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Source : www.thehindu.com Date : 2023-12-02

IMPROVING THE CAPABILITY OF THE INDIAN STATE

Relevant for: Indian Polity | Topic: Functions & Responsibilities of the States, the Governor, the Chief Minister and State COM

December 02, 2023 12:16 am | Updated 08:16 am IST

‘There is an extreme concentration of policymaking and implementation powers within departments’ | Photo Credit: The Hindu

The Indian state is a paradox of too big and yet too small. Try setting up a business or building a house in an urban area, and you will quickly realise how the thicket of the licences, permits, clearances, and permissions can make life impossible. Even as an ordinary citizen, one can never be sure to be on the right side of the law and the circuitous regulations.

At the same time, the Weberian state in India is too small. In the G-20 group, the country has the smallest number of civil servants per capita. The public sector share in total employment in India (at 5.77%) is half the corresponding figures for Indonesia and China, and just about a third of that in the United Kingdom. With approximately 1,600 per million, the number of central government personnel in India pales in comparison to 7,500 in the United States. Similarly, the per capita number of doctors, teachers, town planners, police, judges, firefighters, inspectors for food and drugs, and regulators is the lowest even among countries at a similar stage of development.

The Indian state is relatively small on the other metrics, such as the tax-GDP ratio and public expenditure-GDP ratio. Be it public goods provisions, welfare payments, or the justice system, it is a story of scarcity rather than surplus. Due to an inadequate state capability, governments at the Centre and States end up outsourcing services that are better provided by the public sector, such as primary health.

The proponents of inclusive development rightly pitch for a bigger role for the state — increased public spending on health, education, social security and a larger officialdom to go with it. Their detractors, on the other hand, cite innumerable policy failures to argue for a smaller state. The unwieldy state’s performance, they contend, is disappointing on all fronts be it students’ learning outcomes, child and maternal mortalities, farm and firm productivity, traffic conditions, and crime rates, among others.

Both sides to the debate are missing something fundamental. True, the Indian state is ‘people-thin’ but ‘process-thick’. The main problem, however, is the perverse incentives created by public institutions and the skill gap among officials. These factors have eroded the ability of the political executive and civil services to make and implement sound policies. A recent book, State Capability in India, by T. V. Somanathan and Gulzar Natarajan, two Indian Administrative

Service (IAS) officers, suggests various measures to improve things without fiscal and political consequences.

For instance, there is an extreme concentration of policymaking and implementation powers within departments. Experiences of countries such as Australia, Malaysia and the United Kingdom show that separating policymaking and implementation responsibilities expedites execution and encourages innovations, making the programmes better suited to local contexts. The Indian case in point is the National Highways Authority of India, which is tasked with executing national highway projects, while policy decisions are made at the ministry level. This arrangement has drastically reduced delays and cost overruns.

Moreover, restrictions on the frontline personnel to decide on implementation-related issues foster a culture of mistrust and lack of accountability for poor implementation. The vicious cycle wherein poor delegation and a deficient state capability feed each other can be broken by delegating financial and administrative powers to the frontline functionaries, with clearly defined processes for using them.

The top policymakers exhibit a lack of technocratic skills to govern an increasingly complex economy. In the absence of adequate capability to deal with economic, financial, contract and other technical matters, the Centre and the States hire consultancy firms. According to media reports, the central government paid over 500 crore in the last five years to outsource crucial tasks to the big five consultancy firms, i.e., PricewaterhouseCoopers, Deloitte, Ernst & Young, the KPMG and McKinsey.

An institutionalised and regular lateral entry at the mid and senior levels can help fill the civil services' size and technocratic gap. Qualified officers in non-IAS services (such as the Indian Revenue, Economic and Statistical Services) should get a fair shot at high-level positions if they have the talent and the expertise required. Civil servants at different levels can be provided subject-specific training under Mission Karmayogi (National Programme for Civil Services Capacity Building).

Similarly, there is a need to augment the strength of professional staff with market watchdogs, the Securities and Exchange Board of India, and the Reserve Bank of India (RBI). The first has just about 800 professionals, whereas its counterpart in the U.S., the U.S. Securities and Exchange Commission, has more than 4,500 experts to govern the corporates. Similarly, the professional staff strength of the RBI, less than 7,000, is tiny when compared to the US Federal Reserve which is assisted by 22,000 odd professionals.

Also read |National Centre for Good Governance expanding capacity to train higher number of civil servants from more countries

Yet another problem is the narrowly scoped audits by the Comptroller and Auditor General of India. It encourages the finance and administrative divisions in government to focus on compliance with rules rather than policy objectives. The tendency of the other oversight agencies, i.e., the Central Vigilance Commission, the Central Bureau of Investigation and courts to use hindsight information without appreciating the context has made the bureaucrats averse to exercising discretion in policy matters. Officials prefer to cancel big contracts even when granting extensions would be better. The net outcome is delayed procurement of goods and services and unnecessary contractual disputes. Appealing against arbitration and court awards have become the default mode by officials, making the government the biggest litigator. To fix this, the oversight agencies must be sensitised to appreciate the context of policy decisions. They should factor in the costs associated with the actual decisions as well as their alternatives.

The political will is required to address other issues, such as the appointment of retired officers to regulatory bodies and tribunals. The beneficiaries of such appointments enjoy hefty salaries without compromising the pensionary benefits from past services. This makes civil servants susceptible to political manipulation and influences their in-service decisions. The problem can be fixed by increasing the retirement age to say 65, and making an absolute upper limit for all appointments.

The political economy of the public sector also undermines its efficacy. It is well known that performance-linked pay and incentive schemes such as bonuses, which work well in the private sector, are not very effective in the public sector. The public sector must attract intrinsically motivated individuals to contribute to the social good. Paradoxically, the relatively high salaries in the public sector reduce its effectiveness. Because of job security and better working conditions, the risk and skill-adjusted pay in the public sector should be lower than what it is in the private sector. In India, however, the opposite is true due to the substantial salary hikes by the 6th Pay and the 7th Pay Commissions. Except at the top, for most of the skill spectrum, public sector salaries are much higher than private wages. It breeds corruption in appointments as it makes government jobs very lucrative for all, socially driven or not.

Also read | Must use ‘last-mile’, ‘good governance’ approach to reach out to people in remotest corners, minorities: PM Modi

The solution lies in moderate pay raises by the future Pay Commission and a reduction in the upper age limit for government jobs. Moreover, high economic growth that throws up many lucrative jobs in the private sector will make government jobs less appealing for those who are money minded. Put together, these measures can reduce corruption and increase the chances of socially-driven individuals joining the government.

Ram Singh is Director, Delhi School of Economics and Director, Delhi School of Public Policy and Governance

Source : www.thehindu.com Date : 2023-12-07

LESSONS FROM THE 2023 ASSEMBLY POLLS FOR THE 2024 LOK SABHA BATTLE

Relevant for: Indian Polity | Topic: Elections, Election Commission and the Electoral Reforms in India Incl. Political Parties

December 07, 2023 03:06 am | Updated 03:06 am IST

‘While the BJP’s win in these three States is quite significant, historical evidence that the party which wins these three States goes on to win the Lok Sabha election is mixed’ | Photo Credit: ANI

Election results in the three Hindi heartland States of Madhya Pradesh, Rajasthan and Chhattisgarh are being widely celebrated in ruling circles as a resounding semi-final victory for the Bharatiya Janata Party (BJP). Prime Minister Narendra Modi termed it a “hat trick” and claimed it to be the harbinger of another “hat trick in 2024”.

While the BJP’s win in these three States is quite significant, historical evidence that the party which wins these three States goes on to win the Lok Sabha election is mixed. The BJP won the 2014 Lok Sabha election after its victory in the 2013 Assembly elections in these States, but it lost to the Congress in these States in 2018, yet won the 2019 Lok Sabha election. Two decades ago, Prime Minister A.B. Vajpayee had launched the “India Shining” campaign after similar victories in the Assembly elections in 2003, only to lose the Lok Sabha elections in 2004.

