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“Fate of Article 370: through lens of Transformative Constitutionalism”

Abstract of article-

This article is an attempt to analyze the move of center to abrogate Article 370 which granted special status to state of Jammu & Kashmir. The purpose here is to not go into question how badly our country needed to end this to assimilate the state with mainland rather the procedure which has been adopted through the concept of transformative Constitutionalism which believes in conferring power on state to bring social welfare and justice, but does it mean absolute power? Absolutism is an antithesis to Constitutionalism, limits do exist and the present article tries to see whether the procedure adopted by the center government was within such limits or not.

Introduction

A stroke of a pen and a constitutional provision which was a matter of debate for years, now cease to exist. Yes, I am talking about revocation of special status granted to the state of Jammu & Kashmir.¹ Under Article 370 and further the reorganization of the state into two Union Territories which is an unprecedented event in itself (as in our country we had witnessed Union territories acquiring a status of a state but not vice-versa).

In this article I will not go into the question of how good or bad is this decision when it comes to the point of complete integration of the state of J & K in India, because that surely time will tell us but rather I am going to analyze this move (or actually the procedure adopted to implement

¹ Further referred as J & K..

this decision) with the help of a lens called “Transformative Constitutionalism”. So before proceeding into the matter, let’s have a basic idea about the concept.

Unfolding “Transformative Constitutionalism”

The imagery of constitutionalism varies from the perspective of those who rule and those who are ruled and of the epistemic communities which develop empirical and normative theories/ images of constitutions.”² But commonly it is understood to be the idea that there are legal restraints on the exercise of political authority. The idea conveys limits on the state action and conformity with the constitution, becomes a guiding principle.³ This is the concept of liberal Constitutionalism as adopted by the U.S.A.

Now coming to our country and the concept of transformative constitutionalism, which exactly does not follow this restraining principle, rather it believes in increasing the ambit of power given to the state so that they can freely use them to bring social change and wellness. It embodies the idea that the state is there to regulate society and bring about social justice and create a more just and equal society.

But here naturally the next question pops up that – Is there no limit to which the state should be bound while deciding or taking some “good” decisions for a “just” society? Of course, there is. The Constitution through which we have this concept itself contains the limit but deciding these limits has always been and will be a contentious issue like it is going to be while considering the recent executive orders which ended the special status of the J & K and governments way of handling the entire situation.

What happened on 5th August 2019?

²Rajeshwari Deshpande, Book reviews and notices : ZOYA HASAN, E. SRIDHARAN and R. SUDARSHAN, eds, India's living constitution: Ideas, practices, controversies. Delhi: Permanent Black, 2002. xiii + 446 pp. Notes, references, index. Rs. 675 (hardback), 38 Contributions to Indian Sociology 273-275 (2004). Accessed on 1/08/2019

³ Madhav Khosla, The Indian Constitution (2012).

Article 370 which gave special status to J & K, if I explain in simple terms was that hat except for defense, foreign affairs, communications and matters specified in the Instrument of Accession of Jammu and Kashmir, the Parliament needs the state government's ratification for all other laws and any provision of the Constitution. The most important Clause 3 of the same article contains a procedure to cease the application of this article (as not even our Constitutional makers wanted it to be a permanent one) according to which president is authorized to issue an order to remove it but only with assent to **“constituent assembly.”**⁴ (Which had ceased to function long back in the year 1957)

Now there always been a debate whether Article 370 has become a permanent one as there's no CA to give its consent but to overcome this what way has been adopted is that the President by using its power under Article 370(1) amended Article 367 (which guides to interpret constitution). In 367 a new clause 4 has been added which states “in the 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.” Thus the whole concept of CA was removed and Article 370 stands amended without being technically amended, even when we 370(1)(c) in place which clearly states that president power to amend the Constitution concerning J & K does not extend to this article i.e. 370.

Next what happened that is when it comes to taking the consent of legislative assembly of state which is not in existence as state has been under President Rule for months, we had the consent of the Governor of state who is actually a representative of central government and is suppose to work under aid and advise of council of ministers just like President. Thus all what government did to amend this article was a decision, their very own consent for that decision and a mockery of our Constitution.

“Constitutionalism” should not be forgotten.

What in the name of “correcting a historic blunder” (as claimed by our government) has been done is the blatant fraud on our Constitution and some of its core principles. There's no doubt that our government is empowered to do take some positive steps to make the concept of social justice a reality in our country, like as they claim that the whole move was to integrate Kashmir

⁴ Further referred as “CA.”

and to bring its people in the mainstream, but in this transformative step we can't forget about the concept of "constitutionalism", as certain limitations do exist. Though, checking the constitutionality of this entire clever move rest upon Hon'ble Supreme Court, so all that can be done is to make points where things are questionable and what actual changes are required for a transformation.

As firstly it is true that this special status of J & K was meant to end but only with the concurrence of its people and especially not where we have to deploy massive military force, put senior political leaders of state under house arrest and shut down the entire communication system of the state.

If we look in case of *Prem Nath Kaul vs State of J&K*⁵, decided in 1959, a Constitution Bench consisting of five judges unanimously stated that Article 370 (2) "shows that the Constitution-makers attached great importance to the final decision of the Constituent Assembly, and the *continuance* of the exercise of powers conferred on the Parliament and the President by the relevant temporary provision of Article 370 (1) is made *conditional on the final approval by the said Constituent Assembly in the said matters*".

Next up is that even if we consider state legislative assembly of the state as a substitute of CA (as it is not there in existence) but a governor can never be a substitute for an elected legislative assemble as held in S.R Bommai case where it was stated as -

"If only one keeps in mind the democratic principle underlying the Constitution and the fact that it is the legislative assembly that represents the will of the people and not the governor."⁶

Secondly, the indirect amendment of Article 370(3) proviso which has been done through amending other Articles i.e. 370(1) and 367. Isn't this is a good example of colorable legislation? So as held by our Supreme court in the case of K.C. Gajapati Narayana Deo and Other v. states of orrisa⁷ that legislatures can't legislate something indirectly which they can't do directly and also termed such act as "Fraud on the Constitution."

Lastly the Jammu & Kashmir reorganization bill, 2019 which bifurcated the whole state into 2 Union territories which can be said as a step of rubbing salt on one's wound. Though under Article 3 of our Constitution center has the plenary power to decide when it comes to the boundary of any state but it does mention that a consultation from the legislative assembly of that

⁵ Prem Nath Kaul vs State of J&K, 1959 AIR 749.

⁶ S. R. Bommai v. Union of India, AIR 1994 SC 1918.

⁷ K.C. Gajapati Narayana Deo and Other v. states of Orrisa, Air 1953 SC 375.

particular state should be taken, although it won't have any binding force but to some extent the principle of federalism would be respected.

Also, I would submit that Article 3 was added at the time when our Constitution makers were struggling to unify 560 princely states but now the situation has changed and keeping in mind the concept of transformative constitutionalism this power should ideally reside in hand of the “will of the people of state” but here they were even not consulted.

Conclusion

Lastly, it is all in the hand of our Hon'ble Supreme Court to decide the constitutionality of this whole procedure but what should be kept in mind that when a country believes in the concept that “giving more powers to the authority or state is a way for positive changes”, such ideology should be respected and trust of people should not be misused in any case, whatsoever.

