively. It further made the following observations: -

- The supreme court observed that mere executive action is not sufficient to enforce the agreement between India and Pakistan regarding the exchange of territories, and legislation is necessary to enforce it;
- The supreme court stated that a law of parliament associated with Article 3 will be incompetent for the enforcement and amendment in the constitution under Article 368 is appropriate and required;

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<sup>5</sup> *Ibid*

<sup>6</sup> Constitution of India 1950, art 3

<sup>7</sup> Constitution of India 1950, art 368

- “A law of Parliament relating to both Art 368 and Art. 3 would be necessary only if Parliament chooses first to pass a law amending Art. 3 as indicated above; in that case, parliament may have to pass a law on those lines under Art. 368 and then follow it up with a law relating to the amended Art. 3 to implement the agreement.”<sup>8</sup>

## ANALYSIS AND CONCLUSION

The *Re: Berubari Union* case came at a time of political uncertainty and conflict in the country. The questions by the president were one of the first instances of the use of Article 143(1), and the case prevented future litigation on the issue of boundary disputes where the enforcement of agreements demand an amendment in the constitution's first schedule of territories. The major consequences of this judgment were unforeseen at the time. The position on the preamble was further overturned in the case, which saw the largest-ever bench of the supreme court, the *Keshavananda Bharti Case*.<sup>9</sup> It can be said that by proclaiming that the preamble is not a part of the constitution, the Supreme Court denuded the preamble of its authority, and hence it could not be relied on except as a guiding source into the minds of the makers of the constitution. This means that it did not have any real authority, and hence the important principles in the constitution, such as Justice, Liberty, and Equality, were unenforceable unless provisions of the constitution allowed them to be enforced.

The supreme court cleared the position of the authority of the parliament to change the areas of the territory of the country. Concerning Article 3, which allows it to form a new state or increase, diminish and alter the boundaries of an existing state, the supreme court proclaimed that the said article has the authority to diminish the area of an existing state, but it does not have the authority to alienate the territory to another country as the said territory so diminished has to become either a part of another state, a whole another state or a union territory in itself.

This clarification, suggested by the supreme court, necessitated an amendment in the constitution under Art. 368, which was paid heed by the parliament as it made the *Ninth*

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<sup>8</sup> *In Re: Berubari* (n 2)

<sup>9</sup> *Keshavananda Bharti v State of Kerala* (1973) 4 SCC 225

*Amendment Act, of 1960*<sup>10</sup> to enforce the Nehru – Noon Agreement. The said amendment led to the conclusion of the events about the Re: Berubari case. It is also interesting to note that following the Land Boundary Agreement of 2015 amidst Bangladesh and India, the territories of the Berubari Union have been retransferred to India, and the Nehru – Noon agreement has lost its importance<sup>11</sup>.

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<sup>10</sup> Constitution (Ninth Amendment) Act 1960

<sup>11</sup> Nayar N, 'India and Bangladesh: Exchanging Border Enclaves & (Re-)Connecting with New Citizens' (*Brookings*, 9 March 2022) <<https://www.brookings.edu/blog/up-front/2020/05/12/sambandh-blog-india-and-bangladesh-exchanging-border-enclaves-re-connecting-with-new-citizens/>> accessed 09 January 2023