Abrogation Of Article 370: A Look Back At Its Origin And Aftermath

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Abstract: Article 370 of the Constitution of India contained ‘temporary provision’ with respect to the separate status for the state of Jammu and Kashmir. At present article 370 has been abrogated by the govt. of India. Therefore the study is to present the historical perspective or Constitutional evolution of the enactment of Article 370. It is imperative to understand the background in which Article 370 was made a part of the Indian Constitution. At present Govt. of India crucially abolished the status of Jammu and Kashmir without a Constitutional Amendment. Also, an effort has been made to analyze the significance of this article and to know the rationale behind the abolition of special status to Jammu and Kashmir and thereafter.


0.1. INTRODUCTION:
India and Pakistan- with the creation of these two dominions the Indian Independence Act of British ended the imperial rule over India. At the time of independence princely states were not interested to incorporate themselves into either dominion. Kashmir is a Himalayan region that both India and Pakistan claimed this place as theirs. Subsequently India and Pakistan went to war over this issue and each came to control different parts of the region. There has been violence in the state of Jammu and Kashmir which was administered by the Indian state for thirty years. A ceasefire line was agreed between this two states due to a separatist insurgency against Indian rule of the territory. In the first few days of August 2019, there were signs most of the speculation was that Article 35A of the Indian constitution, which gave some special privileges to the people of the state, would be scrapped. The government of India has revoked nearly all of Article 370. Also, 35A is part of the special provision and which has been the basis of Kashmir’s complex relationship with India for some 70 years. Therefore, it is significant to analyze article 370 prior and the aftermath. Inclusion of article 370 in the Constitution of India: Jammu and Kashmir was a Muslim majority state ruled by a Hindu king. When British sovereignty lapsed, Maharaja Hari Singh had not decided as to whether Kashmir would accede to India or Pakistan. Maharaja Hari Singh executed a standstill agreement with Pakistan and requested India for time to consider an agreement. During this standstill, Pakistani raiders, with the support of the Pakistani Army, began advancing on Kashmir in October 1947. Maharaja ultimately invited Indian armed forces into Kashmir to provide protection from Pakistani rebellion. Subsequently, the Maharaja executed an instrument of accession with India. Under the instrument- Defense, External affairs, and Communications; these three areas were listed under the exclusive domain of the Central Government. Kashmir and the Indian Constitution Article 370 limit the authority of Parliament to pass legislation for the State of Jammu and Kashmir. Under Articles 370 (1) (b) and 370 (1) (d), the Parliament has to confine legislation affecting the state to areas enumerated in a list attached to the Instrument of Accession. Under Article 370 the President can modify or even repeal Article 370. However, this could be done only with the concurrence of the Constituent Assembly of the state of Jammu and Kashmir.

0.2. SIGNIFICANCE OF ARTICLE 370:
Article 370 allowed a certain amount of autonomy to J&K – freedom to make laws, having its own constitution and a separate flag. However, Defense Foreign affairs and Communications remained in the hands of the central government of India. As a result, the issues of permanent residency, ownership of property and fundamental rights - Jammu and Kashmir could make its own rules. This could become a bar for other Indians from purchasing property and permanently settle there like the kashmiri people. Questions have been raised that why did the govt. of India do this – In this regard, it can be said that Prime Minister Narendra Modi and the Hindu nationalist Bharatiya Janata Party had vehemently opposed the Article 370. They often argued to integrate Kashmir by abrogating the 370 and put them on the same line with the rest of India. As they have got a massive mandate in the election, this ultimately leads to the end of Article 370 actively. Reaction on the part of Kashmir in this action of gov’t is very curious whereas many Kashmiris believe that the BJP ultimately wants to change the demographic character of the Muslim-majority region by allowing non-Kashmiris to buy land there. This move of govt. of India also fits in with Mr. Modi’s desire to show that the BJP is tough on Kashmir, and Pakistan as well as China too.

0.3. ABROGATION OF ARTICLE 370:
Under the Presidential order the Jammu and Kashmir Reorganization Bill (Article 370), 2019 was introduced in the Parliament by the home minister Amrit Shah. By this move, Govt. has achieved three main objectives: firstly, govt. has removed the preferential treatment accorded to Jammu and Kashmir(J&K) and applied the entire Constitution to J&K; secondly, it has bifurcated J&K into two Union Territories – J&K with a legislature and Ladakh without a legislature; thirdly, it has made the state legislative assembly (instead of its Constituent Assembly) the competent authority to make the recommendation to the President to declare Article 370 inoperative New Delhi has justified its move by arguing that Article 370 was the root of terrorism in the state of J&K, had ruined the state, stalled its development, prevented proper health care and education and blocked industries; and it was, therefore, necessary to integrate the region with the rest of India and develop it. New Delhi has asserted that its move has popular support in Jammu,
Ladakh and even in most parts of Kashmir. The purpose of govt. of India is not surprising as the political discourse in India identifies the Kashmir issue with Article 370 and holds it just as responsible for the turmoil in J&K as the generous support of Pakistan for cross-border terrorism. Historically govt. of India’s effort legally to introduce the “wishes of the people” as the factor to decide the accession of J&K through the filing of the complaint in the UN by New Delhi. The govt. of India had accused Pakistan of aggression against Indian Territory but returning with a promise to hold a UN-supervised plebiscite to determine whether such territory was even Indian territory. The internationalization of the Kashmir issue by Govt. of India is to give standing on every member of the UN to comment on the happenings in J&K; the conferral of the “disputed territory” tags on J&K by New Delhi. Article 356 of the Indian Constitution is an emergency provision that empowers the President to assume the functions of the state government and Parliament to exercise the powers of the state legislature in a situation in which the government of the state cannot be carried out in accordance with the Constitution. The exercise of the power under Article 356 is limited by as provided in Article 356 itself. All these facts have made the Kashmiri population unsatisfied to a large extent.

