POSITION OF THE CONSTITUTION OF INDIA
1950
CHAPTER 6:
POSITION OF THE CONSTITUTION OF INDIA 1950

6.1 SALIENT FEATURES OF THE CONSTITUTION OF INDIA 1950

The Constitution of a country is considered to be the supreme law of the land. The term Constitution may be defined as the body of rules and maxims in accordance with which the powers of sovereignty are habitually exercised.\(^1\) As in the U.S.A., the Indian Constitution provides for the supremacy of the constitution, which is the supreme law of the land.\(^2\) It has been held that in India the Constitution is supreme and Parliament and State Legislature must act only within the limits of their respective legislative spheres as demarcated in three legislative lists occurring in Schedule VII to the Constitution but they must observe all other limitations on their powers such as the fundamental rights which they on no account transgress.\(^3\) The Supreme Court of India in the Case of Kesavananda Bharati v. State of Kerala\(^4\) has held that the Supremacy of the Constitution part of the basic structure of the Constitution and hence is not amendable. It has also been held that the federal nature of the Constitution is also a part of the basic structure of the Constitution and therefore outside the scope of

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\(^2\) An Introduction to Politics – Shibilnath Chakraborty – fifteenth edition – Page IV 26


\(^4\) AIR 1973 SC 1461

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the amending power.¹ The Constitution of India is also the mother of all laws and any law inconsistent with or in derogation of the Constitution of India shall be void to that extent. The circumstances under which the Constitution of India 1950 was drafted has already been discussed above. The present chapter aims at analyzing how the Constitution of Jammu and Kashmir 1957, exists within the framework of the Indian Constitution. The Constitution of Jammu and Kashmir 1957, is complementary and not repugnant to the provisions of the Indian Constitution, though it creates an apparent anomaly to the doctrine of Constitutional Supremacy.

The Constitution of India is the world's most longest and most detailed Constitution. It caters to the world's second largest population, which comprises of various cultures, religions and languages. The Indian Constitution is federal in character and has a strong Center. The most striking feature of the Indian Federation is that unlike other federations, it is a flexible federation in the sense that in times of emergency, it can be transformed into a Unitary Government.² The Constitution of India provides for a Parliamentary type of Government and in this respect resembles the British Constitution. The Indian Constitution has been described as partly rigid and partly flexible. A flexible constitution is one, which is elastic and is therefore can be changed easily. A rigid Constitution

² An Introduction to Politics - Shibnath Chakraborty - fifteenth edition - Page IV 25
on the other hand is one, which is very difficult to change. The Indian Constitution stands midway between the extreme rigidity of the Constitution of the U.S.A. and the extreme flexibility of the British Constitution.

The Constitution of India has been described as a federal Constitution. However there is some confusion as whether the Constitution is Federal or Unitary or Quasi-Federal. A federal Constitution normally has the following characteristics:

a) There should be a distribution of Powers between the Central and State Governments.

b) The Constitution should be Supreme and neither the Central nor State Government should override its provisions.

c) There should be a written Constitution, without which, Supremacy of the Constitution cannot be maintained.

d) The Constitution should be a rigid Constitution, which cannot be easily amended.

e) There must be an independent judiciary having authority to prevent the Central and State Governments from usurping each other’s powers.

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1 An Introduction to Politics – Shibnath Chakraborty – fifteenth edition – Page I 82
The Indian Constitution provides for a Distinctive Federation. It differs from other Federal Constitutions in the following manner:

a) In India there is only one Constitution, i.e., the Constitution of India 1950. The States (except the State of Jammu and Kashmir) have no right to frame a their own Constitutions. Dr. Ambedkar stated, “The Constitution of the Union and of the States is a single frame from which neither can get out and within which they must work.”

b) The Constitution of India provides for only one citizenship, i.e. Indian Citizenship, unlike other Federal Constitutions that provide for a system of dual citizenship. The Supreme Court has held that India has one common citizenship and every citizen should feel that he is Indian first irrespective of any other basis.

c) In Federal systems there is normally a dual polity. The Constitution of India maintains a unity in basic matters. There is, a single judiciary, uniformity in fundamental laws and a common All-India Service.

d) Under the Indian Constitution the State and Union are not rivals. Each is intended to work harmoniously in its own sphere without impediment by the other, with an overriding power of the Union where it is necessary in the public interest.

