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Amendment of the Constitution vis-à-vis Article 370

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ABSTRACT

The present brief expounds a few facts about the amendment of the constitution in relation to the Article 370 of the Indian Constitution. In the incipient part, the basic considerations mandatory for an amendment are explicated, which is followed by the elucidation about making the Article 370 inoperative and then rescinding of the same. In the later part, the basic information about the formation of states has been discussed and the study has been concluded with an answer to an exasperating question; if this scenario included any abuse of power.

Keywords: Amendment, Article 370, Inoperative, Repealing, Jammu and Kashmir.

I. INTRODUCTION

Part XX, Section 368, of The Constitution of India lays basic idea; how it can be amended whenever such circumstances arises. According to Article 368, only parliament can amend the constitution; by way of additions, variations or by repealing the provision of constitution ensuing the procedure which is laid under Article 368 itself. Amendment in constitution can only be made by the introduction of a bill. To initiate the process of amendment, the bill can be presented in any of the house i.e. Lok Sabha or Rajya Sabha. Further, to amend the constitution of India, Article 368 provides certain methods that are explicated below;

1. Special Majority: Amended with the majority which is not less than 2/3rd of the members of that House present and voting.
2. Special Majority + Ratification: Amendment requires 2/3rd of the members present and voting with ratification by more than 1/2 of State Legislature with a resolution. There is a list of provision mentioned which shall be amended through this method, as follows:
 - a. article 54, article 55, article 73, article 162 or article 241, or
 - b. Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or

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- c. any of the Lists in the Seventh Schedule, or
- d. the representation of States in Parliament, or
- e. the provisions of this article,

After the bill is passed in both of the houses, president's assent to the bill is obligatory as to make the proposed changes in the Constitution. Article 111 gives power to president as to return the bill to houses to reconsider it but after Twenty-fourth Amendment of the Constitution of India³, it made binding for president to give his approbation when Constitutional Amendment bill is presented to him. In addition to this it also laid down that Article 13 cannot be amended by the procedure of Article 368. In the landmark judgement of *Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr*⁴, court gave the 'basic structure doctrine'. Elements of Constitution of India which can be termed as Basic Structure are:

1. Supremacy of the Constitution
2. Rule of law
3. The principle of Separation of Powers
4. The objectives specified in the Preamble to the Constitution
5. Judicial Review
6. Articles 32 and 226
7. Secularism
8. The Sovereign, Democratic, Republican structure
9. Freedom and dignity of the individual
10. Unity and integrity of the Nation
11. The principle of equality, not every feature of equality, but the quintessence of equal justice;
12. The "essence" of other Fundamental Rights in Part III
13. The Parliamentary system of government
14. The principle of free and fair elections
15. Limitations upon the amending power conferred by Article 368

³The Constitution (Twenty-Fourth Amendment) Act, 1971, Available at: http://164.100.47.4/BillsTexts/LSBillTexts/Asintroduced/53_1970_Eng.pdf (Last Accessed on: 5 May 2020)

⁴*His Holiness Kesavananda Bharati Sripadagalvaru and Ors. v. State of Kerala and Anr.*, (1973) 4 SCC 225

16. Independence of the Judiciary

The aforementioned features of the constitution cannot be amended by the procedure placed under Article 368. This doctrine gives power to the Supreme Court to review or to strike down the constitutional amendments and the acts or provisions made by legislature which are in conflict with the basic structure of Constitution. The same has been stated in clause 4 of the Article 368 as in relation to part III relating to Fundamental Rights.

II. MAKING ARTICLE 370 INOPERATIVE

Article 370 was enacted on temporary basis and it was structured with respect to states of Jammu and Kashmir. Firstly, in all the provisions of the constitution, there is nowhere revealed that president can make a provision inoperative, or shall cease to be operative or shall be operative only with such exceptions and modifications as specified. But such a clause is made in Article 370 which makes it a provision of temporary basis as Clause 3 of Article 370 expounds the same.

So, here two things can be construed easily as to make Article 370 inoperative:

1. Can be done by the President's Order.
2. There is no need of Parliamentary assent in the matter

There is difference between a provision being repealed and being inoperative. When any provision is made inoperative then such provision is not removed from the respected act or statute. When a provision is repealed then it is removed from such an act or statute and once a provision is repealed then in such a case it can't be revived at the same place. When any provision has to be repealed it can only be done by legislature whereas to make a provision inoperative it can be done by judiciary as well as the executive branch in certain cases. Judiciary can exercise power to make a provision inoperative if it violates Part III of the Constitution however judiciary cannot repeal any legislation.