So, there is certainly no “guarantee” of a BJP win here. Much will depend on how the Congress and other Opposition parties analyse the results and the lessons they draw from the defeat to strategise for 2024.

Many in the Opposition camp have, however, turned despondent because their expectations were raised by multiple exit polls predicting a smooth win for the Congress in Chhattisgarh and much closer contests in Madhya Pradesh and Rajasthan. While most exit polls accurately predicted the Congress’s impressive victory in Telangana, with even one getting the win by the Zoram People’s Movement’s (ZPM) win in Mizoram right, why did most exit polls fail to predict the outcomes in Chhattisgarh, Madhya Pradesh and Rajasthan?

The reason can be found in the different voting trends underlying the verdict in the various poll-bound States in 2023. In Telangana, there was an over 9% point swing away from the incumbent Bharat Rashtra Samithi (BRS) compared to its vote share in 2018, which translated into a loss of over 20 lakh votes and 49 seats. The Congress increased its vote share by 11% points and gained 45 seats from 2018.

In Mizoram, the ZPM gained 19 seats more in 2023 than its 2018 tally to secure a majority with a 15% point swing in its favour. The incumbent Mizo National Front (MNF) lost 2.6% points in vote share and 16 seats compared to 2018, while the Congress lost over 9% points in vote share and four seats.

Compared to this, the incumbent Congress governments of Rajasthan and Chhattisgarh witnessed negative swings of 0.3% and 0.8%, respectively. This is why the anti-incumbency against the BRS regime in Telangana was clearly discernible, while that against the State governments of Rajasthan and Chhattisgarh was not very evident.

In Madhya Pradesh, where it was in the opposition, the Congress's vote share eroded by around 0.5% points. Such a small erosion in the Congress's vote share, however, translated into significant losses in Assembly seats across the three States.

That is because the BJP succeeded in increasing its vote shares by 7.6% points in Madhya Pradesh, 2.4% points in Rajasthan and a very significant 13.3% points in Chhattisgarh. Even in Telangana, where it finished third, the BJP's vote share increased by 7% points.

The BJP managed to attract more votes from smaller parties and independents than by denting the Congress's vote share. For instance, the vote share of the Bahujan Samaj Party (BSP) eroded in Madhya Pradesh by 1.6% points, Rajasthan by 2.3% points, Chhattisgarh by 1.8% points and Telangana by 0.7% points. Similar declines can be seen in the vote share of other smaller parties and independents in Madhya Pradesh, Chhattisgarh and Telangana. This includes the Janta Congress Chhattisgarh (JCC) which had won five seats with a 7.6% vote share in 2018 in alliance with the BSP, but drew a blank in 2023.

Converting this round of Assembly polls into a prequel of the Lok Sabha election, with the Prime Minister leading the BJP's campaign and national issues dominating the electoral discourse rather than State-specific ones, helped the BJP in this endeavour. In Madhya Pradesh, Rajasthan and Chhattisgarh, the BJP's vote shares both in the 2014 and 2019 Lok Sabha elections were considerably above its Assembly election vote shares in 2013 and 2018, respectively. The BJP's vote share in 2019 in these three States was 17%-19% higher than that of 2018. This is the so-called "Modi effect".

Conversely, the Congress's vote share has tended to be significantly lower in the Lok Sabha elections compared to the Assembly elections. The vote shares of Others/Independents, however, have fluctuated even more widely than that of the Congress. In the 2023 Assembly polls, while the Congress retained much of its electoral base in the three heartland States at the 2018 level, the BJP increased its vote shares significantly by squeezing the vote shares of Others/Independents in all three States to their lowest levels since 2013. This has been the key to the BJP's success.

The Congress and the other Opposition parties can work on three strategic electoral goals before the Lok Sabha elections in order to prevent a repeat.

First, the Congress must try to consolidate its base in these three heartland States through an effective ideological campaign — not only on government schemes and electoral promises but also on a range of constitutional values that are now at stake. The effort should be to ensure that every section of the electorate that voted for the Congress in 2023 votes for it again in 2024.

Second, the Congress and other Opposition parties in the INDIA formation should finalise their seat sharing arrangements without further delay and formulate a common programme which can provide a progressive, socially just, equitable and substantive alternative to the policies of the

present regime. Both the Congress as well as the stronger regional parties in INDIA ought to display a spirit of accommodation and unity of purpose, the absence of which was evident during the recent Assembly poll campaigns.

Finally, serious efforts must be made to further broaden the INDIA coalition by identifying and reaching out to more potential allies. The BSP's inclusion can certainly add value, given the recent Assembly poll experience. Outreach could also be made to smaller State-level parties for inclusion in State-specific INDIA blocs in order to take on the BJP's formidable electoral and propaganda machine.

Engagement with parties such as the ZPM, the Bharat Adivasi Party, the Gondwana Gantantra Party and others, that have made a mark in this round of Assembly elections, as also with similar parties in other States, is imperative. This can contribute to a diverse, motivated and grassroots-level coalition in the run-up to the national elections.

Prasenjit Bose is an economist and activist

Source : www.thehindu.com Date : 2023-12-08

NO FAIT ACCOMPLI: THE HINDU EDITORIAL ON THE CHANGES PROPOSED IN THE LOK SABHA IN JAMMU AND KASHMIR

Relevant for: Indian Polity | Topic: Elections, Election Commission and the Electoral Reforms in India Incl. Political Parties

December 08, 2023 12:20 am | Updated 12:26 am IST

It has been more than five and a half years since an elected government collapsed and Governor's rule was imposed in Jammu & Kashmir amidst the suspension of the elected Assembly — a step that heralded dramatic changes in the erstwhile State. Subsequently, Article 370 that provided for special status for the erstwhile State was removed, the State bifurcated with the region encompassing Jammu and the Kashmir Valley made into a new Union Territory and Ladakh hived off into another. The constitutionality of these changes is still under question and the Supreme Court has reserved its verdict on it. But this has not deterred the Union government from bringing about legislation that will change the make-up of the UT's prospective Legislative Assembly beyond the completion of the delimitation exercise. On Wednesday, the Lok Sabha passed the Jammu and Kashmir Reorganisation (Amendment) Bill, 2023 and the Jammu and Kashmir Reservation (Amendment) Bill, 2023. These Bills do not necessarily bring about any significant change. The first increases the total number of Assembly seats from 107 to 114, with reservation of nine seats for Scheduled Tribes (a first), besides empowering the Lieutenant-Governor to effect some nominations. The second seeks to replace the term "weak and underprivileged classes (social castes)" in the J&K Reservation Act, 2004, enacted by the State legislature, to "Other Backward Classes" as declared by the UT.

Propriety would have demanded that even these changes could have waited for the Supreme Court's verdict, which is due soon, on the legality of the abrogation of special status besides the bifurcation of the erstwhile State and the procedure adopted to do so. Without the involvement of elected representatives from J&K in the process, the changes proposed in the Lok Sabha would only seem to be acts that are presented as fait accompli to the UT's citizens. This should also be taken together with the fact that the last five and a half years have seen the suspension of political and civil liberties of politicians; arbitrary arrests and detentions; communication shutdowns; a chilling effect on the media; and, more recently, long power cuts. Any change to the political life of J&K, citing its status as a region affected by separatism and terrorism, should not be done in a way that the citizens feel alienated. The first order of business in J&K has to be the restoration of the democratic process by holding popular elections and the restoration of its Statehood. This should help not just fill a glaring void in public life in the region in the immediate but also set the stage for addressing the long-pending issues that have led to the persistence of militancy.