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1 Constituent Assembly Debates – Volume VII – Page 34.
under normal conditions the Indian Constitution is federal, in
times of emergency it can become unitary.

6.2 BASIC STRUCTURE OF THE CONSTITUTION AND ITS
AMENDMENT

Part XX of the Constitution of India 1950 deals with Amendment of
the Constitution. Under this Part there is only one Article, that is, Article
368, which deals with the power of Parliament to amend the Constitution
and procedure therefore.\(^1\) By virtue of this Article Parliament has power to
amend each and every Article of the Constitution, however, without
destroying the 'basic structure' of the Constitution. Provision for
amendment of the Constitution is made with the view to overcome the
difficulties, which may encounter in future in the working of the
Constitution.\(^2\) If no provisions were made for amendment of the
Constitution, the people would have recourse to extra constitutional method
like revolution to change the Constitution.\(^3\) The Indian Constitution is
federal in structure and unitary is spirit. The process of amendment of the
Constitution of India is partly rigid and partly flexible, i.e., it stands
midway between the extreme rigidity of the U.S.A. Constitution and
extreme flexibility of the British Constitution.\(^4\)

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\(^1\) See – Article 368 of the Constitution of India 1950.
\(^4\) An Introduction to Politics – Shibnath Chakraborty – fifteenth edition – Page IV 25
Even though Parliament has the power to amend each and every Article of the Constitution in the process laid under Article 368, such power is not unfettered. The power of Parliament to amend is limited to the extent that it has no power to abrogate the ‘basic structure’ of the Constitution. The term ‘basic structure’ has nowhere been defined, though the Supreme Court of India has often tried to illustrate its meaning. As there is no specific definition of the term ‘basic structure,’ it has been criticized as vague and uncertain. The fact that a complete list of the essential elements constituting the basic structure cannot be enumerated is no ground for denying that these do not exist.¹

In the case of Sankari Prasad v. Union of India,² the Supreme Court of India held that the power of amendment, including the amendment of fundamental rights was contained in Article 368 of the Constitution. After this landmark decision, several amendments of Part III of the Constitution of India 1950, dealing with fundamental rights, were made by the Constitution (4th Amendment) Act 1955 and the Constitution (7th Amendment) Act 1956.³ The Supreme Court in the case of Sajjan Singh v. State of Rajasthan⁴ further upheld the decision of Sankari Prasad’s case. However in the case of Golaknath v. State of Punjab⁵ an 11-Judges bench

² AIR 1951 SC 455.
⁴ AIR 1965 SC 845.
⁵ AIR 1967 SC 1666
of the Supreme Court held by a majority of 6:5 that the fundamental rights guaranteed under the Constitution of India 1950 were outside the amendatory process as laid down under Article 368, hence reversing the previous view taken by the Supreme Court. In order to remove the difficulties created by the Supreme Court in Golaknath’s case Parliament enacted the Constitution (24th Amendment) Act 1971, which not only restored the amending power of the Parliament but also extended its scope by adding the words “to amend by way of addition or variation or repeal any provision of this constitution in accordance with the procedure laid down in this Article.”

