

## A MONUMENTAL LITMUS TEST

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

Perhaps not since the Indira Gandhi-declared Emergency has the Supreme Court of India faced an examination such as this, where its moral fibre is at stake. There, in *ADM Jabalpur v. Shivkant Shukla*, the court, by its own subsequent admission, came up lamentably short. The court, by ruling that fundamental rights, including a person's right to life, could be validly suspended during a period of emergency, left democracy teetering on the edge of the abyss. Now it faces a litmus test nearly as monumental. The cases before it concern not only the validity of the government's decision to virtually revoke Article 370 of the Constitution — and, with it, the special status that Jammu and Kashmir (J&K) enjoyed — but also the legality of the chilling limitations placed on civil liberties in the region. How the court decides these cases will have a deep bearing on the destiny of democracy in India.

Article 370, which pledged relative autonomy in governance to J&K, was premised on the idea that ultimate sovereignty rested with the people. But time after time this basic compact has been weakened by successive regimes at the Centre, including by India's first elected government. For its part, the Supreme Court has invariably overlooked these transgressions, by affirming the Union government's position of hegemony. The presently executed moves, however, push the envelope further, by stripping Article 370 of all its meaning. And this the government has achieved not through debate and deliberation but through constitutional obfuscation.

When the Supreme Court hears arguments on the questions arising out of these events, the government will likely point to the political nature of the dispute. In defending its decision, the government has already offered a plethora of justifications — in this, the important and critical need to re-assimilate in J&K, Kashmiri Pandits who suffered a harrowing exodus from the State has scarcely found mention.

But regardless of the ends of the government, what ought to be clear is that the rule of law demands that any state action is bound by the Constitution and its limits. After all, that is precisely why we have a Constitution underpinning our democratic republic. When judges exercise their minds on the simple legality of the government's orders it should be evident to them that the quashing of Article 370 is unlawful. And that, for the court, is all that should matter.

Article 370's *raison d'être* is contained in the Instrument of Accession signed by Hari Singh, the then Maharaja of J&K, on October 26, 1947. The provision, in constitutionalising the terms of that accord, stipulated that Parliament could legislate for J&K only over matters concerning external affairs, defence and communications. Where Parliament intended to legislate over additional areas otherwise provided for in the terms of the accession, it could do so by consulting the State government. But where it proposed to enact laws beyond the agreed subjects it required not only the State government's concurrence but also the express ratification of J&K's Constituent Assembly.

The Article, therefore, clearly envisaged the idea that J&K would have a Constitution of its own. Its chief drafter, N. Gopalaswami Ayyangar, was conscious of the fact that any permanent arrangement between the State and the Union could be arrived at only once the State's Constitution was brought into force. It was to put in place an arrangement in the meantime that Article 370 provided a few other stipulations. For example, it granted the President the power to make orders applying specific provisions of the Constitution other than Articles 1 and 370 to J&K. But even such orders required subsequent ratification by the State's Constituent Assembly.

It was thus clear that once J&K's Constitution came into force, together with Article 370, it would form a cohesive means of governing the State.

This position is further illuminated by Article 370(3). The clause, as Gopaldaswami Ayyangar put it to India's Constituent Assembly, "explains the whole of this article". It accorded the President a power to declare either the Article in full or any part of it inoperative on the recommendation of the Constituent Assembly of the State. This recommendation, as Gopaldaswami Ayyangar explained, was a "condition precedent" to any effort at abrogating the provision.

No doubt, this original arrangement was meant to be temporary. But it was temporary only in the sense that the structure of governance would eventually be elucidated by the J&K Constitution that the State's Constituent Assembly was meant to frame. On its drafting, the Assembly could have well chosen to recommend to the President the abrogation of Article 370 (which could have even meant separation from the Union). But given that no such recommendation was made, the intention was writ large: the Article would continue to represent the sole means of taking India's Constitution into the State. Although this disposition has since been disturbed in various different ways, invariably at the instance of the Indian government, as the Supreme Court recognised as recently as in December 2016, unless the conditions in clause (3) were met, Article 370 would have to remain.

The Union government has not entirely disputed this position. But in finding itself thwarted by these constraints, what the government has offered us is an illusory and coercive change to the constitutional bargain. Article 367, which provides rules for interpreting the Constitution, has been modified insofar as it applies to J&K by providing that wherever the term "Constituent Assembly of the State" was used in Article 370 it would refer only to the "Legislative Assembly of the State". Nifty as this might sound, the substitution, in effect, does not merely alter Article 367, but it also impinges on Article 370 itself, something which the provision, as Ayyangar was keen to stress on, decidedly prohibits.

Swiftly following this presidential order came a statutory resolution which suggested to Parliament the abrogation of the essential components of Article 370. But because J&K was under President's Rule, Parliament had now stepped into the shoes of the State's Legislative Assembly. This meant that, as a result of the newly shaped Article 367, it also acted as the State's Constituent Assembly. The incongruity could scarcely be more evident. The Union executive vested in Parliament an unrepresentative constituent power, which meant it could recommend to the President the absolute nullification of Article 370. The upshot of all this was that a decision of portentous significance affecting J&K's political future was made even though the people of the State were afforded neither an opportunity to speak for themselves nor the chance to speak through their own elected representatives.

Our Constitution's brilliance is contained in its fidelity to principles. Those principles are not fungible. Under no circumstances do they license government to use the excuse of a supposed noble end to trump the Constitution's guarantees. The processes concretised by the Constitution are important because they partake in them a vow to pay heed to the consent of the governed. When those processes are allowed to be broken they strike at the understanding that sovereignty rests with the people.

To borrow from Annie Dillard's inimitable words, in this case, casting aside constitutionalism feels like "sliding down the mountain pass and into the region of dread". Already the extraordinary blockade of communication channels in J&K, and the detention of scores of people, including three former Chief Ministers of the State, have been regarded as unexceptional, and, even more ominously, as necessary consequences of the constitutional change. The judgment in *ADM Jabalpur* may well have been overruled since, but the ghosts of

the court's darkest days have not fully dissipated. In J&K, the legacy of *ADM Jabalpur* has persisted for decades. Now when the court reviews the government's decisions it may want to recall its past blunders, especially the ones that entrenched its place in the annals of the Emergency's history.

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