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Jammu and Kashmir / Article 370 / government / laws / Reservation / judiciary (system of justice) / Lok Sabha

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Source : www.thehindu.com Date : 2023-12-11

BAD PRECEDENT: THE HINDU EDITORIAL ON THE EXPULSION OF TRINAMOOL CONGRESS MEMBER OF PARLIAMENT MAHUA MOITRA

Relevant for: Indian Polity | Topic: Parliament - structure, functioning, conduct of business, powers & privileges and issues arising out of these

December 11, 2023 12:20 am | Updated 12:31 am IST

The expulsion of Trinamool Congress Member of Parliament Mahua Moitra from the Lok Sabha by a hurried voice vote on December 8, based on a report of the Ethics Committee of the House, is bad in form and substance. It was not, however, surprising. By a 6:4 majority, including the vote of a suspended Congress MP, the committee recommended her expulsion, holding her guilty of ‘unethical conduct,’ ‘breach of privilege’ and ‘contempt of the House.’ These were charges raised by a Bharatiya Janata Party MP, who was in turn depending on the statement of Ms. Moitra’s estranged partner. The committee cited in its report a precedent of the expulsion of 11 MPs in 2005 for a cash-for-query sting operation by a news platform. There was video evidence that established a strong case then, unlike the charges against Ms. Moitra. She shared her login credentials with businessman Darshan Hiranandani to upload Parliament questions, a fact she herself admitted. The committee conceded in its report that it had no proof of cash exchanges and its report called for “legal, intensive, institutional and time-bound investigation”, into that aspect. Nevertheless, it was emphatic in calling for her expulsion, and even labelled the sharing of her login credentials a criminal act.

The links suggested between Ms. Moitra’s Parliament questions and the business interests of the Hiranandani group are frivolous. For instance, a question on steel prices or India’s trade relations with Bangladesh is of interest to numerous business groups and consumers. The committee said it acknowledged the fact that several MPs share their login credentials with others, but went on to make a laboured case that Ms. Moitra had endangered national security. The argument that MPs have access to documents on the Parliament portal that are not in the public domain is a stretched one. In fact, there is no good reason to keep draft Bills secret. Bill drafts are meant for public circulation and debate before being brought to Parliament for discussion and voting. That there is very little of that happening these days is a sad commentary on parliamentary democracy. The report of the Ethics Committee also faced the same fate. The 495 page report was tabled and voted on the same day, rejecting the appeal of Opposition MPs for a more detailed discussion once Members had the time to read it in detail. The precedent that the majority in Parliament can expel an Opposition member on a dubious charge is ominous for parliamentary democracy. The expulsion of Ms. Moitra is a case of justice hurried and buried.

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Source : www.thehindu.com Date : 2023-12-12

OMINOUSLY ANTI-FEDERAL: ON THE SUPREME COURT'S JUDGMENT ON ARTICLE 370 AND J&K'S SPECIAL STATUS

Relevant for: Indian Polity | Topic: Provisions related to UPSC, State PSCs and Civil Services in India, and their Role in Democracy

December 11, 2023 10:09 pm | Updated December 12, 2023 09:48 am IST

The Supreme Court of India's verdict upholding the abrogation of Jammu and Kashmir's special status under Article 370 of the Constitution represents not merely judicial deference, but a retreat from the Court's known positions on federalism, democratic norms and the sanctity of legal processes. It is undoubtedly a political boost to the ruling BJP and an endorsement of its audacious move in August 2019 to strip Kashmir of its special status and bring it on a par with other States. However, it is also a verdict that legitimises the subversion of federal principles, fails to appreciate historical context and undermines constitutional procedure. The most potent attack on federal principles is the Court's unconscionable conclusion that Parliament, while a State is under President's Rule, can do any act, legislative or otherwise, and even one with irreversible consequences, on behalf of the State legislature. This alarming interpretation comes close to undermining a basic feature of the Constitution as enunciated by the Court itself and may have grave implications for the rights of States, permitting a range of hostile and irrevocable actions in the absence of an elected body. The government and its supporters have much to cheer about as the Constitution Bench has endorsed its stand and rejected strong arguments from the petitioners, especially the point that the government had acted in a mala fide manner by imposing President's Rule preparatory to the intended abrogation of special status without the need to involve any elected representative from J&K.

The government had adopted a complicated process to give effect to the ruling BJP's long-cherished ambition of removing the State's special status. It had gone on to divide and downgrade it into two Union Territories (UT). It began with a Constitutional Order on August 5, 2019 applying the whole of the Constitution to J&K and changing some definitions so that the State's Legislative Assembly could recommend the abrogation instead of its now-dissolved Constituent Assembly, as originally envisaged in Article 370(3). Ultimately, the Court ruled that parts of the August 5 order were unconstitutional as they, in effect, amounted to amending Article 370 itself, which was impermissible; but, in a peculiar twist, it held the consequential notification on August 6 declaring Article 370 as valid and that the President was empowered to do so even without the legal underpinnings of the previous day's notification that sought to bolster the validity of the action. The President could remove the State's special status without any recommendation.

The Court has reasoned that the Constitution of India has been applied incrementally from time

to time even after the Constituent Assembly was dissolved in 1957 and that the removal of special status is nothing but the culmination of the process of its integration. Even if this line of argument is seen as unobjectionable, the idea that in the absence the Constituent Assembly and in view of the subordination of J&K to the sovereignty of India, there is no fetter on the government's intention to hollow out its residual autonomy is opposed to all canons of federalism and democracy. There is no doubt that J&K is not vested with any sovereignty. The Court says Article 370 represents no more than a form of asymmetric federalism and that additional features — such as having a separate Constitution, residuary power of legislation and requirement of its consent to some legislative subjects before Parliament can make law on them — will not clothe it with sovereignty. All of this is true. But, how this can mean that historical obligations owed to it and promises made by constitutional functionaries can be blown away at the ruling dispensation's whim is beyond comprehension. Forgotten is the fact that the process of integration itself was by and large built on a constant dialogue between Kashmir's leaders and the Union government, the context and conditions in which it acceded to India, the terms of the Instrument of Accession and the progressive extension of constitutional provisions with the consent of the State government over the years.

The Court's failure to give its ruling on whether the Constitution permits the reorganisation of J&K into two UTs is an astounding example of judicial evasion. It is shocking that the Court chose not to adjudicate a question that arose directly from the use of Article 3 of the Constitution for the first time to downgrade a State. The only reason given is that the Solicitor-General gave an assurance that the Statehood of J&K would be restored. It is questionable whether a mere assurance of a remedial measure can impart validity to any action. At the same time, the Court upheld the carving out of Ladakh as a separate UT. On this point, the verdict is an invitation to the Union to consider creation of new UTs out of parts of any State. The Court's position that there is no limit on the President's power or Parliament's competence to act on behalf of the State government and its legislature is equally fraught with danger. In particular, the reference to "non-legislative" powers of the State Assemblies poses a significant threat to the powers devolved to the States. A future regime at the Centre could impose President's rule to carry out extraordinary actions through its own parliamentary majority that an elected government in a State may never do. Some examples could be ratification of Constitution amendments, abrogation of inter-State agreements, withdrawal of crucial litigation and bringing about major policy changes. The view that some of these may be restored by a subsequently elected government or House is of little consolation if actions taken under the cover of President's Rule cause great damage to the State's interests. This is a verdict that weakens institutional limitations on power, and, while rightly upholding Indian sovereignty over J&K, it undermines federalism and democratic processes to a frightening degree.