The validity of the Constitution (24th Amendment) Act 1971 was challenged in the case of Kesavananda Bharati v. State of Kerala, also known as the Fundamental Rights Case. It fell upon a 13-Judges bench of the Supreme Court to decide whether Parliament had power to destroy or abrogate the essentials features, basic elements and fundamental provisions of the Constitution of India. The Supreme Court overruled the decision delivered in Golaknath’s Case and held by a majority of 7:6 that the Constitution (24th Amendment) Act 1971 is valid and that Parliament has power to amend all the provisions of the Constitution, including fundamental rights, but could not amend the basic structure of the

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3 AIR 1973 SC 1461.
Constitution. However the minority view was that fundamental rights were not amendable as they formed a part of the basic structure. According to Chief Justice Sikri, the features, which form the basic structure of the Constitution and are not amendable are, Supremacy of the Constitution, Republican and Democratic Government, Federal character of the Constitution, Secular character of the Constitution and Separation of Powers (into executive, legislature and judiciary). According to Justice Chandrachud the four unamendable features of the Constitution of India are Sovereign Democratic Republic status, Secularism, Equality of Individuals and Government of Laws – not men. According to Justice Beg Supremacy of the Constitution and Separation of Powers form the basic structure of the Constitution. The Supreme Court in subsequent cases has upheld the view taken in Kesavananda Bharati's case. In the case of Minerva Mills v. Union of India¹ it was held by a 4:1 majority that amendments destroying or damaging the basic structure of the Constitution are unconstitutional. In Indira Neheru Gandhi v. Raj Narain² it was also held that the basic structure or framework of the Constitution was not amendable.

Article 368 deals with amendment of the Constitution of India 1950. However, Article 368 is limited by a proviso, which is essential in order to

¹ AIR 1980 SC 1789
² AIR 1975 SC 2299
maintain the federal structure of the Constitution. The Proviso states as follows:

Provided that if such amendment seeks to make any change in –

(a) Article 54, article 55, article 73, article 162 or article 241,

or

(b) Chapter IV of Part V, Chapter V of Part VI or Chapter I of Part XI, or

(c) Any of the Lists in the Seventh Schedule, or

(d) The representation of States in Parliament, or

(e) The provisions of this article,

The amendment shall also require to be ratified by the legislatures of not less that one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.

Article 368 of the Constitution of India applies to the State of Jammu and Kashmir, but is subject to a further limitation inserted by a second Proviso and is applicable solely to the State of Jammu and Kashmir. It states as follows:

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1 Inserted by Constitution (Application to Jammu and Kashmir) Order 1948.
Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under clause (1) of Article 370.

This Proviso to Article 368 is in conformity with the Constitutional position of the State of Jammu and Kashmir within the framework of the Indian Constitution and is designed to protect that position.\(^1\) Regarding Article 370 the Supreme Court has pointed out that Article 370 is a special provision for amending the Constitution in its application to the State of Jammu and Kashmir and Article 368 does not curtail the power of the President under Article 370.\(^2\) The Constitution of Jammu and Kashmir 1957 provides for its own amendment in the procedure laid down under Section 147 of the Constitution of Jammu and Kashmir 1957.\(^3\)

6.3 CENTRE-STATE RELATION UNDER THE CONSTITUTION OF INDIA

Part XI of the Constitution of India 1950 dealing with relations between the Union and the States is divided into two chapters. Chapter I, deals with Legislative Relations and Chapter II, deals with Administrative Relations.\(^4\)

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Chapter I of Part XI dealing with legislative relations consists of Articles 245 to 255. Article 245 deals with the extent of laws made by Parliament and by the Legislatures of the States and Article 246 deals with the subject matter of laws made by Parliament and by the Legislatures of the States. Article 245 defines the ambit or territorial limits of the legislative powers vested in Parliament and the Legislatures of the States; Article 246 defines the respective jurisdiction of the Union and the State Legislatures as regards subjects or topics of legislation.\textsuperscript{1} The Seventh Schedule of the Constitution of India provides three list: List I or the Union List containing 97 items over which the Union Parliament has exclusive powers of legislation; List II or the State List containing 66 items over which the State Legislatures have exclusive powers of legislation and List III or the Concurrent List containing 47 items over which both the Union and the State Legislatures can make laws. However, in case of any conflict on a matter in the Concurrent List the Union Act shall override the State Act. Article 248 deals with residuary powers of legislation. Article 248(1) states that Parliament has exclusive power to make any law with respect to any matter not enumerated in the Concurrent List or State List. This power has been further reiterated in Item 97 of List I. Under Section 104 of the Government of India Act 1935,\textsuperscript{2} residuary power of legislation was given neither to Federal Legislature nor to the Provincial Legislature. It was left