Therefore, it is evidently established, in order to make Article 370 inoperative, procedure laid down in Article 368 cannot be followed. To make 370 inoperative the president has to make a public notification and declare it inoperative however requires the recommendation of Constituent Assembly of the state; Clause 3 of Article 370 will be applicable. It states that:

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause

(2) shall be necessary before the President issues such a notification

To make the operation of Article 370 crystal clear, Article 367 must be referred to, which is an interpretation provision. It was amended by The Constitution (Application to Jammu and Kashmir) Order, 1954⁵ which added the following clause:

*“references to the person for the time being recognised 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, shall be construed as references to the Governor of Jammu and Kashmir.”*⁶

Elucidating the Clause 3 of Article 370, it says; to make the provision out of order there must be a recommendation by the Constituent Assembly of the state but in case of Jammu and Kashmir there is no Constituent Assembly present. They made their Constituent Assembly in 1951 but later dissolved it in 1957, when Jammu and Kashmir were made part of India. Question arises that if there is no Constituent Assembly of state then how can article 370 be made inoperative? Legislature came forward with an elucidation by amending article 367. On 5th August 2019, the president made the Constitution (Application to Jammu And Kashmir) Order, 2019⁷, by which they amended article 367 and added a clause, which was:

*(d) In proviso to clause (3) of article 370 of this Constitution, the expression “Constituent Assembly of the State referred to in clause (2)” shall read “Legislative Assembly of the State”.*⁸

Another question arises; can legislature amend 367 as to make 370 back in working condition? There was precedent set in 1957 when *Sadar i Riyasat* of Jammu and Kashmir was construed as to Governor of Jammu and Kashmir which was done on President and so in the present case also the amendment can be made.

With the help of The Constitution (Application to Jammu and Kashmir) Order, 2019, now legislature revived the president’s power to make Article 370 inoperative as earlier recommendation of Constituent Assembly was needed but after the amendment, recommendation of Legislative Assembly of the State was necessary. But in the present case, there was an additional twist in the plot as the Legislative Assembly of the State was dissolved as there was president rule in the state of Jammu and Kashmir.

⁵ The Constitution (application to Jammu and Kashmir) Order, 1954, Available at: http://jklaw.nic.in/constitution_jk.pdf (Last Accessed on: 5 May 2020)

⁶ *Ibid*

⁷ The Constitution (Application to Jammu And Kashmir) Order, 2019, Available at: <http://egazette.nic.in/WriteReadData/2019/210049.pdf> (Last accessed on: 05 May 2020)

⁸ *Ibid*

In 2018, there was a coalition government of the Kashmir Peoples Democratic Party and Bhartiya Janta Party in Jammu and Kashmir. Nevertheless on 19th June 2018, BJP withdrew its support from the alliance headed by Ms. Mehbooba Mufti and the Chief Minister heading the council of ministers tendered her resignation and same was accepted by INN Vohra, Governor of the state of Jammu and Kashmir and soon governor rule⁹ was applied in the state. As per Section 92: breakdown of the constitutional machinery¹⁰ of the Constitution of Jammu and Kashmir, 1956. Further as per clause 3 of Article 92, *the order cease to operate on the expiration of six months from the date on which it was first issued*. So, on 9th December 2018, Ram Nath Kovind, the president of India released proclamation¹¹ and enforced President Rule in the state of Jammu and Kashmir.

As per Article 370 read with 367, recommendation of Legislative Assembly of the State was needed which was dissolved and the President rule was enforced in the state of Jammu and Kashmir. So, the functions of the Legislative Assembly of the State were transferred to the Parliament and stood vested in parliament as per clause 1 of Article 356 which deals with Provisions in case of failure of constitutional machinery in State. Thereafter President passed the order to make 370 inoperative.

III. REPEALING ARTICLE 370

As proved before that Article 370 is a temporary provision and can be made inoperative by President only and amendment as per article 368 was not needed. But to repeal the law from Indian Constitution, the procedure under Article 368 must be followed. A bill must be introduced, then passed in both the houses and then must have approval of the president and ratification by half of the Legislative Assembly of the State.

On 5th August 2019, Union Minister for Home Affairs, Amit Shah, introduced two bills and two resolutions. They were:

1. “Constitution (Application to Jammu & Kashmir) Order, 2019 as to make amendments in Article 367 and supersede the earlier orders made in 1954. The Constitution (application to Jammu and Kashmir) Order, 1954
2. To repeal the provision of Article 370 that was made inoperative by President.