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Source : www.thehindu.com Date : 2023-12-13

WELCOME DIRECTION: THE HINDU EDITORIAL ON THE SUPREME COURT'S DEADLINE TO CONDUCT ELECTIONS IN J&K

Relevant for: Indian Polity | Topic: Elections, Election Commission and the Electoral Reforms in India Incl. Political Parties

December 13, 2023 12:20 am | Updated 12:20 am IST

In its conclusion in the judgment that upheld the decision to abrogate the special status of Jammu and Kashmir under Article 370, the Constitution Bench of the Supreme Court expressly directed that the Election Commission of India (ECI) must conduct elections to the Legislative Assembly of J&K by September 30, 2024. It is welcome that the Court has set a deadline to conduct the long-delayed elections in J&K, which has been under spells of Governor's Rule and President's Rule since June 20, 2018 and without a Legislative Assembly. But it is also incongruous that the judgment does not press the government to restore statehood to the bifurcated Union Territory, a promise that has been conveyed by the Solicitor General, but has yet to gain fruition. The Bench remarks that direct elections cannot be put on hold until statehood is restored but it could have directed the Union government to restore statehood and conduct elections by a specified date, as there remains no reason for the continuance of J&K as a Union Territory. Restoration of statehood is an important measure as this guarantees a degree of federal autonomy to the province, that should allow the elected government to be able to better address the concerns of the electorate than depend on the representatives of the Union government.

J&K remains among India's most conflict-prone regions partially due to historical reasons related to integration of the erstwhile princely State into the Indian Union and later due to accumulated grievances over the conduct of democratic processes in the erstwhile State. Even when periodic and regular elections were conducted during the height of the militancy, participation was limited in many parts of the Valley, denoting the disenchantment with the political system. But things took a change for the better since the early-mid 2000s when electoral participation improved and J&K's citizens began to partake in the democratic process to get their concerns addressed before agitations and protests — including by separatists — over security policies and the later steps taken by the Bharatiya Janata Party government led to the current state of affairs. In the last five and a half years, local government elections have been held with varying levels of participation indicating that the mood in the Valley has been against the measures that have been implemented since 2018. India's unique selling proposition as a leader in the Global South remains its robust conduct of formal democratic process and which in itself is important for conflict resolution in places such as Kashmir. Without political processes, a contestation of ideas and a sense that elected representatives can address the grievances of citizens, there cannot be any normalcy.

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Source : www.thehindu.com Date : 2023-12-14

ARTICLE 370 JUDGMENT IS A CASE OF CONSTITUTIONAL MONISM

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

December 14, 2023 12:08 am | Updated 08:10 am IST

“By focusing more on the particular concept of sovereignty ‘which requires no subordination to another body’, the Court ends up refusing to recognise the shared sovereignty model of Article 370” | Photo Credit: The Hindu

More than four years after the abrogation of Article 370, the Supreme Court of India, on Monday, unanimously upheld the actions of the Indian government. While much of the discourse around the judgment has focused on the question of statehood, it is important to remember that the special status of Jammu and Kashmir (J&K) was really at the heart of the matter.

To arrive at its conclusions, the Court employs a historical, textual, and structural interpretation of the Constitution of India, and all three approaches are deeply informed by constitutional monism. Here are three sites where the Court employs a monist reading of the Constitution, and why this sets a dangerous precedent for federalism in India.

The monism that is reflected in the judgment imagines the Union Constitution as the sole bearer of internal and external sovereignty. While this may be true, Article 370 laid down an elaborate framework for the distribution of powers and authority between the Union and the State governments. This was affirmed by the J&K Constituent Assembly and not just as an interim measure pending total integration. Its Basic Principles committee’s report, based on which the State Constitution was drafted, stated: ‘The sovereignty of the State resides in the people thereof and shall except in regard to matters specifically entrusted to the Union be exercised on their behalf by the various organs of the State...the State’s legislature will have powers to make laws for the State in respect of all matters falling within the sphere of its residuary sovereignty’.

Editorial | Ominously anti-federal: On the Supreme Court’s judgment on Article 370 and J&K’s special status

By focusing more on the particular concept of sovereignty ‘which requires no subordination to another body’, the Court ends up refusing to recognise the shared sovereignty model of Article 370. After all, sovereignty in federal constitutions is not a binary concept restricted to a simple ‘is’ or ‘isn’t’ classification. Rather, it encompasses various dimensions and exists along a spectrum of degrees.

Another site where the Court's monism operates is in its reading of Clause 3 of Article 370. The Court rejects the argument that Article 370 had gained permanence after the dissolution of the Constituent Assembly as this 'is premised on the understanding that the constitutional body had unbridled power to alter the constitutional integration of the State with the Union'. The Court also relies on Clause 3 to hold that Clause 1 could be operated without the concurrence of the State government since 'the effect of applying all the provisions of the Constitution to Jammu and Kashmir through the exercise of power under Article 370(1)(d) is the same as issuing a notification under Article 370(3)'.

In a constitutional democracy, no body or institution has unbridled powers. Further, Clause 3 of Article 370 is primarily concerned with the relationship of two powers and not just the status or the relationship of the power-bearing entities. The proviso to Clause 3 makes it clear that the presidential power to abrogate Article 370 was contingent on the recommendation of the Constituent Assembly.

As it is in the nature of the presidential powers under Clause 3 to be contingent on the Constituent Assembly, this limitation does not die with the dissolution of the Assembly. The relation of powers here does not mean that the President becomes 'subordinate' to the Constituent Assembly but that power as a federal arrangement has been distributed across multiple axes under Article 370. The interpretation of Clause 1 that the Court offers is based on syllogistic reasoning but one that collapses the question of the nature of powers into the question of the effect of powers.

Holding that the President has the untrammelled power to abrogate Article 370 and order a total application of the Indian Constitution to the State to the effect that the State's Constitution becomes inoperative is an 'unbridled power' that defies the logic of federalism and constitutional democracy.

The judgment's monism imagines popular sovereignty as a monolith where since the views of an individual State for the purposes of reorganisation are not binding on Parliament, Parliament, therefore, is well placed to speak for the state. Justice Sanjay Kaul holds that 'views are to be taken from the entire nation via the Parliament, as the issue leading to the reorganisation affects the nation as a whole'.

There are many sites within the Constitution where a recommendatory power is vested in a body. Merely because that power may not be binding does not mean that the power can be taken over by another body or that power need not be exercised because at its heart lies the question of agency. The inevitable conclusion that one arrives at is that the popular sovereignty of a State's people vis-à-vis the State becomes subordinate to the popular sovereignty of the entire nation vis-à-vis the Union as well as the States. This is particularly worrying in the context of J&K where the threshold for reorganising the State was historically much higher compared to the other States.

By relying on a monist reading of the Constitution, in a context that defies monism, the Court has not only upheld the abrogation of Article 370 but has also put its stamp of approval on the silencing, and rendering inconsequential, of the voice of the people of the former State of J&K.

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judiciary (system of justice) / Article 370 / Jammu and Kashmir / constitution / government / laws / parliament

BACK TO TOP

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Source : www.thehindu.com Date : 2023-12-18

ONE PERSON, ONE VOTE, ONE VALUE

Relevant for: Indian Polity | Topic: Elections, Election Commission and the Electoral Reforms in India Incl. Political Parties

December 18, 2023 12:37 am | Updated 12:37 am IST

A voter casts her vote at a polling booth for the Madhya Pradesh Assembly elections, on the outskirts of Bhopal. | Photo Credit: ANI

Political equality in liberal democracies is not only about equality of opportunity to participate in the political decision-making process, but also about carrying a vote value that is equal to that of other members of the community. According to the legal scholar Pamela S. Karlan, the right to vote can be diluted quantitatively and qualitatively by redrawing the boundaries of the constituency in an electoral system. Quantitative dilution happens when votes receive unequal weight due to huge deviations in the population among the constituencies. Qualitative dilution happens when a voter's chance of electing a representative of their choice is reduced due to gerrymandering (redrawing of boundaries to favour a candidate/party). Thus, delimitation of constituencies plays a major role in strengthening or weakening democracy.