\textsuperscript{2} See – Section 104 of the Government of India Act 1935.
to the discretion of the Governor General to assign these powers to either Legislature.\(^1\) Under Article 249 Parliament shall have power to legislate with respect to a matter in the State List in the national interest. Under this Article the Union Parliament may make laws for any item of List II (State List), if it has become a matter of national interest, without amending the Constitution of India. In August 1986 the Union Government extended the operation of this Article to Jammu and Kashmir by amending the Presidential Order of 1954 and the Rajya Sabha also passed a resolution under clause (1) authorizing Parliament to make laws on the State List in order to control infiltration of extremists from across the border with Pakistan. The matter was, however, not pursued further.\(^2\) Article 250 provides that Parliament shall have power to legislate with respect to any matter in the State List if a Proclamation of Emergency is in operation. Article 254 provides that in case of any inconsistency between laws made by Parliament and laws made by the Legislatures of States or if any provision of a law made by a Legislature of a State is repugnant to any provision of a law made by Parliament which Parliament is competent to enact, then the law made by the Legislature of the State shall to the extent of the repugnancy be void.

Chapter II of Part XI dealing with administrative relations consists of Articles 256 to 263. Article 256 deals with obligations of the States and

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\(^1\) Constitution of India – Eighth Edition – Page 520 – M. P. Singh

Union. Under this Article it is the duty of the State to ensure that every Act of Parliament is given effect to within the State to which it applies. Under this Article the Central Government has power to issue directions to the State Governments to ensure that the Central Acts are given effect within the States. Article 257 deals with control of the Union over States in certain cases. By virtue of this Article the Union has power to issue directions upon the States regarding, the manner in which the State Governments shall act so as not to impede or prejudice the executive power of the Union, the construction and maintenance of means of communication declared in the direction to be of national or military importance and the measures to be taken for the protection of the railways within the State. Article 258 deals with power of the Union to confer powers, etc., on States in certain cases. By virtue of this Article the President may entrust the State Government with functions relating to any matter falling within the executive power of the Union. However the consent of the State is necessary for such delegation of power. By virtue of Article 258 the Central Government had delegated its executive powers under the Foreigners Act to the Government of Jammu and Kashmir and it was held by the Supreme Court of India that the State had the power to pass orders under the said Act.1 Article 263 deals with dealings with the provisions with respect to an inter-State Council. Under this Article the

President has power to set up Inter-State Council for the purpose of inquiring into and advising upon disputes between States, for investigating and discussing subjects in which the some or all of the States, or the Union and one or more State, have a common interest, and for making recommendations any such subject. However this Article mainly applies to non-legal inter-State disputes. The Supreme Court has jurisdiction by virtue of Article 131 of the Constitution of India to hear inter-State disputes of a legal nature.¹

Part XI dealing with Centre-State relations does not apply to the State of Jammu and Kashmir and to other Indian States equally. The Constitution of India also does not guarantee equal treatment of the all the States and the Constitution provides for several instances where the States have been dealt with differently.² Some of the exceptions enjoyed by the State of Jammu and Kashmir regarding the legislative relation between the Centre and the State are discussed below.

