

“Abrogation of Article 370 in J&K”

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Article 370 has been one of the most contentious issues from the time it was abrogated i.e., from 5th August 2019 to the current time. It is one of those articles which had given a lot of autonomy and special status to the state of Jammu and Kashmir. It became a contentious issue or the most debating topics because of the provisions that are contained in this article 370 of the Indian constitution. Many people argued that it was discriminatory on many grounds and it has acquired permanence even if initially it was included as the temporary provisions until Jammu and Kashmir drafts its own constitution.

Historical background

It all begun with the sage kashyapa who is said to drain the lake that covered the valley at Baramullah to make home for people and so the name kashyapa-mir or Kashmir. It is also said that here was a king Jamboo- lochan who fell in love with the land near river Tawi who made his home and founded a town in his own name Jamboo or Jammu and this is how the name of Jammu and Kashmir came into being. Islam first appeared from the Khyber pass and shah mir, who was an immigrant from the mountains become king and established the sultan dynasty and so Islam was prominent during this period and flourished. Later on Kashmir valley was taken by the Sikhs under Maharaja Ranjit Singh, who became the first Non-Islamic ruler with Gulab Singh (Dogra) from Jammu as the head of state. Then General Zorawar Singh captured Ladakh and Gulab Singh continued after the death of Maharaja Ranjit Singh and with the help of General Zorawar, Gulab Singh extended the empire to Baltistan and Gilgit near the Indus. After that General Zorawar was killed in the Battle of To-Yo. In 1925 Hari Singh became the Hindu king with a majority of Muslim population. With the end of British Paramountcy, Jammu and Kashmir became independent on 15th August 1947, after that a major issue came to them that whether they want to be with India, Pakistan or remain sovereign. At that time Maharaja Hari Singh was undecided about this issue and tried to remain independent and this forced Pakistan to launch operation Gulmarg which was aimed at annexing Kashmir. After this Maharaja Hari Singh took the decision to accede with India and Instrument of Accession of Jammu and Kashmir to India was signed by Pandit Jawaharlal Nehru and Maharaja Hari Singh on 26th October 1947¹. Under this, the state surrendered only three subjects (defence, external affairs and communication) to the Dominion of India². Hari Singh wanted to have special privileges for his people that could deny the outsiders the right to own property in the state and this was done to

¹ M Laxmikanth, Mc Graw Hill Education, Ed. 5th, p. 36.1

² Available at <https://timesofindia.indiatimes.com/india/article-370-rewriting-both-the-history-and-geography-of-jk/articleshow/70546131.cms> (accessed on 12.04.20)

keep the Britishers away from the valley of Kashmir and this is how it formed the basis of Article 370. So, it was decided that until the time the constituent assembly of the state frame its own constitution the government of India will provide an interim arrangement and that's how Article 370 was incorporated in the constitution of India in the Part XXI that proclaimed it to be Temporary, Transitional and Special Provisions³.

Provisions of Article 370

This article of the Indian constitution gives a lot of autonomous status and power to the state of Jammu and Kashmir and it also shows the centre's jurisdiction with the state and it also contains those provisions for which some of the people are accepting the decision of abrogation of this article while some are not. The provisions are as follows:

1. Jammu and Kashmir has its place in part I and schedule I of the constitution of India. However, an area or boundary cannot be changed at the discretion of the union it has to take the consent of the state legislature before doing that.
2. The state of J&K has its own constitution and it is not bound to accept the provision of the constitution of India and is run according to that state constitution only.
3. The Power of the parliament to make laws for the state of J&K is limited to the subjects which are there in the Union list and concurrent list only but the residuary power belongs to the legislature of state, subject to the matters like prevention of activities involving terrorist acts, questioning or disrupting the sovereignty and territorial integrity of India and causing insult to national flag, national anthem and constitution of India. Laws relating to preventive detention are taken by state legislatures, they have the autonomy over it.
4. Right to property is granted to the citizens of the Jammu and Kashmir that means no other people other than the residents has the right to acquire property and they have certain rights regarding public employment, acquisition of immovable property, settlement etc.,
5. Part IV (dealing with Directive principles of state policy) is not applicable to J&K.
6. Financial emergency cannot be declared to the state and national emergency declared on the ground of internal disturbance will not have any effect in the state of J&K⁴.
7. State emergency (president's rule) is applicable to the state. But that emergency can be imposed if there has been any failure of the constitutional machinery under the provision of the state constitution. Basically, two types of emergencies can be declared in the state that is the president's rule under the Indian constitution and Governor's rule under the state constitution.

