



## Law and opinion

The apex court should decide on Kashmir without being swayed by popular mood

The Supreme Court's decision to form a five-member Constitution Bench to examine the validity of the abrogation of the special status given to Jammu and Kashmir puts an end to apprehensions that its response to the Centre's legal measures since August 5 will only be one of quiet acquiescence. The court appeared reluctant to intervene in the immediate aftermath of the decisions when the restrictions imposed on political activity, communications and movement of the people were challenged. Instead, it chose to give enough time to the Centre to stabilise the situation. It seemed to afford wide latitude to the executive to decide the extent to which fundamental rights, including the freedom of the media, would be restricted in the name of achieving greater integration of Jammu and Kashmir with India and preparing for its development. In some habeas corpus matters, the court is yet to examine the legality of the detention of the persons concerned. True relief in such cases lies in ascertaining the whereabouts of a detenu and determining the lawfulness of the detention, but in a couple of matters, the court has only "allowed" the petitioners to travel to Kashmir and meet the detenues. Lawyers and activists have begun drawing parallels with the court's infamous approbation of the suspension of the writ of habeas corpus during the Emergency in the *ADM Jabalpur* case.

The petitions before the court cite many grounds for challenging the President's August 5 Order, by which the Order of 1954, which set out the constitutional provisions applicable to J&K, was superseded. A substantial question is on the validity of the substitution of the concurrence of the Governor for that of the government while under President's Rule; in effect, the Centre is taking its own consent to alter the status of the State. The replacement of the term 'Constituent Assembly' (of J&K) found in Article 370 with the term 'Legislative Assembly' is also under challenge. Another question that looms large is whether a federal unit can be downgraded from the status of a State to that of a Union Territory, a move for which there is no precedent. The constitutional morality of the rest of the country deciding the destiny of a State without the consent or participation of its citizens is also a serious issue the court cannot ignore. It does appear that there is widespread popular support for the government's decision to declare Article 370 inoperative and to divide the State into two Union Territories. Yet, the court is duty-bound to examine the legality of the measures taken by the President and Parliament on August 5 and 6. The challenge before the court is to give a reasoned verdict on these questions of constitutional importance, with far-reaching implications for democracy and federalism, without being swayed by the popular mood in J&K or the rest of India.

## Tinkering for optics

The latest FDI rule changes may not be enough to draw a rush of investments

On the face of it, the Centre's announcement on Wednesday appears to be one more push to make India a more attractive destination to overseas investors, especially those keen on entering the market for the long haul. From extending the available 100% FDI under the automatic route in the coal mining sector (till now permitted only for captive consumption) to include those companies seeking to commercially sell the commodity, to distinctly including contract manufacturing under the automatic 100% route and easing local sourcing norms for overseas investors in the Single Brand Retail Trading (SBRT) business, the changes in investment guidelines approved by the Cabinet have been touted as "FDI policy reform". The government, clearly concerned by the economic slowdown and persistently weak investment activity, has sought to provide a policy fillip to attract more foreign capital into sectors that it sees as having a multiplier effect particularly in terms of job creation. One must also consider the pressing contexts. Earlier this month, the RBI pointed out that net FDI flows had moderated to \$6.8 billion over the first two months of the current fiscal year, from \$7.9 billion in April-May 2018. And with Prime Minister Narendra Modi having set a goal of ensuring India becomes a \$5 trillion economy within the next five years, the overall consumptive capacity needs to be raised manifold to undergird demand growth. To that end, the act of widening reforms in coal mining, manufacturing and retail is completely understandable.

A closer examination, however, raises several concerns about the ultimate attractiveness of these changes. For instance, the tweaks to investment norms on coal appear at first flush to be a win-win for both the economy at large and the coal industry, the environmental costs of focusing on one of the most polluting fossil fuels notwithstanding. This is predicated on the prospect of seeing an influx of both capital and modern technology into mining and processing, as well as raising domestic supply of the key raw material for power, steel and cement production thereby cutting costly and burgeoning imports. But for foreign mining companies to make a beeline to pitheads, several related regulatory and market challenges will have to be addressed post-haste. Large miners will need economies of scale and so require access to large contiguous fields with minimal bureaucratic constraints on operations. While domestic thermal power plants have had to rely on increased imports in recent times, many of the electricity producers themselves are in financial stress. How much additional investments may actually accrue is not clear.

