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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

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

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“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.

Zaid Deva is a lawyer based in Srinagar

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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

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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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