³ Available at <https://www.indiatoday.in/news-analysis/story/kashmir-situation-article-370-history-1578495-2019-08-08> (accessed on 12.04.20)

⁴ M Laxmikanth, Mc Graw Hill Education, Ed. 5th, p. 36.2, 36.3

8. Whatever the amendments that are being made to the Indian constitution does not apply to J&K unless extended by a presidential order.
9. The High Court of J&K can issue writs only if fundamental rights are being violated to enforce it and for any other purpose.
10. The agreements or treaty done at the international level affecting it can be made by the centre, but only after getting the consent of the state legislature.
11. The fifth schedule which talks about the administration of scheduled areas and scheduled tribes and sixth schedule which describes about the administration of tribal areas of North-Eastern states are not applicable to the state.
12. The special leave jurisdiction of the Supreme Court and the jurisdiction of the comptroller and auditor general and Election commission are, however, applicable to the state of J&K.

Abrogation

The President of India has the power to revoke or make any sort of changes in Article-370 by issuing a public notification and the entirety of this article can be abrogated under article 370 (3), but for all of this purpose recommendation of the constituent assembly was made to be necessary, however, the constituent assembly of J&K was dissolved on January 25, 1957 without even recommending whether it should be revoked or not,⁵ so on 5th August 2019, the Home Minister of India, Shri Amit shah announced the decision of abrogating Article 370 and the President has issued the order under the title The constitution (Application to Jammu and Kashmir) order, 2019, C.O. 272 which again superseded the order of the constitution (Application to Jammu and Kashmir) order, 1954 after the constitution (Application to Jammu and Kashmir) order, 1950⁶. The order stated that with the concurrence of the government of the state, even all the provisions which has been amended from time to time shall apply to the state of J&K, however, the Presidential order issued under C.O. 272 alone was not sufficient, so, Article 367 was used, the interpretation clause of the constitution, to change the term constituent Assembly to Legislative Assembly in Article 370(3) and this is the point where the effectiveness of the process of abrogation starts getting questioned and this is where the decision given in the case of *Mohd. Maqbool Damnoo v. Jammu and Kashmir*⁷ is helpful as the effectiveness of the decision given by the President can be ascertained from this case. In this case, in 1965 the office of *sadr-e-Riyasat* was replaced with the Governor and the governor was to be indirectly elected and that became the point of argumentation that it tried to indirectly amend the Article 370. The case was, however, dismissed as ‘clarificatory’ and it was only then in the *Kesavananda Bharti* case it was laid down that it was not clarificatory and no one can amend the basic features of the

⁵ Available at <http://www.legalserviceindia.com/article/1256-Article-370.html> (accessed on 12.04.20)

⁶ Available at <https://www.gktoday.in/gk/abrogation-of-article-370/> (accessed on 12.04.20)

⁷ 1972 AIR 963, 1972 SCR (2)1014

constitution by frustrating the powers or rights of the people of India or the people of state of J&K and also clarified the difference between the constituted and constituent powers.

After the announcement of the revocation, all of the provisions that were there in this article became inoperative and afterwards debates and arguments started on this issue as to why it was abrogated and why it should not. After this new order of abrogation, even all laws and provisions that is there in the Indian constitution will also be applicable to the state of Jammu and Kashmir. But the road to abrogate Article 370 has never been that easy as it might appear to anyone. Even before this order many petitions and PILs were filed, but many of them were dismissed on some ground or the other. In the case of the *state Bank of India v Santosh Gupta*⁸ the court said that the state of J&K has a special status and Article 370 of the constitution, though titled as ‘Temporary, Transitional and Special Provisions’ in the part XXI has assumed a place of permanence for the reasons mentioned in Article 370 (3) that says that without the recommendations of the state constitutional assembly, Article 370 cannot be abrogated⁹ but then the constituent assembly got dissolved without clarifying anything on that issue. Similar views were held in the case of *Sampat Prakash v state of Jammu and Kashmir*¹⁰ and *Prem Nath Kaul v state of Jammu and Kashmir*¹¹ as it was laid in the Santosh Gupta case where the strong position of Article 370 has been established.