To avoid these dilutions, our Constitution framers envisaged appropriate safeguards to ensure equal political rights for all citizens. Articles 81 and 170 of Constitution state that the ratio of the population for the Lok Sabha and State Legislative Assembly constituencies shall be the same as far as practicable. Article 327 empowers Parliament to make laws related to the delimitation of constituencies, which cannot be questioned in a court of law. Based on this, the government forms an independent delimitation commission headed by a retired Supreme Court judge to avoid qualitative dilution. Articles 330 and 332 guarantee reservation of seats for Scheduled Castes (SCs) and Scheduled Tribes (STs) in Parliament and State Legislative Assemblies, which need to be kept in mind during delimitation. Delimitation of constituencies needs to be carried out regularly based on the decennial Census to maintain equality of the vote value as far as practicable.

The government has constituted four delimitation commissions so far: in 1952, 1962, 1972 and 2002. The first delimitation order in 1956 identified 86 constituencies as two-member constituencies, which was abolished by the Two Member Constituencies (Abolition) Act, 1961. The second delimitation order in 1967 increased the number of Lok Sabha seats from 494 to 522 and State Assembly seats from 3,102 to 3,563. The third delimitation order of 1976 increased the number of Lok Sabha and State Assembly constituencies to 543 and 3,997, respectively. Due to the fear of more imbalance of representation, the 42nd Amendment Act in 1976 froze the population figure of the 1971 Census for delimitation until after the 2001 Census. The Delimitation Act of 2002 did not give power to the Delimitation Commission to increase the number of seats, but said that the boundaries within the existing constituencies should be

readjusted. The Commission allowed up to 10% variation in the parity principle; yet around 17 parliamentary constituencies and many more Assembly constituencies violated this so that each representative could represent more people. But the fourth Delimitation Commission was able to reassign reserved constituencies, which increased the number of seats for SCs from 79 to 84 and STs from 41 to 47 based on the increase in population. The moratorium was extended until the first Census after 2026 for any further increase in the number of seats.

The population of Rajasthan, Haryana, Bihar, Madhya Pradesh, Uttar Pradesh, Jharkhand, and Gujarat has increased by more than 125% between 1971 and 2011, whereas the population of Kerala, Tamil Nadu, Goa, and Odisha has increased by less than 100% due to stricter population control measures. This also reveals a huge variation in the value of vote for a people between States. For example, in U.P., an MP on average represents around 2.53 million people, whereas in Tamil Nadu, an MP represents on average around 1.84 million people, a quantitative dilution.

The qualitative dilution of vote value parity can be used as a tool to sideline or make insignificant the votes of minorities. This can happen in three ways. The first is cracking, where areas dominated by minorities are divided into different constituencies. The second is stacking, where the minority population is submerged within constituencies where others are the majority. And the third is packing, where minorities are packed within a few constituencies; their strength is weakened everywhere else.

The qualitative dilution of vote value was highlighted in the National Commission to Review the Working of the Constitution and the Sachar Committee Report: in a majority of the seats reserved for SCs by the Delimitation Commission (1972-76), the population of Muslims was more than 50% and also higher than the SC population. And constituencies which had a large SC population and a lower Muslim population were declared unreserved. This has a major impact on the number of Muslim representatives in Parliament. At present, the share of Muslims MPs in Parliament is only around 4.42%, whereas the Muslim population is 14.2%.

Delimitation cannot be postponed further as it will lead to more deviation in the population-representation ratio. At the same time, the interests of the southern States have to be protected as their representation in Parliament might weaken due to more seats being assigned to States with a higher population growth. Along with addressing quantitative dilution of vote value, the next Delimitation Commission needs to address qualitative dilution so that minorities are represented more adequately.

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Source : www.thehindu.com Date : 2023-12-19

LEGISLATIVE DECLINE: THE HINDU EDITORIAL ON GOVERNMENT'S ACTIONS AND A DISREGARD FOR DELIBERATIVE DEMOCRACY

Relevant for: Indian Polity | Topic: Elections, Election Commission and the Electoral Reforms in India Incl. Political Parties

December 19, 2023 12:30 am | Updated 08:08 am IST

Both the security breach in Parliament last week featuring a theatrical attempt by individuals to highlight an issue of public importance — unemployment — and the Union government's response have been deeply problematic. The government's stymieing of any debate over this issue in Parliament and the Chair's recourse to an unprecedented high number of suspensions of Opposition legislators following their demand for a statement in the Houses and a debate, have been in line with its disregard for deliberative democracy. As many as 78 Opposition Members of Parliament were suspended on Monday. Fourteen more were suspended earlier — 92 in total, and nearly matching the 94 suspensions overall since 2014 prior to this session. Unlike in the two Lok Sabhas (2004-14), when even ruling party legislators, including rebels, were suspended for unruliness, only Opposition members have been subject to suspension, which includes those for far less severe offences since 2014.

The hallmark of a functioning democracy is deliberation, wherein elected legislators debate and discuss issues of public import and seek solutions to issues that affect citizens. A thorough deliberation involves not just televised speeches from Parliament but also debates, the utilisation of parliamentary and standing committees to delve into the issue and for Bills and legislation to be discussed threadbare before consideration. Instead, over the course of recent parliamentary sessions during the National Democratic Alliance's tenure, there have been multiple attempts at browbeating the Opposition, getting Bills passed without adequate discussion, disallowing amendments on merit, and under-utilising standing and parliamentary committees while trying hard to play to the gallery. Legislative business and parliamentary work have been given short shrift, while theatrics by legislators in both the Treasury and Opposition benches, and one-upmanship through the use of suspensions, have dominated proceedings. It is no wonder that such actions have compelled global democracy reports by research institutions such as V-Dem Institute to characterise India's democracy as an "electoral autocracy". Worse, the use of the draconian Unlawful Activities (Prevention) Act to indiscriminately target dissenters, such as the protesters who threw canisters and raised slogans in Parliament last week, has also fallen into the recent pattern of a deliberate equation of dissent with terror. Again, this has led the U.S.-based Freedom House, that measures civil and political liberties, to declare India as "partially free". The recent actions by the government only contribute further to the backsliding of democracy in India, making these developments a matter of serious concern.

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BACK TO TOP

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Source : www.thehindu.com Date : 2023-12-20

THE DEEP IMPORT OF THE ARTICLE 370 VERDICT

Relevant for: Indian Polity | Topic: Indian Constitution - Amendments, Schedules, and Important Articles

December 20, 2023 12:16 am | Updated 08:36 am IST

‘In the Valley, the verdict has reinforced a widespread belief that Kashmiris are resented by the rest of India and their voice is repeatedly silenced’ | Photo Credit: ANI

Days after the Supreme Court of India’s voluble judgment on the August 2019 presidential orders, there has been considerable, and excellent, dissection of its validation of the removal of Jammu and Kashmir’s autonomy, and its cursory handling of Parliament’s demotion and division of the State to two Union Territories.

Much of the commentary has dealt with the judgment’s implications for the rest of the country, which are far-reaching. It undermines the rights of States vis-à-vis the Union even on critical issues such as statehood and division, grants the President far larger powers over States than earlier envisaged, and allows long-term political and territorial decisions to be made under limited-term emergency conditions such as President’s rule.

There are three other key elements which have, however, been less discussed: what the verdict means on the ground for Jammu and Kashmir, and Ladakh, what it tells us about how the Court sees peace and security, and what it implies for the fundament of democracy in India. Back in 1953-55, the States Reorganization Commission held widespread public consultations during which villages expressed their preference for which unit to belong. This judgment negates even the right to consultation of the State’s elected representatives.