Article 246 dealing with Subject matter of laws made by Parliament and by the Legislatures of the State applies to the State of Jammu and Kashmir with several exceptions. Article 248 dealing with residuary powers of legislation provides that residuary power of legislation shall vest

¹ See – Article 131 of the Constitution of India 1950.
² See Part XXI – Constitution of India 1950.
solely in Parliament and not the States. In the case of Jammu and Kashmir
the residuary power of legislation shall vest in the State and not in
Parliament. The only real limitation to the legislative power of the State of
Jammu and Kashmir is that the matter must not be within the exclusive
jurisdiction of Parliament.¹ The Jammu and Kashmir Legislature had the
legislative competence to enact laws on any subjects which comes within
List II, Schedule VII by virtue of the residuary power it had been given by
the Presidential Order viz. Constitution (Application to Jammu and
Kashmir) Order 1954.² By virtue of Article 253, dealing with legislation
giving effect to international agreements, Parliament has power to make
any law for the whole or any part of the territory of India for implementing
any treaty, agreement or convention with any other country or countries or
any decision made at any international conference, association or other
body. This power of Parliament is restricted in the case of the State of
Jammu and Kashmir by a proviso, which states –

Provided that after the commencement of the Constitution
(Application to Jammu and Kashmir) Order, 1948, no decision
affecting the disposition of the State of Jammu and Kashmir shall
be made by the Government of India without the consent of the
State.³

¹ Hindustan Construction Co. v. Assessing Authority – AIR 1970 J&K 85 (86)
² Article 370 of the Constitution – Its Past and Present – Page 27 – Bimal Kr. Chatterjee and
Regarding Administrative relations the State of Jammu and Kashmir also enjoys certain extra privileges over the other Indian States. Article 256 dealing with Control of States and the Union applies to the State of Jammu and Kashmir subject to the following proviso:

The State of Jammu and Kashmir shall so exercise the executive power as to facilitate the discharge by the Union of its duties and responsibilities under the Constitution in relation to that State, and in particular, the said State shall, if so required by the Union, acquire or requisition property on behalf and at the expense of the Union, or if the property belongs to the State, transfer it to the Union on such terms as may be agreed, or on default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India.

Article 261 dealing with Public acts, records and judicial proceedings applies to the State of Jammu and Kashmir. However, in the case of the State of Jammu and Kashmir, the State and not the Union, shall have power to lay down the manner in which the acts, records and proceedings shall be proved. Article 262 dealing with adjudication of disputes relating to waters of inter-State rivers or river valleys and Article 263 dealing with provisions with respect to an inter-State Council both
apply to the State of Jammu and Kashmir. The State of Jammu and Kashmir is a member of the North Zone Council.¹

6.4 REPORTS ON CENTER–STATE RELATIONSHIP

The Constitution of India 1950 is a comprehensive statute catering to the needs of the world’s second largest population. It not only acts as a Constitution for the Union but also acts as a Constitution for the States of the Union. It also clearly demarcates those areas in which both the Union and the States shall have jurisdiction. In case of any dispute between the Union and the States or between the States inter se the Constitution of India also provides the remedy. However, often the States have not been satisfied with the powers entrusted to them and have made demands for more power and autonomy. One of the major causes for such demands would be the change in the political scenario of the Country caused by the growth of regional parties and the erosion of national parties leading to fragile coalition Governments at the Centre. In many States the demand for further autonomy has lead to terrorism and insurgency.

The Government of Tamil Nadu set up the Rajamannar Committee to review Centre-State relationship under the Federal System, and to recommend necessary changes to the present Centre-State Relationship as

embodied in the Constitution of India. The object of the Committee headed by P. V. Rajamannar, a retired Chief Justice of the Madras High Court, was to “secure utmost autonomy to the State.” On 27th May 1971, the Committee submitted a report making several recommendations enhancing the autonomy of the States.\(^1\) However, as the State Government appointed the Committee, the Centre rejected the recommendations with an observation that further autonomy, as recommended could lead to National disintegration. It is interesting to note that the Rajamannar Committee also recommended the retention of the special status of the State of Jammu and Kashmir within the Union of India.