Apart from all of the petitions that has been filed before the abrogation of this article many more PILs and petitions has been filed in the High Courts as well as in the Supreme Court challenging the decision on the ground that it is invalid and ultra vires. Legal luminaries and experts are endowed with a lot of doubts and ambiguity that whether this decision is valid or it is consonance with the welfare of people or not and one of the first issues that they are having with them is whether this decision has been actually taken in concurrence with the state government, as the state was under the president rule under article 356 of the constitution and the governor was taking the charge of the state and since it has already been seen many a times that the governor is the agent of the central government and he holds office during the pleasure of the president also, so it can be comprehended that free decision might not have been taken in this regard and the centre has taken its own consent to amend or revoke this article¹². The second argument that can be put is that the powers which have been exercised by the president under article 370 (1) (c) should not have been exercised because it prevents the president from using that power even if it has been exercised indirectly and the normal process of amendment, which is specified under article 368 should have been used¹³. Besides, there are a lot many petitions

⁸ 12237-12238_OF 2016

⁹ Available at <http://lawtimesjournal.in/state-bank-of-india-v-santosh-gupta-and-ors/> (accessed on 12.04.20)

¹⁰ 1969 AIR 1153, 1969 SCR (3) 574

¹¹ 1959 AIR 749, 1959 SCR Supl. (2) 270

¹² Available at <https://www.thehindu.com/news/national/presidential-order-under-article-370-has-no-relevance/article30627632.ece> (accessed on 12.04.20)

¹³ Available at <https://indiankanoon.org/doc/1193525/> (accessed on 12.04.20)

which have also been filed regarding the lifting of the restriction on the movement of the people, which has been continuing for such a long time and it has been stated that approx. 14 people PIL is being filed in the courts on this issue and even the petition from the political party has also been filed in the courts challenging both the abrogation and the president rule which was imposed in the state and then the courts also asked the centre for its responses or answers regarding the petitions that has been filed against the decision of revocation. The court started hearing on the above petitions from 1st October, 2019, however, the petitioners were not content with this thing as the reorganization of the state was to be implemented from 31st October¹⁴, so the petitions must be dealt properly and it should not go unheard.

Conclusion

But despite of any hindrances that had come in the past, the present central government has taken this initiative yet the riskier decision to abrogate this article. Even if many people might be against this move, but they must also realize on the other hand that it is going to offer a lot many benefits and opportunities to the people and to the country as well, as the economy would grow more than before now, in the manner that more and more of investments can be made in the state, more schools and colleges will be opened in the state and accordingly the migration rate of the students will get comparatively reduced since they no longer have to travel to other states for their higher education then and that would further create more number of employments for the people and since the right to acquire property will now be granted to all the people of the country more investments will come from multinational corporations as well, the people of the state of J&K will also be able to enjoy all the benefits that have been provided by the centre to the other residents of the country and not only that, this decision of central government shall also help in combating the separatism, corruption and nepotism that might be existing in the state and this is how the economy will grow more and led into the prosperity of the state as well as the country but as everything has its own pros and cons so revocation of this article also has its some own cons attached with it and some of them can be that it might instigate Pakistan to lead into a surge in their ongoing rebellious activities towards India and some people of Jammu and Kashmir might also start holding negative attitude or perception towards the central government because some are not happy with the decision that have been taken by the government as some of their rights which they were receiving alone now those has to be shared with the others. The repercussions or the demerits of this decision should be dealt properly and the government should try to ascertain the reasons behind them and solve them accordingly and instead of criticizing the decision of abrogating Article 370, its side of affirmation should also be seen.

¹⁴ Available at <https://m.economictimes.com/news/politics-and-nation/sc-refuses-to-refer-article-370-cases-to-larger-bench/articleshow/74434625.cms> (accessed on 12.04.20)