

IN ARTICLE 370 HEARING, THE ORIGINAL TEXT AND SPIRIT COUNT

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‘At stake in the case is not only the bare relationship that the Constitution establishes between the Union and the States but also the sanctity attached to the various subtleties in this relationship’. File | Photo Credit: Sushil Kumar Verma

Tomorrow, August 2, the Supreme Court of India will begin hearing oral arguments in the case concerning Article 370 of the Constitution. The changes made to Article 370 through measures that commenced with a presidential order issued nearly four years ago, on August 5, were, by all accounts, seismic in proportion. Amendments were made to make applicable the entirety of India’s Constitution to Jammu and Kashmir (J&K). The State was also sundered into two Union Territories: J&K and Ladakh.

These decisions were made at a time when the State was under President’s Rule with no elected Legislative Assembly in place. Both in the lead up to the events and in the months following them, sweeping limitations were placed on civil liberties in the region. But the Court has already made it clear that what it will consider is not the consequences of the measures adopted but their legality. In other words, the question that it will strive to answer is whether as a matter of law the decisions made on Article 370 are ultra vires the Constitution.

The Indian Independence Act, 1947, which established the independent dominion of India, allowed the Government of India Act, 1935, to serve as an interim constitution until the country adopted its own. The statute permitted princely States to accede to India by executing an instrument of accession. In the case of J&K, the instrument came with qualifications that were ultimately written into Article 370.

These caveats stipulated that Parliament could legislate for J&K only over matters concerning external affairs, defence, and communications. Where Parliament intended to legislate over areas otherwise provided for in the instrument of accession, it could do so by consulting the State government. But where it proposed to enact laws beyond the agreed subjects, it required additional ratification by the State’s Constituent Assembly.

But after 1957, when J&K’s Constitution came into force, its Constituent Assembly was disbanded and replaced by a Legislative Assembly. Article 370, however, remained unaltered. Its chief drafter, Gopalaswami Ayyangar, had described the State Constituent Assembly’s recommendation, as mandated by clause (3) to Article 370, as a “condition precedent” to any

effort at abrogating the provision.

Now, with the Constituent Assembly disbanded, this clause had, for all practical purposes, become nugatory. Thus, Article 370 came to be seen, together with the State's new Constitution, as the only means of governing J&K.

When changes were made to alter this arrangement the Union government seemed quite conscious of the limitations within the existing text of Article 370. Therefore, it chose to look elsewhere, specifically at Article 367. Nestled inside a bunch of miscellaneous provisions in Part XIX of the Constitution, Article 367 comprises a set of general rules for interpreting the Constitution. It was this Article that the President's order on August 5, 2019, amended with a view to transforming the existing status of J&K.

The President achieved this by adding a new clause to Article 367, which stipulated that wherever the term "Constituent Assembly of the State" was used in Article 370, it would now refer to the "Legislative Assembly of the State." As a result, the basic thrust of Article 370 was abrogated, without complying with the precondition that Ayyangar thought obligatory.

Consider the consequences: with J&K under President's Rule, the Governor came to act not only as the State's Legislative Assembly but also as its Constituent Assembly. Buoyed by this new position, the President followed his decision with a declaration under Article 370(3) that with effect from August 6, 2019, "all clauses of the said Article 370 shall cease to be operative." And the new Article 370 proclaimed that all provisions of the Constitution would apply to J&K.

The President's order no doubt asserts that it was made with the concurrence of the "government of the state of Jammu and Kashmir." But seeing as the State was under President's Rule, that assent was made by J&K's Governor. In other words, the Union government was effectively assenting to its own decision, and, in this case, a decision with far-reaching consequences, without so much as consulting — let alone securing the concurrence of — the State's democratically elected representatives. This, the petitioners in the Supreme Court say, ought to be regarded as a colourable exercise of power.

In the petitioners' argument, representative democracy is a basic feature of the Constitution. Any interpretation of the Constitution must strive, they say, towards enhancing this value. What is more, even the framers of Article 370, they add, were of the view that any overriding of the provision can only be done through the procedure contemplated in clause (3), that is with the concurrence of the State's Constituent Assembly. Once the Assembly stood disbanded, this option ceased to exist.

The Union, for its part, argues that this is not the first time that different provisions of the Constitution have been made applicable to J&K. There have been numerous instances of presidential orders made through the erstwhile Article 370(1)(d), by securing the concurrence of the State government wherever necessary.

But, as the petitioners point out, there is a difference here, and this might well be where the case turns. Previous presidential orders, including the order introducing the controversial Article 35A, were made without altering the text of either Article 1 or Article 370 in any manner. This is critical because on a conjoint reading of clauses (c) and (d) of Article 370(1), what seemed to follow was that the President could make applicable to J&K, "such of the other provisions of the Constitution" — i.e., provisions other than Articles 1 or 370 — with modifications or exceptions as deemed necessary.

No doubt, the President's order on August 5, 2019, only alters the text of Article 367. But as a

consequence it upsets the existing text of Article 370, something that had up until this point never been attempted. By amending Article 370 through changes made to Article 367, the petitioners claim that the Union has done indirectly what it could not have done directly.

India's Constitution establishes a system of governance, where power and authority are divided between the Union and the States. The political scientist Louise Tillin has described this balance as representing a form of asymmetric federalism, where some States enjoy greater autonomy over governance than others, a feature reflected in various constitutional provisions, especially in Articles 371 to 371J.

The Supreme Court has routinely described federalism as representing an essential component of the Constitution. Therefore, when arguments are heard on the validity of the decisions made on Article 370, the Court will have to be guided not only by the text of the provision's original version but also by the spirit that pervades through the document's basic structure.

How arguments play out in court and how the Court ultimately decides on the legality of the President's order will have a deep bearing on the future of our constitutional law. The Indian Constitution brims with moral values. It also houses a series of procedural minutiae. To that end, the Court might want to ensure that fidelity is maintained both to these moral values and to the systems and processes that make up the administration of the country's laws. At stake in the case is not only the bare relationship that the Constitution establishes between the Union and the States but also the sanctity attached to the various subtleties in this relationship.

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