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Article 370 in India: Modi's BJP versus India's Constitutional Basic Structure?



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Article 370 was enacted so that, when necessary, the President of India could apply the Indian Constitution to the State of Jammu and Kashmir with the "consultation" [370(1)(b)(1)] or "concurrence" [370(1)(b)(2)] of the State government. Essentially, Article 370 envisaged a distribution of power between the Union and the State of Jammu and Kashmir.

Article 370 (3) also authorizes the President to pass an order removing Article 370

(<https://web.archive.org/web/20201026014905/https://www.soas.ac.uk/blogs/study/modis-move-on-kashmir/>). A proviso to Clause 3, however, states that "the recommendation of the Constituent Assembly of the State ... shall be necessary before the President issues such a notification (order)." The Constituent Assembly of the State of Jammu and Kashmir ceased functioning in 1957. In fact even the most recent elected Legislative Assembly of the State was dissolved in November 2018 after the BJP withdrew from its coalition with a state-level Kashmiri party known as the People's Democratic Party or PDP (led by Mehbooba Mufti). President's rule was imposed in December 2018.

As such, we are left to understand that, in some sense, India's President may have *consulted with himself* (acting as the State's government) to "recommend" the disputed presidential order.

If so, the 2018 dissolution of Jammu and Kashmir's elected Legislative Assembly by a BJP-controlled central government and, then, the imposition of President's rule, setting the stage for the recent abrogation of Article 370, was colored by mala fide intentions.

President's Rule may be imposed in a State when the constitutional machinery of that State breaks down. It continues until the elected government is restored. With respect to fundamental constitutional changes requiring the "recommendation" or "concurrence" of the State, it would be surprising if a President could substitute for an elected State-level government. (Supporting such a move would have significant implications for the operation of Indian federalism more generally, particularly since the Supreme Court of India has previously described federalism as an immutable feature of India's constitutional basic structure.) Before the BJP's recent move, no state has been unilaterally demoted from a fully fledged "State" to a "Union Territory". The Indian constitution does not allow variations in the territory of a State without the "concurrence" of the elected State assembly. In effect, the president's order appears to challenge key features of India's constitutional approach to federalism. It also challenges the UN Security Council Resolution of 1948, which mandates a plebiscite in Jammu and Kashmir to decide the contested status of the State.

It may be that the constitutional status of Jammu and Kashmir is entirely exceptional in India—not to be compared, in any way, to any other State in India. However, this way of reading the constitutional status of Jammu and Kashmir, as a "Union Territory," is entirely at odds with earlier treatments of that State (and others) by India's Supreme Court. The manner in which India's President removed the applicability of Article 370, governing the

State of Jammu and Kashmir, would appear to introduce a significant reinterpretation of India's core constitutional principles regarding India's approach to federalism. This is a source of concern not only for the political process at work in Jammu and Kashmir, but for the practice of Indian federalism at large. As the International Commission of Jurists (ICJ) has said, that "[t]he Indian government's revocation of the autonomy and special status of Jammu and Kashmir violates the fundamental rights and participation guaranteed to the people under the Indian constitution and in international law", calling the president's order "a blow to the rule of law ... [both] in the State and in India".

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