On the ground, the judgment has been met largely with silence that is ambiguous in Jammu, disappointed in Kargil, welcoming in Ladakh (with reservations), and ominous in the Valley. Jammu’s ambiguity centres on its experience of economic dispossession post-2019, when the Lieutenant-Governor’s administration awarded trade, retail and mining rights to national rather than local industry. In Ladakh, Kargil’s disappointment stems from the fact that its majority Shia wishes to retain ties to the Valley. Leh’s welcome of separation from the Valley is tempered by the desire for an elected administration instead of a Lieutenant-Governor.

The most severe impact is undoubtedly in the Valley, where the verdict has reinforced a widespread belief that Kashmiris are resented by the rest of India and their voice is repeatedly silenced. The circumstances in which the President of India, Ram Nath Kovind, passed his August 5 orders were draconian, to say the least. Additional troops were sent in at July end, over 5,500 Kashmiri politicians and activists, including three former Chief Ministers, were put in detention on the day before, Section 144 was applied forbidding gatherings of four or more persons, and a total communications blackout was imposed.

Editorial | Ominously anti-federal: On the Supreme Court's judgment on Article 370 and J&K's special status

Notably, neither the main nor the concurring judgments mention these events in their summaries of incidents prefiguring the presidential orders.

Instead of acknowledging the enormity of the administration's actions, which imposed war-like conditions on the people, the judges accepted the alleged security threat, in August 2019, to the Amarnath Yatra — of which nothing has been heard since, either on what it comprised or how it was averted — as background to the presidential orders and the Jammu and Kashmir Reorganisation Act, 2019. Security has also been accepted as a reason for the delay in restoring statehood, despite the administration's claim that the situation is much improved.

A blanket acceptance of alleged security concerns can be dangerous. Over the past eight years, it has allowed innumerable unwarranted arrests of journalists, activists and even comedians, who languish in jail on unproven charges of unlawful activities and/or sedition. The failure to probe security concerns has closed debate on policy and performance in tackling internal and external conflict, as can be seen in the cursory parliamentary discussion of the ongoing civil conflict in Manipur. Though there was indication of a security lapse leading to the death of 40 paramilitary troops in a terrorist attack in Pulwama in February 2019, there was no published inquiry into it. Whether we will learn the truth of the recent lapse that allowed a group of young Indians to let off canister smoke bombs in Parliament remains to be seen. Yet, policy accountability is critical to operational improvement.

In the recent judgment, Justice S.K. Kaul's 'epilogue' does take note of human rights abuses in Jammu and Kashmir. But it appears, like the main judgment, to ignore the violation of human and political rights in and since August 2019. Worse, both ignore the lesson learned from India's own experience, that peacemaking offers the best solution to internal conflict. Available data show a slowly rising curve of violence in Jammu and Kashmir after the Union Home Ministry adopted policies of purge and censorship, accompanied by deterioration in the India-Pakistan ceasefire agreement. By contrast, the data show a sharp curve of diminishing violence during the peace process of 2002-13.

In other words, the rise in violence between 2016-2018 that the Attorney-General and Solicitor-General referred to might have been more effectively countered by the policy of the A.B. Vajpayee and Manmohan Singh administrations, of improving democratic practice on the ground in the State while engaging in peace talks with Pakistan. Validation of the extreme clampdown of August 2019 and the actions taken under its cover, on the other hand, run the risk of an upsurge in violence if or when a semblance of democracy is restored.

Could a truth and reconciliation commission bridge the gap, as Justice Kaul appears to suggest? The proposal was made over a decade ago by then Chief Minister Omar Abdullah, but found few takers. Unlike the South African commission, which took place in the context of a peace agreement to end apartheid and transfer power to the African National Congress, Mr. Abdullah's proposal was made when peace talks with Pakistan had withered, first at General Musharraf's request and then due to the Mumbai terrorist attacks. Despite this end, the after-effects of the peace process lasted until 2014.

By contrast, there is no peace process in Jammu and Kashmir today. Far from it, the verdict's validation of the removal of autonomy, and administrative bias towards developers and industrialists from outside the former State, can only harden alienation in the Valley. In such a situation, who will reconcile with whom?

Many ask: Alright, but what is done is done. How do we move on from here? My answer will please no one.

The Union administration could start a new peace process. It could restore statehood, and hold elections. It could return freedom of expression. But it would need to be prepared for an outpouring of anger that has thus far been dammed by fear of arrest or worse, and to respond to that anger with compassion and understanding, not bullets and prison bars. Longer term, it would need to return to the blueprint for a solution that was developed by A.B. Vajpayee and Mr. Singh. That blueprint included the disarmament of armed groups and demilitarisation of the area, a soft border with autonomy for both Jammu and Kashmir and its Pakistan-held parts, together with an option of joint development for the whole of the former princely State.

I do not see the current administration returning to that blueprint, nor can I imagine another that would sustain. Perhaps better minds than mine will.

Radha Kumar is the author of **Paradise at War: A Political History of Jammu and Kashmir**

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Source : www.thehindu.com Date : 2023-12-22

SHOULD AN ALL-INDIA JUDICIAL SERVICE BE CREATED?

Relevant for: Indian Polity | Topic: Judiciary in India: its Structure, Organization & Functioning, Judges of SC & High Courts, Judgments and related Issues

December 22, 2023 12:15 am | Updated 02:08 am IST

AIJS is a proposed centralised recruitment system for judges at the level of additional district judges and district judges across States. | Photo Credit: The Hindu

Recently, President Droupadi Murmu suggested that an All-India Judicial Service (AIJS) will help diversify the judiciary. In the same way that the Union Public Service Commission conducts a central recruitment exam and assigns successful candidates to cadres, the recruitment of judges of the district judiciary is being proposed to be made central, following which they will be assigned to the States. This idea has been discussed in the past and has also been a part of the Union government's official policy for years. However, there has been no consensus on the proposal either from the High Courts or the State governments. Should an AIJS be created? **Alok Prasanna Kumar** and **Bharat Chugh** discuss the question in a conversation moderated by **Aaratrika Bhaumik**. Edited excerpts:

The India Justice Report (IJR) 2022 shows that only 35% of subordinate court judges are women. No State has been able to meet the quotas for Scheduled Castes (SC), Scheduled Tribes (ST), and Other Backward Classes (OBC) categories in the subordinate judiciary. Is an AIJS the solution to this?

Alok Prasanna Kumar: All the States have been doing better over the years if you see Vidhi's data in the context of the representation of women in the subordinate judiciary. It might take some more time for the SC, ST, and OBC communities to get that level of representation, or at least proportionate to their populations. But the key barrier is the entrance exam; preparing for it is time-consuming. The requirement of seven years of practice to become a district judge also poses a problem because law as a profession is already very difficult if you do not have connections; it is doubly so if you are from an underprivileged community. Many High Courts also place requirements — that you have to have appeared in 'x' number of cases or had an active practice of 'y' number of years. This automatically raises barriers to entry, especially for women and other excluded classes.

Bharat Chugh: The State governments and the High Courts which conduct the various exams have been doing their bit for affirmative action. From personal experience, I can say that for the last few years, the number of women who have joined the judicial services has been more than the number of men.

There is one point where an AIJS may help — different States provide for different patterns of reservations. I think some amount of rationalisation can help.

Since cases in the district courts are argued in regional languages, do you think a central recruitment exam will act as an impediment for candidates who are not well-versed in the regional language? A contrarian perspective is that civil servants overcome this barrier through intensive language training.

Bharat Chugh: Not only are cases argued in the regional language, but there is vast documentation in the regional language. Therefore, an understanding of the regional language and the dialect of the people giving evidence is important. Sometimes, even customs play an important role in judicial decision-making. Intensive language training would take an enormous amount of effort. At the end of the day, we are deciding lives here and the smallest mistake in understanding the issues or the evidence may be irreparable. The need to understand a language is greater in our case than in the case of bureaucrats.