# On dilution, bifurcation and 'special status'

J&K's perceived loss and New Delhi's real gains over the Centre's Article 370 decision need to be objectively assessed



FAIZAN MUSTAFA

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

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

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

President's rule, the Parliament, by exercising 'powers' of the Legislative Assembly, gave its concurrence to the aggressive surgery of Article 370 that has killed the spirit as well as the text of the provision.

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

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

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

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



"The constitutional validity of J&K's bifurcation into two Union Territories is doubtful." Residents in Srinagar earlier this month. •REUTERS

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

### Blow to federalism

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

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

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

### No major departure

Let us now objectively assess New Delhi's gains in sounding the death knell for Article 370. Since almost the entire Constitution of India had been already applicable to

J&K, constitutionally speaking, heavens have not fallen for Srinagar. Entry 76 of the Union List, which deals with audit, was extended to J&K in 1958. The Election Commission of India was given powers to conduct elections from 1959 by the First Amendment to the J&K Constitution. A total of 94 out of the 97 items in the Union List had already been made applicable to J&K when the Centre made its move and hence Parliament had all the powers.

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

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

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

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# Govt. needs to be prudent in using RBI's transfer

The fund transfer provides some much-needed relief and manoeuvrability to the beleaguered Centre



M. GOVINDA RAO

With the acceptance of the Bimal Jalan committee's report by the Reserve Bank of India (RBI), the stand-off between the RBI and the Ministry of Finance seems to have ended for now. The report has also helped to clarify the volume of reserves required for risk provisioning to counter a financial stability crisis if it were to arise.

Though the RBI belongs entirely to the government, the integrity of its balance sheet is important to ensure financial stability and to combat market risks. The committee made its recommendations after taking into account the role of RBI in financial salience; cross-country practices; statutory requirements; and impact of its public policy mandate and operating environment. Based on these factors, it decided on the volume of reserves required to support the financial system in times of crisis

and concluded that the provisioning has to be more stringent than in developed countries to ensure the perception of safety, particularly as India has low sovereign rating and the Indian rupee does not have reserve currency status.

The revised economic capital framework recommended by the committee makes a distinction in the economic capital of the RBI between 'revaluation reserves' and 'realised equity'. Revaluation reserves, it held, are a risk buffer against market risks and not available for transfer. The committee used the Expected Shortfall (ES) method to measure the market risk and adopted a more stringent confidence level of 99.5% as against the practice by other central banks at 99%.

### Economic capital range

The revised framework would allow the economic capital to be in the range of 24.5% to 20% of the balance sheet. As regards realised equity, the committee recommended the required range to be between 6.5 to 5.5% of the balance sheet.

The RBI Board in its meeting on August 26 accepted these recommendations and decided to transf-



er ₹1,76,051 crore to the government. As the economic capital of the RBI, at 23.3% in June 2019, was within the prescribed range, it decided to transfer the entire surplus of ₹1,23,414 crore earned during 2018-19. As the RBI had already transferred ₹28,000 crore as interim dividend in February 2019, the remaining amount will be transferred in the current fiscal. The government will get an amount of ₹58,081 crore over the budgeted dividend of ₹90,000 crore for the current fiscal. The large surplus in 2018-2019 was mainly due to the revenues earned from open market operations, amounting to ₹3 lakh crore, to shore up liquidity and therefore, the coming years

may not see such large dividends.

The additional fund transfer from the RBI provides much-needed relief and manoeuvrability to the beleaguered government. An analysis of the budget presented in July shows that the tax revenue projections are far too optimistic. In fact, the actual net tax revenue collection of the centre in 2018-2019 was ₹15.9 lakh crore and to achieve the budgeted target of ₹19.78 lakh crore in 2019-2020, the net tax revenue will have to increase by almost 25% and correspondingly, gross tax revenue will have to grow by 26.5%. The expected shortfall in tax revenue for the Central government, if the past trend is taken (after devolution to the States), is likely to be about ₹70,000 crore.

### Achieving fiscal deficit target

With the economy slowing down and the Goods and Services Tax (GST) not kicking in the expected buoyancy, the shortfall may even be higher. The infusion of additional funds, thus, will help the government to substantially overcome this shortfall and achieve the fiscal deficit target without having to axe allocations to social sector and poverty alleviation.

However, while the Central government will overcome the shortfall in tax collections, the States will have to suffer the consequence of lower-than-budgeted revenue realisations. They have presented their budgets taking into account the tax devolution based on Central budget forecast and shortfall in collections will adversely impact their expenditure allocations to various sectors.

