Article 370 Abrogation and its challenge in SC

Why in news?

A five-judge Constitution Bench is set to hear the pleas about the abrogation of Article 370 for the first time since March 2, 2020.

What is Article 370?

- Article 370 of the Indian Constitution accorded a special status to Jammu and Kashmir (J&K).
- It substantially limited Parliament's power to legislate for the State as compared to other States.
- The provision came into force as a result of the ***Instrument of Accession*** signed by erstwhile ruler of J&K Maharaja Hari Singh in ***1947***.
- It was intended to be a temporary provision to allow the State to transition from an independent princely state to a democratic state under the dominion of India.

How can changes be made to Article 370?

- Any changes to the special status of J&K and provisions of the Article 370 can be made in two ways -
- **Clause (1)(d) of Article 370** empowered the President of India to extend other provisions of the Constitution through an executive order with the concurrence of the government of J&K.
- **Clause 3 of Article 370** empowered the President to 'declare that this article shall cease to be operative' completely or partially but only if the Constituent Assembly of J&K recommended such an action.

How did the abrogation of Article 370 happen?

- The Constituent Assembly of J&K and no state government either in J&K and the President had no way to acquire the concurrence of the state government.
- **New way -** The Centre, used the President's powers under Article 370(1)(d) to amend ***Article 367***, which provides guidelines to interpret the Constitution.
- A new clause was added to Article 367, replacing "Constituent Assembly of the State" referred to in Article 370(3) by "Legislative Assembly of the State".
- **Promulgate Order -** On August 5, 2019, the President of India under Article 370(1), promulgated the Constitution (Application to Jammu and Kashmir) Order, 2019.
- Thus, the presidential order route under Article 370(1)(d) was used to amend Article 370 itself.

How the state of J&K was downgraded to Union Territory?

- On August 9, 2019, the President gave his assent to the Jammu and Kashmir Reorganisation Act, 2019 (2019 Act).
- The Act bifurcated J&K into two Union Territories (UT)
    - J&K, an UT with a Legislative Assembly;
    - Ladakh, an UT without an Assembly.
- The Union territory of Ladakh comprises Kargil and Leh districts while the Union territory of Jammu and Kashmir comprises all the remaining territories of the erstwhile State of Jammu and Kashmir.

What do the petitions contend?

- The petitions challenge the Presidential Orders of August 5 and 6, 2019, as well as the 2019 Act, contending that they are 'unconstitutional, void and inoperative.'
- Under **Article 147 of the J&K Constitution**, the *Legislative Assembly of J&K had no power to recommend* any amendment to any provision of the Constitution of India.
- Hence, the J&K Legislative Assembly wasn't legally competent to give consent to the President's order.

The doctrine of colourable legislation is the legal principle that says what cannot be done directly cannot be done indirectly.

- The challenge is also based on the argument that the constitutional changes are "colourable legislation" and thus legally untenable.
- The petitioners have highlighted that the abrogation is a gross violation of the quasi-federal balance and defeats the principle of pluralistic federalism.

- **2019 Act -** The Centre's decision has been challenged on the ground that it violates ***Article 3*** of Indian Constitution.
- It mandatory under Article 3, for the President to refer any Bill proposing the reorganisation of a state to its legislature if the Bill "affects the area, boundaries or name of any of the states".

How about the hearing of the petitions?

- In 2020, the batch of petitions was referred to a five-judge Constitution Bench headed by Justice NV Ramana.
- On March 2, 2020, the bench refused to refer the matter to a larger bench (seven-judge bench).
- Despite several assurances of 'early listing' of these petitions by former CJIs, the case has not come up for hearing post the order declining reference to a larger bench.
- The petitions are being listed for hearing for the first time after March 2020.
- **New Bench -** A five-Judge Constitution Bench, comprising Chief Justice of India (CJI) D.Y. Chandrachud and Justices Sanjay Kishan Kaul, Sanjiv Khanna, B.R. Gavai and Surya Kant, is slated up.
- The five Judges are the seniormost in the Court and members of the Supreme Court

Collegium.

References

1. The Hindu - What are the cases about Article 370 up for hearing at the SC?
2. IE - The issues in challenge to Centre’s 2019 Jammu & Kashmir decisions