0.4. BIFURCATION OF J&K INTO UNION TERRITORIES:
Article 3 of the Constitution implies that Parliament may by law form a new State and alter the areas, boundaries or names of any State. The provision to Article 3, however, provides that no Bill for such purpose will be introduced in Parliament unless the Bill has been approved by the President to the state legislature for expressing its views thereon when the proposal contained in the Bill affects the area, boundaries or name of that state. It was the exception with regard to J&K only. The 1954 Order applied Article 3 to J&K with an additional provision that mandated that “no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of that State. By superseding the Order of 1954 which was applied to the J&K, now the govt. of India under the order of 2019 declared to be valid; through which parliament may by law alter the areas, boundaries, and name of J&K without the consent of the state legislature. As J&K has been a long term Presidential rule, therefore, the requirement of provision 3 for the Bill to introduced in the state legislature of J&K to expressing their view become vain. In light of the scope of the emergency provision of Article 356 discussed above, surely Parliament should have exercised the power of the state legislature in matters relating to national sovereignty. In this regard to the principle of federalism enshrined in the Constitution become more unilateral rather than federal. In the verdict of Keshavananda Bharati (1973) has declared the federal character of the Constitution as part of its basic structure. Therefore Parliament of India has violated the federal structure of the Constitution by exercising the power of state legislature to bifurcate J&K into Union territories. The changes that have taken place in J&K are as follows- Jammu and Kashmir will no longer have a separate constitution but they will have to abide by the Indian constitution much like any other state. As the special provision towards the J&K is no longer exist. Like all other Indians laws will be automatically applied to Kashmiris also, and people from outside the state will be able to buy property there which was not prevails earlier. According to govt. scrutiny will bring development to this region equally with the rest of Indian landmass. "It's because of these sections that democracy was never fully implemented, corruption increased in the state, that no development could take place." -Mr. Shah told in the parliament. The rationale behind the government is to break up the state into two smaller, federally-administered territories respectively Muslim-majority Kashmir and Hindu-majority Jammu. The other is Buddhist-majority Ladakh, which is culturally and historically close to Tibet. The opposition Party described the decision of Govt. as a "catastrophic step" and warned in parliament that it could have serious consequences in the nearer future. But expert opinion is sharply divided regarding the Kashmir issue. One constitutional expert, Subhash Kashyap, told news that the order was "constitutionally sound" and that "no legal and constitutional fault can be found in it". However, another constitutional expert, AG Noorani, told BBC Hindi it was "an illegal decision, akin to committing fraud" that could be challenged in the Supreme Court. Opposition political parties could launch a legal challenge but Kashmir is an emotive issue with many Indians, and most parties would be wary of opposing the move lest they are branded anti-India. The UNO and US policy on Kashmir has been consistent- that Kashmir is a bilateral issue between India and Pakistan.

0.5. CONCLUSION:
To sum up, it can be deduced that Article 370 has not been amended yet. However, this Article has been abrogated through Presidential Order. Also, the Rajya Sabha has passed the resolution recommending that the president abrogate most of Article 370. The government has also introduced a reorganization bill that splits up the state of Jammu and Kashmir into the Union Territories of Ladakh (without a legislature) and Jammu and Kashmir (with a legislature). Govt. of India has at present taken some steps like troop mobilization, and a complete shut-down of communications in the valley which on the one hand violated the rights of people in a democratic country like India and open a developmental path for Indian economy. Also, there is a possibility of more terrorist activities in the region if the govt. of India doesn’t effectively hold the situations in a cooperative and peaceful manner. The impending civilian unrest, prospects of renewed insurgency and Pakistan-sponsored asymmetrical warfare ended India's hopes of returning stability to Kashmir which causes India’s move towards the abrogation of article 370.

0.6. REFERENCES:

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[9] August 8 2019, - Article 370: The Legal Test Ahead; Stable URL: https://www.livelaw.in/columns/re-writing-article-370-147035