The Working Committee of the Shiromani Akali Dal also recommended more autonomy to the States. On 17th October 1973, the Working Committee of the Shiromani Akali Dal passed the Anandpur Resolution. The main suggestions of the Anandpur Resolution was the right to frame a separate Constitution for the State\(^2\) and to make the Constitution of India federal in the real sense and to ensure that the authority and the representation of all the States are equal at the Centre.\(^3\)

On 1st December 1977 the Cabinet of the West Bengal Government adopted the West Bengal Memorandum on Centre-State relations. The

\(^1\) For details see – Rajamannar Committee Report.
\(^2\) For details see Anandpur Resolution.
\(^3\) Constitutional Autonomy – A Case Study of J & K – page 54 - Dr. K. K. Wadhwa.
Memorandum recommended greater powers for the States and Limiting Central Government’s powers only to subjects like defence, foreign affairs, foreign trade, currency, communication and economic coordination. All other powers should be given to the States and the Centre should not interfere with the exercise of these powers by the States.¹ It is interesting to note that, like the Rajamannar Committee Report, the West Bengal Memorandum also recommended the continuation of the special status of the State of Jammu and Kashmir by retaining Article 370 of the Constitution of India.

In 2000, the Punjab Government’s Expert Panel Report submitted its report on State Autonomy. The object of the Punjab Government’s Expert Panel Report was to make certain recommendations regarding Centre-State relationship for consideration of the Constitutional Review Commission.² The 38-page report aims at making major changes in the Constitution so as to curtail the powers of the Central Government.

The latest and very controversial report on State Autonomy is that of the Jammu and Kashmir Government.³ Like other States of the Union, the State of Jammu and Kashmir has also been demanding more autonomy. It may be pointed out that the State of Jammu and Kashmir compared to

¹ For details see West Bengal Memorandum.
² For details see Punjab Government’s Expert Panel Report.
other Indian States is already enjoying excess autonomy. The Autonomy Commission was to formulate its report within the four corners of the Deed of Accession, the President’s Constitutional Ordinance, and the 1952 Delhi Agreement.\(^1\) The Farooq Abdullah Government “endorsed” the report of the State Autonomy Committee, recommending pre-1953 status for the State.\(^2\) Farooq Abdullah reiterated that neither he nor his party was anti-India but wanted autonomy in order to satisfy the long standing urge of the Kashmiri people.\(^3\) However, on 4th July 2000, the Central Government outright rejected the State Autonomy Report. However the Jammu and Kashmir Government is still discussing the autonomy proposal with the Centre.\(^4\) The Cabinet remarked that the acceptance of it would set the clock back and reverse the national process of integration of the State with India.\(^5\) The object of the autonomy report was to restore pre-1953 status to the State as was guaranteed by the Delhi Agreement of 1952.\(^6\) The autonomy report also suggested certain amendments to the Constitution of India in order to increase the autonomy of the State. The State Autonomy Report, inter alia, recommended as follows:\(^7\)

1) Kashmir to have exclusive rights over all subjects, excluding defence, foreign affairs and communications

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\(^{1}\) Organiser - Vol. LII No. 21 - December 10, 2000 - Page 2.
\(^{3}\) The Telegraph - 27 June 2000 - Page 1.
\(^{4}\) The Sunday Statesman - 14 October 2001 - Page 10.
\(^{6}\) For details see Jammu and Kashmir Autonomy Report.
\(^{7}\) The Telegraph - 27 June 2000 - Page 1.
2) Chief Minister to be called Prime Minister
3) Governor to be called Sadr-e-Riyasaat (President) elected by the assembly
4) Own National Flag
5) Own Constitution and right to amend it.
6) Authority to draw up fundamental rights
7) Regulate all administrative and financial affairs without Central interference
8) Beyond the jurisdiction of Article 365 on imposition of President’s rule.

