

ON DILUTION, BIFURCATION AND 'SPECIAL STATUS'

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

"The constitutional validity of J&K's bifurcation into two Union Territories is doubtful." Residents in Srinagar earlier this month. | Photo Credit: [DANISH SIDDIQUI](#)

The jubilation in parts of the country following the supposed abrogation of Article 370 was in contrast to the gloom in the Kashmir Valley. It was ignored by both sides that New Delhi did not make any substantial gain in terms of powers; neither did Srinagar suffer any major loss. Later, in what could be construed as a setback to the Centre, the Supreme Court referred all the petitions on Article 370 to a Constitution Bench, which will hear the matter in the first week of October.

Amidst these developments, some points require deeper scrutiny. First, the apex court could possibly strike down as 'unconstitutional' the Centre's move to amend Article 370 by invoking the very same article. Second, the bifurcation of a State which is under President's rule into two Union Territories is possibly against federalism. And third, Article 370, as it stood on August 4, was a special power available not to Kashmir, but to the Centre.

First, Article 370 has not been abrogated. It still very much remains part of the Constitution. Instead, the government, in an innovative and constitutionally suspect manner, invoked the Article to amend Article 367. On August 5, the President inserted a new clause to say that the 'Constituent Assembly' of Jammu and Kashmir (J&K) shall mean 'Legislative Assembly' of the State, and 'State government' shall mean 'Governor acting on the advice of Council of Ministers'. With this interpretation, Article 370 presented an entirely different picture. Since the erstwhile State was already under President's rule, the Parliament, by exercising 'powers' of the Legislative Assembly, gave its concurrence to the aggressive surgery of Article 370 that has killed the spirit as well as the text of the provision.

True, during President's rule, Parliament can certainly exercise 'powers' of the State Assembly; but whether the aforesaid 'concurrence' can be termed as a legitimate and bona-fide exercise of power is a moot question for various reasons.

One, a Legislative Assembly that was in itself a creation of the Constituent Assembly cannot take the place of the latter. Two, the August 5 order defined the 'State government' to mean 'Governor acting on the advice of Council of Ministers'. And since there was no Council of Ministers, the validity of the Governor's concurrence mentioned in the presidential order was questionable.

Finally, Article 370(1)(d), which on August 5 was used for the purpose of diluting the Article itself, was meant to be deployed to apply 'other provisions of Constitution' to Jammu and Kashmir, not to modify or repeal Article 370 itself. The expression 'other provisions' here means provisions other than 'Article 1', 'Article 238' (now repealed) and 'Article 370'.

Four points are to be kept in mind here. First, one constitutional provision cannot be used to nullify another. Second, an interpretation clause is to be used only when there is ambiguity in the Constitution. Here, the 'Constituent Assembly' Article 370 talked about was clearly identifiable — it first met on October 31, 1951 and was dissolved on January 26, 1957, and hence there was no ambiguity. Third, even when there are two contradictory provisions, the 'doctrine of harmonious construction' is to be invoked so that both the provisions are given effect to. Fourth,

like Parliament, President too cannot alter the federal character of the Constitution, which has been held to be part of its basic structure. The Constitution prohibits colourable exercise of power — what you cannot do directly, you cannot do even indirectly.

Next, the constitutional validity of Jammu and Kashmir's bifurcation into two Union Territories is also doubtful. Article 3, which deals with Parliament's powers to alter boundaries of a State or bifurcate it, required the President to obtain the 'concurrence' of the J&K State Assembly before Parliament took up such a Bill. It has now come to light that while imposing President's rule in J&K on December 19, 2018, the proviso on the reference to Assembly was suspended. This not only shows that the bifurcation was planned by the Centre in 2018 itself but also gives a clear indication of its mala-fide intention of doing something indirectly.

A mala-fide presidential action under Article 356 can be struck down. If the apex court upholds the Centre's suspension of Article 3, it will be an end of Indian federalism as States will become a plaything in the Centre's hands. It needs to be recalled here that prior to the Reorganisation Act of 1956, States were given the opportunity to express their views. Andhra Pradesh Assembly too was given this opportunity in 2014 prior to the creation of Telangana. Since the J&K Assembly stood dissolved and there had been no election announced, it was denied its right to express its view.

When a State is under President's rule, Parliament can act as nothing more than a 'night watchman'. It certainly cannot pass a resolution to bifurcate the State.

Let us now objectively assess New Delhi's gains in sounding the death knell for Article 370. Since almost the entire Constitution of India had been already applicable to J&K, constitutionally speaking, heavens have not fallen for Srinagar. Entry 76 of Union List, which deals with audit, was extended to J&K in 1958. The Election Commission of India was similarly given powers to conduct elections from 1959 by the First Amendment to the J&K Constitution. A total of 94 out of the 97 items in the Union List had already been made applicable to J&K when the Centre made its move and hence Parliament had all the powers.

Out of the 395 Articles in the Indian Constitution, 260 Articles had already been extended to J&K through successive Presidential Orders. As regards the rest of the Articles, J&K Constitution had identical provisions. Moreover, more than 250 Central laws had already been extended and most of J&K's State laws were identical to Central laws.

In reality, the 'special status' Article 370 conferred was not to J&K but to the Central government. The Centre could deny certain provisions while extending unilaterally some other amendments. For instance, following the 44th Amendment, unlike in the rest of the country, national emergency in J&K could still be imposed on the grounds of 'internal emergency'. Similarly, while for the rest of the country, freedom of speech could be curtailed only through 'reasonable restrictions', in J&K, it could be controlled through restrictions that "appropriate legislature considered reasonable".

Yes, we do live in a post-truth world but we need to objectively assess J&K's loss and New Delhi's real gains when it comes to the dilution of Article 370. Further, whether the apex court will allow India to become a 'unitary state' remains to be seen.

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