

A BLOW AGAINST ARTICLE 370

Relevant for: Indian Polity | Topic: Issues and Challenges Pertaining to the Federal Structure, Dispute Redressal Mechanisms, and the Centre-State Relations

On March 1, 2019, the 77th and 103rd constitutional amendments were extended to Jammu and Kashmir (J&K) by a presidential order, with the concurrence of the J&K Governor. These relate to reservations in promotions for Scheduled Castes and Scheduled Tribes in the State services and special provisions for the advancement of economically weaker sections, respectively. However, on March 18, this was challenged before the J&K High Court.

The constitutional relationship between J&K and the Indian Union has been the subject of numerous discussions in recent times. This has rekindled the long-standing debate on the continued [relevance of Article 370](#). As in Article 370, the provisions of the Indian Constitution do not automatically apply to J&K. To extend constitutional provisions and amendments to the State, a presidential order to that effect has to be passed. This order requires the concurrence of the State government, where the subject matter does not relate to the subjects specified in the Instrument of Accession (defence, external affairs, and communications). For other cases, only consultation is required.

Accordingly, a 1954 presidential order extended various provisions of the Indian Constitution to J&K. This order was made with the concurrence of the State government and also ratified by the State Constituent Assembly. After the J&K Constitution came into effect in 1957, the State Constituent Assembly was dissolved. Since then, more than 40 such orders have been made, through which most constitutional provisions have been extended to the State. The sheer number of such orders, as well as the circumstances under which they were made, have considerably eroded J&K's special status under Article 370.

From the 1950s there has been a gradual dilution of the procedural norms followed by these presidential orders. In passing the 1954 order, procedural propriety was followed in the fullest possible sense as the requisite concurrence was obtained not only from an elected State government but also the State Constituent Assembly. The presidential orders made after the dissolution of the State Constituent Assembly — except a 1986 order extending Article 249, and the present 2019 order — can be seen as the first level of dilution. This is so because for all these orders, while the concurrence of an elected State government was obtained, the State Constituent Assembly did not exist and, therefore, could not give its ratification. Although the Supreme Court upheld this practice in the Sampat Prakash case (1968), it has been criticised as being beyond the scope of Article 370.

Article 370: J&K's special status challenged

The 1986 order represents a second level of dilution. This is because it was made when J&K was under Governor's rule as per Section 92 of the J&K Constitution. In the absence of an elected council of ministers, the Governor could not have validly given the requisite concurrence to the presidential order. Even if the Governor acting without a popularly elected government can be considered as a "state government" for the purposes of concurrence, the Governor must at least have had some nexus with the State and some independence from the Centre. However, this is not the case in practice, since the Governor is not only an unelected nominee of the Central Government but also holds office during the latter's pleasure. Not surprisingly, the 1986 order was challenged in the J&K High Court; it is still pending.

If the 1986 order was problematic, the third level of dilution brought about by the 2019 order is

almost the final blow. In December 2018, the President assumed all the functions of the State government and the Governor through a proclamation under Article 356. In an order passed on the same day, the President directed that all powers assumed by him would be exercisable by the Governor as well, “subject to the superintendence, direction, and control of the President”.

This is the main point of distinction between the 1986 and 2019 orders. During Governor’s rule, as was the case in 1986, the Governor is at least on paper expected to act independently. However, in the present case involving President’s rule, the Governor is reduced to a mere delegate of the Centre and is expected to act as per the aid and advice of the Central Government. A presidential order made through obtaining such a Governor’s concurrence is tantamount to the Centre talking into a mirror and makes a mockery of Article 370.

The manner in which the 2019 order was made also goes against the spirit of federalism, which is a salient constitutional principle. President’s rule is an exception to the general constitutional scheme that envisages representative government at the State level to accommodate regional aspirations. Extending constitutional provisions to the State during this exceptional state of affairs is suspicious. If the Centre had legitimate intentions, it should have waited until the formation of an elected government in J&K. In the absence of popular will backing it, the 2019 order clearly falls foul of the principles of constitutional and political morality.

Commenting on the 1986 order, the Sarkaria Commission had observed that “every action which is legally permissible may not be necessarily prudent or proper from the political stand-point”. Not only is the recent presidential order against federalism generally and the spirit of Article 370 in particular but it also violates the letter of the Constitution.

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