Besides the demands made by various State Commissions, the Central Government from time to time has set up Commissions to review the provisions of Centre and State Relations. To review the Centre-State Relations envisaged under the Constitution of India the Central Government appointed the Sarkaria Commission in 1983 and the Constitutional Review Commission in 2000. As a result of pressure coming from various States of the Union regarding Centre-State relations the Government of India appointed the Sarkaria Commission\(^1\) to examine and review the working of the existing arrangements between the Union and States with regards to powers functions and responsibilities in all spheres

\(^1\) For details see Report of the Sarkaria Commission.
and recommend such changes or other measures as may be appropriate.\textsuperscript{1}

The said report consisting of 1580 pages was submitted on 29 October 1987. The Sarkaria Report has till today neither been accepted nor rejected by the Government of India but it has got a tremendous importance in academic circles.\textsuperscript{2}

On 24\textsuperscript{th} February 2000 the Government of India appointed the Constitution Review Commission, to review and examine the working of the Constitution during five decades after independence. The terms of reference of the Commission as adopted through the Cabinet resolution are as follows: “The Commission shall examine in the light of experience of the past 50 years as to how far the existing provisions of the Constitution are capable of responding to the needs of efficient, smooth and effective system of governance and socio-economic development of modern India and to recommend changes, if any, that are required to be made in the Constitution within the framework of parliamentary democracy without interfering with the basic structure or basic features of the Constitution.”\textsuperscript{3}

One of the main objects of the Constitution Review Commission was to review Union-State relations. However it may be noted that Article 370 has not been included within the purview of the Constitutional Review

\textsuperscript{1} Constitutional Autonomy – A Case Study of J & K – page 58 - Dr. K. K. Wadhwa.
\textsuperscript{2} Constitutional Autonomy – A Case Study of J & K – page 60 - Dr. K. K. Wadhwa.
\textsuperscript{3} BJP Today – March 1-15 2000 – Page 12.
The Constitution Review Commission was expected to submit its report within a year. Justice R. S. Sarkaria, who was the Chairman of the Sarkaria Commission, is also one of the members of this Review Commission. It may be noted that Justice R. S. Sarkaria while referring to the Jammu and Kashmir Autonomy Report stated that the solution lies within the present Constitution and the Centre can easily delegate more powers under the Concurrent List to the States without needing to go for a Constitutional amendment, not just for Jammu and Kashmir but for every Indian State. The moment this is done everything will be resolved.

The reality of today's India leaves not much doubt or debate that the States have to be given more autonomy. The important question is whether the autonomy should be as much as demanded by the Jammu and Kashmir Government or as mentioned in the Anandpur Sahib resolution? Or, it may consist of some peripheral changes in the respective powers of the Centre or the State. However, it needs no mention that the grant of more autonomy to the States cannot be at the cost of maintaining unity of the country and integrity of the nation, which objects need to be kept in the forefront and placed high in the agenda.

1 Article 370 of the Constitution – Its Past and Present – Mr. Bimal Kumar Chatterjee.
4 Does India Need a New Constitution? – Page 34 – B. L. Hansaria.
6.5 EMERGENCY PROVISIONS UNDER THE CONSTITUTION OF INDIA

Part XVIII\(^1\) of the Constitution of India 1950 deals with the Emergency Provisions. One of the most unique characteristics of the Indian Constitution is that in normal times, the Constitution is framed to work as a federal system, but in times of war and other national emergencies it is designed to work as though it were unitary.\(^2\) The Constitution of India provides for 3 types of emergency:\(^3\):

a) National Emergency: due to war, external aggression or armed rebellion (Article 352)

b) State Emergency: due to failure of Constitutional machinery in the States (Article 356)

c) Financial Emergency: (Article 360)

Article 352 of the Constitution of India 1950, dealing with Proclamation of Emergency states that if the President is satisfied that a grave emergency exists whereby the security of India or any part of the territory thereof is threatened, whether by war or external aggression or armed rebellion, he may, by Proclamation make a declaration to that effect in respect of the whole of India or of such part of the territory thereof as