Alok Prasanna Kumar: I think implicit in this assumption is that the Indian Administrative Service has been a wonderful institution. But the way the institution is structured, the way it recruits and promotes people... I am not sure that is a model we want to replicate in the judiciary. I would rather have people with local knowledge serve local needs.

According to the data released this year by the Law Ministry, 5,388 posts of judicial officers are lying vacant in the district judiciary. Do you think a centralised service could tackle the issue of judicial vacancies?

Alok Prasanna Kumar: Judicial vacancies, as a percentage of the total number of judges, is 20-25%. Vacancies in the All India Services (AIS) are also 20-22%. In fact, as per the data of the Union government, of 4 million civilian central posts, 1 million are vacant. There isn't anything inherently superior in a centralised system that will make it necessarily more efficient in filling up the vacancies. The problem has been the ability to conduct these exams in a timely manner.

Bharat Chugh: We have seen the number of vacancies in the AIS as well. I don't see how this can be a solution. The AIJS attempts to induct lawyers between 35 to 45 years to the cadre of district judges. There is a problem. A 35- 45-year-old practicing lawyer who has spent 15-20 years in the profession is likely to be well-established in their State with a steady stream of briefs. If they make it an all-India service, which is again transferable, they may not like to leave their State and family. If the idea was to have a big talent pool, we will be losing out on that as well.

Mr. Chugh, do you think a national service for judges will be an attractive proposition for young lawyers? Additionally, what will be their career progression, since the number of district judges elevated to the High Courts is much lower than those from the Bar?

Bharat Chugh: I don't think a law student or a young lawyer who wants to be a judge is particularly bothered about whether they are serving an all-India service or a State service. More often than not, if there is a prestigious State service, the inclination would always be to join it and be closer to the family. Apart from metros, positions elsewhere in the country are problematic in terms of access to basic facilities. We have seen women judges not having access to even a toilet in some States. It is also time to look at a better pay structure. A successful lawyer on the private side makes in one appearance or a day what a trial court judge makes in a month. This needs to be borne in mind if we are to attract the best talent out there. Lastly, regarding prospects, we have seen that High Court and Supreme Court appointments have been from the Bar. For a young civil judge to enter the system is difficult. There are only a handful of examples

of district judges who have made it to the Supreme Court.

Mr. Alok, a common rebuttal to the creation of an AIJS is that it is an affront to federalism. If such a policy were to be implemented, how can we ensure that State governments as well as the High Courts have a say in the recruitment process?

Alok Prasanna Kumar: It will be very difficult. The High Courts will perhaps determine transfer postings and have some form of disciplinary control. But it is a sub-optimal solution — why should the High Courts accept it? Today, they are in control of everything starting from recruitment to the eventual promotion or transfer of that particular civil judge. The State governments will have even less control. They will just be paying their salaries. The problem is that we assume that if the Centre does it, it will be a good job. There are problems in the system, but they do not require an overturning of everything. I am suspicious of the parts of the Constitution that were introduced in the 42nd Amendment. It was done in controversial circumstances by a government that had no legitimacy. Almost the entire Opposition was put in jail while passing this amendment.

At present, the independence of the district judges from the State governments is guaranteed by the fact that the High Courts play a significant role in their appointment, transfer, and removal. If the AIJS were to be created, how can we ensure that there is judicial independence?

Bharat Chugh: That is the biggest problem. I could pass a lot of decisions back in the day because I knew that even the Governor or the Chief Minister of the State could not take any action if my decision was to be unsympathetic to the government. This is all the more important because the government is the biggest litigant before the courts. It is problematic if the litigant were to decide who is to be appointed as a judge and for what considerations. The present system has worked well and the AIJS doesn't seem to be the better alternative. The way the 42nd Amendment was introduced was constitutionally suspect. All of this has possibly not been challenged because the AIJS never got implemented. But arguably, it is violative of the basic structure of the Constitution.

APK: There are multiple issues with our district judiciary and almost none of them will really be addressed by an AIJS. The need of the hour is to ensure that there is a smooth career path for those who enter the district judiciary to the High Courts and the Supreme Court. I think the real pressing need is the areas outside the metros. There is a serious lack of infrastructure. The judges need to be supported so that they think that they are as much constitutional court judges as the Chief Justice of India.

Listen to the parley podcast here

Alok Prasanna Kumar is co-founder and lead, Vidhi Karnataka; Bharat Chugh is a lawyer based in Delhi and a former civil judge

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Source : www.thehindu.com Date : 2023-12-26

ARTICLE 370 ISSUE CLOSED, BUT TERROR VICTIMS NEED CLOSURE

Relevant for: Indian Polity | Topic: Indian Constitution - Amendments, Schedules, and Important Articles

December 26, 2023 01:19 am | Updated 08:52 am IST

‘If a truth and reconciliation commission is constituted by the Central government (or authorised by Parliament) to undertake structural investigation of human rights violation in the Kashmir Valley, the parameters need to be defined carefully and clearly’ | Photo Credit: Getty Images/iStockphoto

While delivering the judgment on Article 370 of the Constitution, Justice Sanjay Kishan Kaul of the Supreme Court of India also recommended the constitution of a truth and reconciliation commission to heal the wounds and suffering of the victims of the insurgency that gripped the Kashmir Valley, particularly in 1989-90. Justice Kaul wrote that this may help to ‘achieve collective understanding of the human rights’ violations perpetrated by State and non-State actors, against people of the region’. Since truth-telling provides an opportunity for victims to narrate their stories which may facilitate an acknowledgement from those responsible for perpetrating the wrongs, and from society as a whole, this may pave the way for reconciliation, he wrote separately in the Epilogue. At the same time, he cautioned that the commission, if constituted, should not turn into a criminal court.

The purpose of a truth and reconciliation commission is to facilitate the process of reconciliation in societies that are divided during periods of violence and grave human rights abuses. While Uganda had a truth commission constituted (Uganda 1: Commission of Inquiry into Disappearances of People of Uganda, 1974) in 1974 — said to be the world’s first — to investigate and report on hundreds of disappearances that occurred during the earlier regime, most of such commissions have been constituted to study the pattern of human rights violations that took place either during an earlier regime or military dictatorship or arising out of insurgency or similar grave acts of violence. Justice Kaul, for instance, referred to the South African truth and reconciliation commission, which was set up to investigate rights violations during the apartheid regime.

Priscilla B. Hayner, known for her expertise on truth commissions and transitional justice, in her book, Unspeakable Truths: Transitional Justice and the Challenge of Truth Commissions, has delineated the five main characteristics of truth commissions.

First, they focus on the past, rather than ongoing events. Second, a truth commission investigates a pattern of events that took place over a period of time. Third, it engages directly and broadly with the affected population, gathering information on their experiences. Fourth, a

truth commission is a temporary body, with the aim of concluding with a final report. Fifth, a truth commission is officially authorised or empowered by the state.

However, truth commissions are known to have also been appointed by the United Nations (such as in Timor-Leste or East Timor) and a non-governmental organisation (NGO) such as the World Council of Churches, in Brazil as well. The International Center for Transitional Justice (ICTJ), an NGO established in March 2001 (Hayner is also a founding member) to propagate truth commissions and help to transfer the expertise, is still working in many countries.

Therefore, if a truth and reconciliation commission is constituted by the Central government (or authorised by Parliament) to undertake structural investigation of human rights violation in the Kashmir Valley, the parameters need to be defined carefully and clearly. Much will depend on the composition of the commission because it is the members who provide impartiality and objectivity to the pious work they are entrusted with. In South Africa, two members (out of 17) could also be appointed as non-South African commission members.

