

## UNDER THE COVER OF PRESIDENT'S RULE

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to The Preamble, Union & its Territories and The Citizenship

The lynchpin of the government's legal measures to declare Article 370 inoperative and reorganise Jammu and Kashmir (J&K) into two Union Territories is the [Constitution \(Application to Jammu and Kashmir\) Order](#) of August 5, 2019. However, the task was not accomplished by that Order alone. The Centre and Parliament also used the fact that the State was under President's Rule to act on behalf of the State government and the State Assembly. This means that another principal source of the government's power was the President's proclamation issued on December 18, 2018, imposing Central rule.

Much has been written about the constitutionality or otherwise of the two principal moves of the Centre: hollowing out Article 370 using the two-pronged mechanism referred to above, and downgrading the State into two Union Territories. One clear way to question and challenge the legality of the measures is to find out whether there are any limitations on the Centre or Parliament using the prevalence of President's Rule to do anything that is not realistically possible to be done if there were a popularly elected legislature in a State.

While assuming to himself the functions of the State government and Assembly under Article 356 of the Constitution, the President also suspends portions of the Constitution. One such suspended part is the proviso to Article 3 (this Article empowers Parliament to create or divide States and alter their boundaries). The proviso says the President must refer any proposal to alter a State's name or boundaries to the State legislature for its views. It is an acknowledged fact that under the constitutional scheme, Parliament has overriding powers over the States in this matter. However, in respect of J&K, there is an additional proviso, one found only in the State's own Constitution. This says J&K's legislature has to give its consent to any altering of its boundaries or size or name. Significantly, the Presidential proclamation suspends the second proviso too.

Consider the following: (a) the issuance, "with the State government's concurrence", of the Order of 2019, by which the Order of 1954 was superseded and the reference to 'Constituent Assembly of Jammu and Kashmir' was to be read as the 'Legislative Assembly' (b) the passage of a statutory resolution in Parliament recommending the declaration of Article 370 as inoperative (c) the adoption of a resolution accepting the Jammu and Kashmir Reorganisation Bill, 2019 and, finally, (d) the issuance of a notification by the President on August 6 midnight, declaring Article 370 inoperative. All these were made legally and constitutionally possible only because the State was under President's Rule and the President's Proclamation under Article 356 provided for it.

Explained | President's Order scraps its predecessor and amends Article 370

The legal fiction is that whatever Parliament or the President does in respect of J&K, it is the State Assembly or the State government that is actually doing it. How far should this legal fiction be allowed to prevail? Are there any legal limitations on this substitution of the State's powers and functions with the Centre's own, even if one concedes the wide amplitude of executive power under Article 356?

A presidential proclamation under Article 356 is subject to judicial review, going by the verdict of the nine-judge Bench of the Supreme Court in *S.R. Bommai vs. Union of India* (1994). However, the scope for judicial intervention is limited to the adequacy and relevance of the material on the

basis of which the President comes to the subjective satisfaction that the governance of a State cannot be carried on in accordance with the Constitution. At the same time, the court read another limitation into the same Article. It said the initial exercise of the power is limited to taking over the executive and legislative functions without dissolving the Assembly. Once Parliament approves the proclamation, the Assembly may be dissolved.

India's quasi-federal Constitution is admittedly weighted in favour of the Centre, but the courts have always emphasised that, in their limited domain, States remain 'supreme'. They are not "mere appendages of the Centre". Notwithstanding the Centre taking over all the State government's functions under Article 356, there are certain functions that the States alone can do. If these functions are allowed to be performed by the Centre in lieu of the State government or Assembly in the garb of President's Rule, the concept of States being supreme in their own domain is completely destroyed.

In the realm of law and policy, the Centre may issue orders or enact laws that fundamentally alter the State's policies and programmes. This appears to be permissible under the Constitutional scheme of Article 356, which says the President may assume to himself all or any of the functions of the State government; and Parliament may perform the functions of the State legislature, but the President shall not assume any power vested in the respective High Courts. This schema poses a real danger to the will of the people of a State, as decisions that a popular regime would never make may become possible under President's rule.

Explained | How the status of Jammu and Kashmir is being changed

Some of the possibilities of the kind of anti-federal damage that may be done while a State is under Central rule can be listed: (a) suits instituted by the State against other States or the Centre under Article 131 may be withdrawn or claims against it conceded (b) the power of a State Assembly to ratify Constitution amendments may be exercised by Parliament, and (c) the Assembly may be denied the opportunity to give its views on a proposal to alter the boundaries of the State. In the case of J&K, the consent of its legislature was mandatory, but the State Assembly's consent was given by Parliament itself. The resolution adopted in Parliament stated that since the State legislature's powers are vested in Parliament, "This House resolves to express the view to accept the Jammu and Kashmir Reorganisation Bill, 2019."

To this list of State responsibilities that ought not to be discharged by the Centre while a State is under President's Rule, one may add two more aspects in respect of J&K. One is the power of the J&K government to concur with proposals to modify the way in which provisions of the Constitution apply to the State; and two, the recommendation of the State 'Constituent Assembly' to the President to declare Article 370 inoperative. These two measures have been adopted by the Centre in the name of the Governor and by reading the term 'Constituent Assembly' as 'Legislative Assembly', and using the factum of the State being under President's Rule to make Parliament itself perform the duty of recommending the step.

It may be argued that Article 356 empowers the Centre to assume and perform these two functions. However, these are clearly powers exercisable by elected regimes, and not by the Centre discharging its emergency powers. The implicit limitation on the Centre performing nothing more than routine governance functions on behalf of the State will have to be traced to the overall scheme of Article 356 itself. First, the power is invoked only with the objective of restoring constitutional governance in the State, and not to exercise absolute powers to change policies, laws and programmes of the State in the limited period during which a State is under President's rule. Parliament may pass the State Budget, or essential legislation so that existing programmes and statutory measures survive, but Article 356 does not give a blanket power to the President or Parliament to alter any matter in which the political leaders and the electorate of

the State have a legitimate stake. Unless these implied limitations on the way the President or Parliament performs the functions of a State under Central rule, no State law or policy is safe.

Fact check: What is true and what isn't on J&K, Article 370

Another example may drive home the point. Let us suppose the Centre finds that it does not have the requisite number of State Assembly resolutions ratifying a Constitution amendment it has managed to pass with a two-thirds majority in both Houses of Parliament. Can a few State governments be dismissed, and Parliament used to adopt resolutions ratifying the amendments on behalf of those States?

This may happen in other ways too. A State law may be amended by Parliament during President's Rule, and thereafter, the subject it falls under may be shifted to the Union or Concurrent List through a Constitution amendment; and the latter may be ratified on behalf of several State governments by placing them under President's Rule for a limited period. This route may be used to abrogate any State law, and thereafter future elected regimes in the State may be prevented from restoring its old law, by stripping it of its legislative competence.

Therefore, anyone challenging the constitutionality of the President's Constitutional Order, or the resolutions adopted by Parliament preparatory to the declaration of Article 370 as inoperative, will also have to seek a verdict that imposes judicial limitations on the extent to which Article 356 can be used to subvert the will of the States.

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