

DOWNGRADED AT THE STROKE OF A PEN

Relevant for: Indian Polity | Topic: Indian Constitution - Features & Significant Provisions related to The Preamble, Union & its Territories and The Citizenship

Jammu and Kashmir (J&K) acceded to India in 1948 on terms recorded in the Instrument of Accession. Picture shows J&K Prime Minister Sheikh Abdullah taking oath as member of Constituent Assembly in June 1949. | Photo Credit: [HINDU PHOTO ARCHIVES](#)

The Indian government's decision to revoke the special status of Jammu and Kashmir (J&K) raises many constitutional questions. One important question is whether the President had the powers to make all the provisions of India's Constitution apply to the State. Another is whether the Indian government was authorised to do this in the face of its own obligations to J&K under Article 370. Even assuming for a moment that these questions did not arise, a further question that does crop up is: Did Parliament have the authority to bifurcate J&K into two Union Territories (UTs)?

The last question assumes importance because the conversion of a State governed by an elected legislature into a UT/UTs adversely affects a people who had earlier enjoyed the freedom of full democratic participation. In the case of J&K, the centrally appointed administrator — called the Lieutenant Governor — will now have the power to make a wide range of decisions, as opposed to a regular State Governor, who must act typically on the aid and advice of the State's Council of Ministers.

Moreover, while the legislature of the UT of J&K — which the reorganisation law states will be akin to Puducherry's — will have the power to enact laws on matters in the State List and the Concurrent List of the Constitution, Parliament will retain the power to enact overriding laws. Consequently, the arenas open to decision-making by elected representatives will be diminished.

The total reorganisation of a full-fledged State into two UTs is historically unprecedented in India. However, one example here that can be cited is that of Delhi.

Explained | How the status of Jammu and Kashmir is being changed

When the Constitution of India was adopted, Delhi was a 'Part C' State administered by the President acting through a Chief Commissioner or Lieutenant Governor. From 1952 to 1956, Delhi had a Legislative Assembly empowered to make laws on all matters in the State List excepting law and order; constitution and powers of municipal corporations and local authorities; and land and buildings in possession of the Central government situated in Delhi. However, in 1956, Delhi and all the other Part C States were divested of their legislative powers and converted into UTs that would now be administered by the President acting through an administrator appointed by her.

Within some years, the other UTs were given legislatures, and by 1987, the UTs of Himachal Pradesh, Manipur, Tripura and Goa were even made into States. Only the restoration of a Legislative Assembly in Delhi was stalled, out of concern that Delhi holding legislative powers over matters in the State List would compromise the Union government's ability to discharge its functions towards the nation in the national capital.

Even when Delhi received partial Statehood in 1992, with full legislative powers on subjects in the State List — except public order, police and land — the elected government in Delhi found

its hands tied by the powers of a centrally appointed Lieutenant Governor. This tussle for democratic power in Delhi finally culminated in 2018, when the Supreme Court recognised that the Constitution has sought to create a democratic and representative form of government in Delhi. Only in the exceptional case that the elected government and the Lieutenant Governor differ on matters fundamental to Delhi's governance could the latter's decision override democratic will.

Kashmir has been cut to the quick

However, J&K's entry into the Indian Dominion is not comparable with Delhi's beginning as a 'Part C' State. Delhi was an integral part of the India during Independence and later, when the Constitution came into force. J&K on the other hand was a sovereign Princely State at the time of India's Independence and acceded to the Indian Dominion in 1948 on terms recorded in a treaty — the Instrument of Accession. Article 370 of the Indian Constitution, which accorded a special status to J&K in comparison with other States, was an embodiment of the treaty's terms.

However, J&K's special status was not a claim to sovereignty. This is apparent from Section 3 of the Constitution of the State of J&K, 1956, which recognises it as an integral part of India.

The special status merely meant that provisions of the Indian Constitution (other than Article 1 defining India as a Union of States; and Article 370 itself) were permitted to be applied to J&K differently from the way they applied to regular States. Such a modified application allowed J&K a higher degree of autonomy.

Fact check: What is true and what isn't on J&K, Article 370

For instance, while Parliament had exclusive powers to make laws pertaining to States, on all matters not in the State and Concurrent Lists, the residuary power rested with the State legislature in the case of J&K. With this autonomy, the people of J&K on paper had an even larger arena than regular States for enacting laws through democratic participation. Therefore, J&K's reorganisation into a UT amounts to a more severe curtailment of democratic rights than that of Delhi in 1956.

Further, Delhi's conversion into a UT and the subsequent restoration of its Legislative Assembly were both carried out through constitutional amendments, which cannot easily be amended further. J&K's conversion into a UT, on the other hand, was effected through a regular law of Parliament, which can easily be amended at the behest of a majoritarian consensus from time to time.

Special status for States is not extraordinary in the Indian Constitution. Several States in India enjoy differential rights in their relationship to the Union by constitutional design, depending on their unique cultural, ethnic and geopolitical compositions. The thinking underlying this arrangement is that the interests of States with stronger intra-group ties or ethnic bases — like Tripura, Arunachal Pradesh, Manipur and Nagaland — are better represented in the Constitution and the structure of the government, if we account for their subjective contexts.

Explained | President's Order scraps its predecessor and amends Article 370

The Constitution of India's chosen federal principle was to honour these subjective contexts to hold together the diverse Indian States in the Union, as B.R. Ambedkar stated in the Constituent Assembly. Therefore, the evisceration of the right to full democratic participation of an entire section of people, as happened earlier this week in the case of J&K, should make us all wonder: what if more such laws are enacted, disregarding the subjective contexts of our other States and

downgrading the States into Union Territories?

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