⁹ Proclamation, Governor Rule Order, Available at: <https://jkgad.nic.in/common/showOrder.aspx?actCode=N25034> (Last accessed: 05 May 2020)

¹⁰ The Constitution of Jammu and Kashmir, 1956, Article 92, Available at: http://jklaw.nic.in/the_constitution_of_jammu_and_kashmir_1956.pdf (Last accessed on: 05 May 2020)

¹¹ Notification, President Rule Order, Available at: <http://egazette.nic.in/WriteReadData/2018/194042.pdf> (Last accessed on: 06 May 2020)

3. Jammu & Kashmir (Reorganisation) Bill, 2019¹²
4. Jammu & Kashmir Reservation (2nd Amendment) Bill, 2019^{13,14}

In the case of Jammu and Kashmir, article 370 was repealed by the bills introduced by the procedure laid in Article 368. As the abovementioned bills were laid in Rajya Sabha on 5th August 2019 and were passed by Rajya Sabha with 125 votes in its favour and 61 against¹⁵. The bill was passed by the Lok Sabha with 370 votes in its favour and 70 against it¹⁶. As according to Article 368 procedure bill was passed in both houses by the majority specified. The bill became an Act after it was signed by the President thereafter.

IV. FORMATION OF STATES

Further, another question arises how Jammu and Kashmir were made Union Territories under Constitution of India. Article 1 state that India also known as Bharat will be a Union of states. All the states and territories are specified in First Schedule. Further territories of India are those which are in first schedule and which are acquired. So, by Referring Schedule 1, entry 15 of the Indian Constitution, it can be clearly seen that Jammu and Kashmir were the territories which immediately before the commencement of this Constitution was comprised in the Indian State of Jammu and Kashmir.

New states can be formed under Indian Constitution under Article 3 that lays down the provisions related to forming new states, altering areas, boundaries and names of the states already existing. There is a procedure laid down in article 3 relating to the same. Firstly, a bill must be introduced in either of the house but it cannot be placed with President's recommendation with reference to Legislature of the concerned state. Secondly, it must have president's accent after passed in both houses. Now the Jammu & Kashmir (Reorganisation) Bill, 2019 was laid for the purpose as "*there shall be a new Union territory to be known as the Union territory of Ladakh comprising the following territories of the existing State of Jammu and Kashmir, namely:— "Kargil and Leh districts", and thereupon the said territories shall*

¹² Jammu & Kashmir (Reorganisation) Bill, 2019, Available at: <http://egazette.nic.in/WriteReadData/2019/210407.pdf> (Last Accessed on: 06 May 2020)

¹³ The Jammu And Kashmir Reservation (Second Amendment) Bill,2019, Available at: https://www.prsindia.org/sites/default/files/bill_files/The%20Jammu%20and%20Kashmir%20Reservation%20%28Second%20Amendment%29%20Bill%2C%202019.pdf (Last accessed on 06 May 2020)

¹⁴ Government brings Resolution to Repeal Article 370 of the Constitution, Jammu and Kashmir (Reorganisation) Bill, 2019, Constitution (Application to Jammu and Kashmir) Order 2019, Jammu & Kashmir Reservation (2nd Amendment) Bill, 2019, Available at: <https://pib.gov.in/PressReleasePage.aspx?PRID=1581308> (Last accessed on: 06 May 2020)

¹⁵ Sunil Prabhu and Anindita Sanyal, Already, Rajya Sabha Clears J&K as Union Territory Instead of State, *NDTV*, 05 August 2019

¹⁶ Zee Media Bureau, Lok Sabha passes J&K Reorganisation Bill with 370 votes for and 70 against it, *ZeeNews*, 06 August 2019

cease to form part of the existing State of Jammu and Kashmir.”¹⁷ And “there shall be a new Union territory to be known as the Union territory of Jammu and Kashmir comprising the territories of the existing State of Jammu and Kashmir other than those specified in section 3.”¹⁸ It received the assent of President on 9th August 2019.

Moreover, the state legislature recommendation is not present in the immediate case scenario as well therefore; the functions of the Legislative Assembly of the State are transferred to the Parliament and stand vested in parliament as per clause 1 of Article 356 which deals with the provisions in case of failure of constitutional machinery in State. Thereafter President passed order under Article 3 to form two Union territories Ladakh and Jammu and Kashmir.

V. ABUSE OF POWER?

Is there any abuse of power in the present scenario? Abuse of power can be explained as when power is exercised for an illegitimate purpose. Parliament can recast the structure of a state under section 3. Formation of Union territories of Ladakh and Jammu and Kashmir are not done by the executive but by the Centre’s government in parliament. Abuse is an expression which is used when executive uses its power but not with parliament which is a democratic institution. As when president rule is enforced under Article 356 that scenario may be questioned as for the abuse of power but in the immediate case the process clearly involves Parliament to form new states. Law can never be challenged on the basis of abuse of power or malice but on the other hand the actions of executive can be challenged on the same. Parliament acted on behalf of state assembly which was dissolved as to ratify the process aid under article 3 resultantly, the concept of abuse of constitutional power will not arise here. According to the evolution of the constitutional law, the abuse of power is doctrine which is to check the executive power but here the parliament had taken the step.

¹⁷ Section 3, Jammu and Kashmir Reorganisation Act, 2019.

¹⁸ Section 4, Jammu and Kashmir Reorganisation Act, 2019.