

THE FRAGILITY OF INDIA'S FEDERALISM

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

The abrogation of Article 370 has exposed ambiguities that have long been evident in India's federal system. Asymmetric agreements have been negotiated in settlement of a number of regional conflicts in India. Kashmir's autonomous status was the oldest and — in original conception — the most far-reaching of these provisions. But in practice, there has been a contingency to autonomy provisions, leaving them open to revision by popular majorities at the all-India level.

The regionalisation of India's party system between 1989-2014 contributed to the appearance that deeper federalism and growing regional autonomy *vis-à-vis* the Central government was an almost inexorable process. However, the rise of the Bharatiya Janata Party (BJP) to national political dominance has altered that trajectory. By abrogating Article 370 and bifurcating Jammu and Kashmir State to create two Union Territories, the BJP has demonstrated the possibility of using the inherent flexibility in the federal order to centralise power and reshape the size, powers and stature of a constituent unit of the Indian Union — the only unit with a Muslim majority population.

The constitutionality of the abrogation of Article 370 will be carefully picked over in the months and years to come. But the government's ability to table and pass legislation with such important consequences for the fabric of federalism — while the elected assembly of Jammu and Kashmir is in abeyance — exposes the fragile set of compromises on which India's asymmetric federal system rests.

Asymmetric federalism involves the granting of differential rights to certain federal subunits, often in recognition of their distinctive ethnic identity. In the case of Jammu and Kashmir, the negotiation of Article 370 was a transitional and contingent constitutional arrangement agreed in the midst of a continuing conflict while the Indian Constitution was being finalised. Over time, this 'transitional' clause had become a semi-permanent institutional compromise, although this was ever an uneasy compromise. Kashmir's autonomy arrangements had been eroded under successive governments as tensions grew between the desire of Prime Ministers from Jawaharlal Nehru onwards to integrate the State more closely into the Indian Union and the desire of many Kashmiris to preserve a special status for their State. Since 1954, as many as 94 of 97 entries in the Union List and two thirds of constitutional articles have been extended to the State. This process has happened with the approval of the Supreme Court.

Subsequent asymmetric agreements were reached with the Nagas and the Mizos, which are enshrined in Article 371 in the Constitution. When the small State of Sikkim joined the Indian Union in the early 1970s, Article 371F was added to the Constitution. Article 371F allowed for laws that were in place before Sikkim's accession to remain in place unless amended or repealed by the legislature. Article 371 also contains measures that were intended to promote intra-State equity in Andhra Pradesh, Telangana, Maharashtra, Gujarat and Karnataka.

Asymmetric constitutional provisions are a common feature of federalism in diverse societies. Many have argued that India sets an international example for how asymmetric features can help dampen secessionist conflicts by recognising multiple modes of belonging within the Union. Rather than encouraging secessionism, proponents of asymmetric arrangements argue that it is the denial of autonomy that can provide ground for secessionist claims to grow.

However, asymmetric arrangements are often contested by majority national communities and by other regions without special arrangements. The annulment of Article 370 has long been a *cause célèbre* for Hindu nationalism, but it was striking that it also received wide support from many regional parties in Parliament.

The rationale set out by the BJP this week drew on all the textbook critiques of asymmetric arrangements to attract the support of many regional parties to pass the legislation in the Rajya Sabha. These include the argument that asymmetric provisions are discriminatory, for instance, by placing prescriptions on who can own property in particular regions, or because they privilege certain kinds of 'special' identities over others. A Telugu Desam Party MP, from India's first linguistic State Andhra Pradesh, welcomed the fact that India would now be 'one nation with one flag and one constitution.' Alternatively, asymmetric status is presented as contributing to secessionist claims, hence the argument that Article 370 is the 'root cause of terrorism'. Autonomy arrangements are also presented as anti-egalitarian because they prevent the extension of rights in force elsewhere in a country. This last argument underscores the significance of the simultaneous emphasis on extending reservations for Scheduled Castes and Scheduled Tribes in the new Union Territories alongside the abrogation of Article 370. As the Home Minister, Amit Shah, said in the Lok Sabha: "Those who support Article 370 are anti-Dalit, anti-tribal, anti-women."

By design, India's federal institutions place relatively weak checks on the power of a government with a parliamentary majority. As the political scientist, Alfred Stepan, identified, federal systems can be more or less 'demos constraining'. In those at the more 'demos constraining' end of the spectrum, federalism serves to undermine the consolidation of power by national majorities. For instance, the American theorist, William Riker, saw American federalism as a counter-weight to national populism since 'the populist ideal requires that rulers move swiftly and surely to embody in law the popular decision on an electoral platform'. By contrast, other federal systems, such as India's, are more 'demos-enabling'. This means that the design of federalism places fewer checks on the power of national majorities. For instance, the composition of the Rajya Sabha mirrors the composition of the Lok Sabha, rather than providing equal representation to States regardless of size, and the Rajya Sabha has weaker powers than the Lower House. Fewer powers are constitutionally allocated to federal subunits exclusively compared to more demos-constraining federations.

Placing this kind of flexibility in the hands of the Central government was deliberate and designed to enable decisive Central action to protect national integrity in the aftermath of Partition. In the Constituent Assembly, B.R. Ambedkar highlighted the difference between the 'tight mould' of other federal systems and the flexibility hard-wired into India's which would enable it to be both 'unitary as well as federal' according to the requirements of time and circumstances.

This constitutional permissiveness has been used to do things that have deepened federalism in the past under both Congress and BJP-led governments, such as the creation of new States in response to regional demands from the linguistic reorganisation of States in the 1950s onwards. By granting the Central government the power to create new States or alter State boundaries under Article 3, and not giving State governments a veto over bifurcation, the Constitution enabled the Central government to accommodate linguistic and ethnic diversities in a way that would have been much harder in a more rigid federal system. It also enabled the Central government to adopt asymmetrical measures in the first place without facing a backlash from other regions that might have resented the 'special' treatment of minority regions. Until the 2000s, most of these changes were done based on a slow process of consensus building within the regions concerned.

By abrogating Article 370, bifurcating Jammu and Kashmir and downgrading the status of the successor units to Union Territories, the government has used the flexibility of the federal provisions of the Constitution to other ends. This is not the first time that a Central government has used its powers to bifurcate a State in the absence of local consensus. This was also seen with the creation of Telangana in 2014. As in the case of Telangana, the creation of the Union Territory of Ladakh does respond to a long-run demand in this region with a substantial Buddhist population. However, the decision to transform the remainder of J&K State into a Union Territory, at the same time as annulling Article 370, is a departure with profound and as yet unknown consequences in Kashmir, and wider implications for Indian federalism.

Louise Tillin is a Reader in Politics at King's College, London. She is the author of 'Indian Federalism' (2019)

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