On 5th August 2019, President of India in the exercise of the powers conferred by Clause (1) of Article 370 of the Constitution had issued the Constitution (Application to Jammu and Kashmir) Order, 2019. Through this, Government of India has made modifications in Article 370 itself (not revoked it).

With this, the Government of India has dramatically altered the relationship between the state of Jammu and Kashmir and the Indian Union.

Background

- On October 17, 1949, Article 370 was added to the Indian constitution, as a 'temporary provision', which exempted Jammu & Kashmir, permitting it to draft its own Constitution and restricting the Indian Parliament's legislative powers in the state.
  
  It was introduced into the draft constitution by N Gopalaswami Ayyangar as Article 306 A.

- **Under Article 370:** The Constituent Assembly of Jammu & Kashmir was empowered to recommend which articles of the Indian Constitution should apply to the state,
  
  The J&K Constituent Assembly was dissolved after it drafted the state's constitution. **Clause 3 of the article 370** gives the President of India the power to amend its provisions and scope.

- **Article 35A** stems from Article 370 and was introduced through a Presidential Order in 1954, on the recommendation of the J&K Constituent Assembly.
  
  ◦ Article 35A empowers the Jammu & Kashmir legislature to define the permanent residents of the state, and their special rights and privileges.
  
  ◦ It appears in Appendix I of the Constitution.

Key Changes
• The Constitution (Application to Jammu and Kashmir) Order, 2019 has replaced Presidential Order of 1954.
• Subsequently, the Jammu and Kashmir Reorganisation Bill, 2019, passed by Parliament divides the state of Jammu and Kashmir into two new Union Territories (UTs): Jammu & Kashmir, and Ladakh.
  ◦ This is the first time that a state has been converted into a UT.
  ◦ Of the six Lok Sabha seats currently with the state of Jammu and Kashmir, five will remain with the union territory of Jammu and Kashmir, while one will be allotted to Ladakh.
  ◦ The UT of Jammu and Kashmir will have an Assembly, like in Delhi and Puducherry.
  ◦ Instead of 29, India will now have 28 states. Kashmir will no longer have a Governor, rather a Lieutenant Governor like in Delhi or Puducherry.
• Status of J&K Union Territory
  ◦ J&K Assembly will have a five-year term, not six, as was the earlier case.
  ◦ Section 32 of the J&K 2019 Bill proposes that the Assembly can make laws on any subjects in the State and Concurrent lists except on state subjects relating to “public order” and “police”.
    ▪ This is similar to Article 239 A of the Constitution that is applicable to Union Territories of Puducherry and Delhi.
    ▪ However, by insertion of Article 239AA and by virtue of the 69th Constitutional Amendment, the Delhi Assembly cannot legislate on matters in entry 18 of the State List, i.e. land.
    ▪ In the case of J&K, the Assembly can make laws on land.
• The special status provided to J&K under Article 370 will be abolished.
  ◦ Jammu & Kashmir will no longer have the separate constitution, flag or anthem.
  ◦ The citizens of Jammu and Kashmir will not have dual citizenship.
  ◦ As the new union territory of Jammu and Kashmir will be subject to the Indian Constitution, its citizens will now have the Fundamental Rights enshrined in the Indian constitution.
  ◦ Article 360, which can be used to declare a Financial Emergency, will now also be applicable.
  ◦ All laws passed by Parliament will be applicable in Jammu and Kashmir, including the Right to Information Act and the Right to Education Act.
  ◦ The Indian Penal Code will replace the Ranbir Penal Code of Jammu and Kashmir.
  ◦ Article 35A, which originates from the provisions of Article 370 stands null and void.

Since Presidential Order has extended all provisions of the Constitution to Jammu and Kashmir, including the chapter on Fundamental Rights, the discriminatory provisions under Article 35A will now be unconstitutional.

The Need for Changes

• Article 370 was added in the Indian constitution to provide autonomy to J&K.
  ◦ However, it failed to address the well-being of Kashmiris who have now endured two generations of insurgency and violence.
  ◦ It contributed to the gap between Kashmir and the rest of the nation.

• International events
  ◦ The situation emerging in the western neighbourhood and the possible re-ascendance of the Taliban in Afghanistan call for greater attention and care.
  ◦ More so, the emerging geopolitical dynamics in Afghanistan and the resultant United States-Pakistan rapprochement could have potentially led to more heat on the Kashmir situation in the months ahead.

Challenges
**Constitutional challenges**

- Presidential order that sought to abrogate of Jammu and Kashmir’s special status, according to Article 370 (3) the President would **require the recommendation of the constituent assembly of Jammu and Kashmir** to make such a change.
- However, **the 2019 Presidential order adds a sub-clause to Article 367**, **replacing** the terms:
  - “Constituent Assembly of Jammu and Kashmir” to mean “legislative Assembly of Jammu and Kashmir”.
  - “Government of Jammu and Kashmir” to mean “Governor of Jammu and Kashmir acting on the aid and advice of the council of ministers”.
- The government sought to dilute the autonomy under Article 370 **without bringing a Constitutional Amendment** that would require a two-thirds majority in the Parliament.
  - This provision is currently under challenge in the Supreme Court on the ground that it added article 35A in the Indian Constitution only through a Presidential Order.

- Conversion of Jammu and Kashmir into a Union Territory is in **violation of Article 3**, as the Bill was not referred to the President by the State Assembly.
  - In the reorganisation of the state, the Presidential order also requires the concurrence of the government of the state. However, since Jammu & Kashmir is currently under Governor’s rule, the Governor’s concurrence is deemed to be the government’s concurrence.

**Federalism issue:**

- The **Instrument of Accession** was like a treaty between two sovereign countries that had decided to work together.
  - The **maxim of pacta sunt servanda** in international law, which governs contracts or treaties between states, asks that promises must be honoured.
- In Santosh Kumar v. State of J&K & ors (2017), the **SC said that due to historical reasons, Jammu and Kashmir had a special status**.
- In SBI v Zaffar Ullah Nehru (2016), the SC held that **Article 370 cannot be repealed without the concurrence of the Constituent Assembly of Jammu and Kashmir**.

Possible Consequences
Rise in Militancy: Article 370 was seen by Kashmiris as a marker of their separate identity and autonomy.
- There is a possibility of widespread protests and violence as a reaction to the dilution of Article 370.
- Terror elements in Pakistan would find Kashmir to be the most fertile ground for breeding terrorism.
- The unrest can affect the democratic progress that has been made so far.

Out-maneuvering Pakistan: Pakistan used 370 to wage a proxy war, internationalise Kashmir, supporting terrorism, all that is gone now.

Way Forward

- A 10-year strategy for education, employment and employability should be deployed for uplifting Kashmir.
- The Gandhian path of non-violence and peace should be adopted to solve the legitimacy crisis in Kashmir.
- The government can mitigate the challenges emanating out of Action on article 370 by launching a comprehensive outreach programme to all Kashmiris.
- In this context, Atal Bihari Vajpayee's version of Kashmiriyat, Insaniyat, Jamhooriyat (inclusivity culture of Kashmir, humanitarianism and democracy) for Kashmir solution, should become a cornerstone of the forces of reconciliation in the State.