If, on the other hand, the tax revenue growth picks up, then the government can use the additional money to clear the dues of the Food Corporation of India and fertiliser companies to minimise spillover of deficits to the next year. The additional funds can also be used to spend on much-needed capital expenditure.

The decision of the RBI Board must be welcomed as it has not come a day sooner and should help the government in combating the economic slowdown and to conform to the fiscal targets. It is hoped that the government will be prudent in using these funds.

The author is Adviser, Centre for Public Policy, Indian Institute of Management, Bangalore. Views are personal

## LETTERS TO THE EDITOR

Letters emailed to letters@thehindu.co.in must carry the full postal address and the full name or the name with initials.

### The judiciary hears

The Supreme Court has done the right thing in deciding to admit and hear a batch of petitions challenging the abrogation of special status to Jammu and Kashmir under Article 370 (Front page, "5-judge SC Bench to hear pleas on withdrawal of Article 370," Aug. 29). Thankfully, it has set in motion the process to decide on the constitutional validity of stripping the erstwhile State of whatever autonomy it had. However, in cautioning the apex court against passing any order or making any observation that can weigh with the UN against India, the Central government has shot itself in the foot. The ruling dispensation in New Delhi should know that invoking 'national interest' in a bid to gag or dictate to the country's top court to suit or serve its political

interest can eventually prove to be self-defeating. It is only fair to say that whatever a democratic government does should stand the scrutiny of the independent judiciary. The judiciary cannot be expected to play second fiddle to the government. Meanwhile, it is very baffling and disconcerting that the Supreme Court has not taken a serious view of the continuing lockdown in the Valley and done little for the people to regain their liberties.

G. DAVID MILTON,  
Maruthancode, Tamil Nadu

### Disgraceful comment

By flippantly commenting in his maiden official media interaction since August 5 that the longer politicians stay in jail, the higher the political dividends for them, Jammu and Kashmir Governor Satya Pal Malik

has brought disgrace to the office. The comment trivialises the prolonged detention of political leaders and betrays his disdain for the liberty of an individual guaranteed under the Constitution. Equally outrageous is his belief that mobile phones and Internet are essentially weapons of terrorists, and ordinary citizens have little use for them. If so, why not extend such restrictions to the rest of the country? The Governor also displayed his scant regard for decency by predicting that people will beat Congress leaders with shoes ("Front page, 50,000 govt. posts will be filled: Malik," Aug. 29).

S.K. CHOUDHURY,  
Bengaluru

### Lifting the economy

This is with reference to the article "Hardly the brick and mortar of a revival" by

Jayati Ghosh (Editorial page, Aug. 29). The author is right in saying that the transfer of Reserve Bank of India (RBI) surplus is only a stop-gap measure which will not address the key problems of lack of demand. The present precarious state of Indian economy is visible in the crises experienced by sectors like automobiles, real estate and consumer goods. Badly managed policy measures like demonetisation and improper implementation of GST had caused body blows to the informal economy, which is now having an effect on the formal sector.

T.S.N. RAO,  
Bhimavaram, Andhra Pradesh

### RBI's income

During the course of a recent television panel discussion on the transfer

of ₹1.76 lakh crore from the reserves of the RBI to Central government, an eminent panel member said the RBI's main income derived from the issue of currency notes. As an example, he stated that the cost of printing a 2,000-rupee currency note comes to about ₹3.50 and the difference between the face value and the cost of its printing is RBI's main income. This is utterly incorrect. While the cost of printing banknotes is taken as an item of expenditure in RBI's balance sheet, no income is recorded on

account of issue of notes. The wrong notion of the panel member was not countered by other panellists or the anchor. The main income of RBI comes from interest earned on loans and advances to commercial banks, ways and means advances to State and Central governments, investment in Central government securities and foreign currency assets, etc.

M.O. SEBASTIAN,  
Kochi

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**CORRECTIONS & CLARIFICATIONS:** >>The last paragraph of "Chandrayaan-2 nears Moon" (Aug. 29, 2019) read: "Launched on July 22, Chandrayaan-2 has been in lunar orbit since August 20. It is due to land on the moon's surface in the early hours of September 7, 48 days after it was launched from Sriharikota." It should be recast to say: "Launched on July 22, Chandrayaan-2... The lander riding on it is due to land on the moon's surface in the early hours of September 7, 48 days after its launch from Sriharikota."

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