The most important function of a truth and reconciliation commission is to hold public hearings and record patterns of rights violations, as narrated by the victims as well as by the perpetrators. The South African commission, for instance, had the power to grant amnesty in exchange for full disclosure by applicants. Such a provision could attract controversy in India if applied uniformly to state and non-state actors. Non-state actors in the Valley were terror groups, mostly financed by actors active across the border. Even home-grown terror groups are known to have been brain-washed and trained by them.

But as far as state actors are concerned, levelling imputations against the Indian Army (and/or the Jammu and Kashmir security forces) which have been holding fort since the late 1940s may not go down well with the government, as the Army’s presence in the Valley is still required to further normalise the situation. Also, it is important to note that the central government has denied permission in the past to prosecute certain members of the defence forces for alleged offences and rights violations. The Supreme Court of India, in General Officer Commanding (Army) vs CBI & Anr. (2012), held that the government’s sanction is necessary if there is a ‘reasonable nexus’ between action and the lawful discharge of duties of the official.

Therefore, while collective understanding of rights violations, perpetrated by state and non-state actors may be necessary — as observed by Justice Kaul — the mandate needs to be chosen carefully without having an adverse impact on the overall credibility of the security forces, including the armed forces.

Determining reparation for victims is one of the essential mandates of a truth and reconciliation commission even if the perpetrators are not identified.

As mentioned by Justice Kaul, the phase of involuntary migration (of Kashmiri Pandits) that took place in 1989-90 due to the second round of insurgency is the one that awaits rightful redress. It is quite understandable that many victims might not be alive to seek closure of their loss and violations. The truth and reconciliation commissions, if constituted immediately after the change of regime or end of hostilities or insurgency, would be most useful in reconciliation and in rebuilding fractured societies. Therefore, the truth and reconciliation commission, even if constituted without further delay, will have only limited utility.

Nevertheless, the victims of rights violations still reserve the right of reparation (recognised even by the UN) which may take all or any of the five forms, i.e., restitution; compensation; rehabilitation; satisfaction, and guarantees of non-repetition. Restitution includes all measures aimed at re-establishing the original situation before the rights violations happened. Examples

include return to one's place of residence or the return of property. This, though it appears to be problematic, is still the most crucial step for most migrants who need to be given a fair chance without further aggravating their agony. Monetary compensation for damages and pension may solve some problems of the poor victims, though the neediest might not be alive to the situation to get due benefits. Rehabilitation could restore reputation and may include legal services if needed. Satisfaction may assume the form of a public apology, commemoration, tribute to victims and so on. The guarantee of a non-repetition may include measures contributing to the prevention of further violations as well as training for armed and other security forces. Despite Jammu and Kashmir being a case of delayed reparation, some relief can still be given to the victims within each parameters given above to rebuild their lives.

The fact remains that the (Kashmiri Pandit) victims of mass exodus, who have roots in the Valley, still feel aggrieved, and need authoritative acknowledgement and closure for the violation of their rights. The chapter of Article 370 of the Constitution has been authoritatively closed by the Supreme Court, but the sufferers of insurgency must also get a rightful closure. Justice Sanjay Kaul, who knew well the limitations of his recommendation, chose to air his views on behalf of all victims, which must not go unheeded.

R.K. Vij is a retired Indian Police Service officer. The views expressed are personal

Source : www.thehindu.com Date : 2023-12-27

LAW OF NUMBERS: ON THE WINTER SESSION AND A LOW IN INDIA'S PARLIAMENTARY DEMOCRACY

Relevant for: Indian Polity | Topic: Comparison of Indian Constitutional System with that of other Countries - Parliamentary & Presidential Systems of Governance

December 27, 2023 12:20 am | Updated 09:02 am IST

The 18-day winter session of Parliament that was adjourned sine die on December 21 marked a new low in India's parliamentary democracy as the ruling Bharatiya Janata Party refused to engage with the Opposition, evaded executive accountability and passed a battery of Bills with far-reaching consequences for the country while a majority of the Opposition members remained suspended. In the final count, a total of 146 Members of Parliament (MP) from the Opposition bloc were suspended — 46 of the Rajya Sabha, and 100 of the Lok Sabha, as they clamoured for a statement by Union Home Minister Amit Shah on a breach of security that involved protesters gaining entry into the chamber of the Lok Sabha on December 13. The rift lingers, as Leader of Opposition in the Rajya Sabha Mallikarjun Kharge has written to Vice-President of India and Rajya Sabha Chairman Jagdeep Dhankhar, terming the suspension of Opposition MP as "predetermined and premeditated" by the government. The absence of any application of mind was evident, Mr. Kharge has written, recalling that an MP who was not even present in the Lok Sabha, was among those suspended. The Chairs of both the Houses could not ensure smooth conduct of the session. Attempts made by Mr. Dhankhar and Lok Sabha Speaker Om Birla lacked the requisite imprimatur of impartiality.

It was in the absence of a majority of the Opposition members that the government passed new laws that rewrite the criminal code of the country, regulation of telecommunication and the appointment of the Election Commission of India. The common feature of these laws is an unprecedented increase in the power of the executive, and it is not a coincidence that they were passed without a meaningful parliamentary debate that took on board conflicting views. The government refused even the Opposition demand for a statement on the security breach, in a show of obstinacy that equates numerical majority with logical and moral infallibility. The government has blamed the Opposition for bringing the suspensions upon itself, and this position has been echoed by the Speaker and the Chairman. The case of the alleged mimicry of Mr. Dhankhar by an Opposition MP was a distraction that was convenient for the ruling party. Mr. Dhankhar himself told the Rajya Sabha that the alleged mimicry was an insult to his community, a dismaying correlation to be made by anyone, let alone a legal luminary such as himself. It is another matter whether the Opposition should have invested so much time and effort in asking for a debate on the security breach by a few misguided youths. The effect, if not the objective, of it all was to derail parliamentary functioning and obtain a free pass for the executive.

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Source : www.pib.gov.in Date : 2023-12-27

PM TO CHAIR THIRD NATIONAL CONFERENCE OF CHIEF SECRETARIES IN DELHI ON 28TH AND 29TH DECEMBER

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

Prime Minister Shri Narendra Modi will chair the third National Conference of Chief Secretaries in Delhi on 28th and 29th December 2023. This is the third such conference, the first was held in June 2022 in Dharamshala and the second in January 2023 in Delhi.

Driven by the vision of the Prime Minister of putting the principle of cooperative federalism in action, National Conference of Chief Secretaries are organised to encourage participative governance and partnership between the Centre and the State Governments. This year, the National Conference of Chief Secretaries will be held from 27th to 29th December.

The three day conference will witness participation of more than 200 people comprising of representatives of the Central Government, Chief Secretaries and other senior officials of all States/Union Territories. It will lay the ground for collaborative action for achieving better quality of life for both rural and urban population by strengthening the delivery mechanisms of government interventions.

The key focus of the National Conference of Chief Secretaries this year will be ‘Ease of Living’. The Conference will emphasise on the evolution and implementation of a common development agenda and blueprint for cohesive action in partnership with the States.

With special emphasis on easy access to welfare schemes and quality in service delivery, five sub-themes which will be discussed in the conference are Land & Property; Electricity; Drinking Water; Health; and Schooling. Apart from these, special sessions will also be held on Cyber Security: Emerging Challenges; Perspectives on AI, Stories from the Ground: Aspirational Block & District Programme; Role of States: Rationalisation of Schemes & Autonomous entities and Enhancing Capital Expenditure; AI in Governance: Challenges & Opportunities

Besides these, focused deliberations will also be done on Drug De-addiction & Rehabilitation; Amrit Sarovar; Tourism Promotion, Branding & Role of States; and PM Vishwakarma Yojana & PM SVANidhi. Best practices from States/ UTs under each of the themes would also be presented at the Conference so that the States can replicate the success achieved in one state or manoeuvre as per their own requirements.

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