\(^1\) See Part XVIII of the Constitution of India 1950.
may be specified in the Proclamation. However, such a Proclamation will cease to operate after one month. Such Proclamation is to be laid before each House of Parliament, which may approve, reject or take no action. If approved by both Houses then the Proclamation shall continue to operate for six months. Article 353 deals with the effect of Proclamation of Emergency, both executive and legislative and Articles 354 deals with the application of provisions relating to distribution of revenues while a Proclamation of Emergency is in operation. Article 355 dealing with the duty of the Union to protect States against external aggression and internal disturbance states that it shall be the duty of the Union to protect every State against external aggression or internal disturbance and to ensure that the Government of every State is carried on in accordance with the provisions of the Indian Constitution. Article 356 dealing with the provisions in case of failure of constitutional machinery states that if the President, on receipt of a report from the Governor of a State or otherwise, is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Indian Constitution, the President may declare a State Emergency. Article 357 deals with the exercise of legislative powers under Proclamation issued under article 356. Under this Article the federal distribution of legislative powers shall give way to the extent provided in Article 357(1).

Article 365 (under Part XIX – Miscellaneous) deals with effect of failure to comply with, or to give effect to, directions given by the Union. This Article though not an emergency provision, is relevant to both Part XI (Relations Between the Union and the States) and Part XVIII (Emergency Provisions). Without Article 365, there would have been no means to enforce the directions issued by the Union under Articles 256 and 257.1

Under Articles 355 it is the duty of the Union to ensure that the Government of every State is carried on in accordance with the provisions of the Constitution of India. Under Article 356 if the President is satisfied that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution of India, the President may declare a State Emergency.2 Article 365 states that where a State has failed to comply with, or give effect to, any directions given in the exercise of the executive power of the Union under any of the provisions of the Constitution of India, it shall be lawful for the President to hold that a situation has arisen in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution of India.

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Article 358 deals with the suspension of provisions of article 19 during emergencies. Article 358 provides that if during a Proclamation of Emergency the legislature makes laws or the executive commits any act inconsistent with the rights guaranteed under Article 19 of the Constitution, their validity is not open to challenge either during the continuance of emergency or even thereafter. Article 359 deals with the suspension of the enforcement of rights conferred by Part III during emergencies. Article 359 provides that where a Proclamation of Emergency is in operation, the President may by order declare that the right to move any court for the enforcement of such of the rights conferred by Part III (except articles 20 and 21) as may be mentioned in the order and all proceedings in any court for the enforcement of the rights so mentioned shall remain suspended for the period during which the Proclamation is in force or for such shorter period as may be specified in the order. Article 359, in short, takes away the locus standi of a person to move a Court on the ground of violation of any of the fundamental rights specified in the Order issued under that Article.¹

Article 360 deals with financial emergencies. If the President is satisfied that a situation has arisen whereby the financial stability or credit of India or any part of the territory thereof is threatened, he may by a

Proclamation make a declaration to that effect. However, till date, Article 360 has never been invoked. Furthermore the provisions of Article 360 do not apply to the State of Jammu and Kashmir.


Proclamation of Emergency under Article 352 applies to the State of Jammu and Kashmir subject to the modifications made by the Constitution (Application to Jammu and Kashmir) Order 1950 and 1954. The power of the President to issue a Proclamation of Emergency under Article 352 is restricted by Section 2 (13) (a) of the Constitution (Application to Jammu and Kashmir) Order 1954 which provides:

To article 352, the following new clause shall be added, namely: -

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\(^1\) For details see – Constitution (Application to Jammu and Kashmir) Order 1950.
(6) No Proclamation of Emergency made on grounds only of internal disturbance or imminent danger thereof shall have effect in relation to the State of Jammu and Kashmir (except as respects article 354) unless—

(a) it is made at the request or with the concurrence of the Government of that State, or

(b) where it has not been so made, it is applied subsequently by the President to that State at the request or with the concurrence of the Government of that State.

The Proviso to Article 353, added by the Constitution (42nd Amendment) Act 1976, enables the Proclamation of Emergency to be applicable to only a part of the territory of India. This amendment of the Constitution does not apply to the State of Jammu and Kashmir and Article 353 applies to the State of Jammu and Kashmir without this proviso. Article 356 dealing with State Emergency also applies to the State of Jammu and Kashmir, but like Article 352, subject to the modifications made by Constitution (Application to Jammu and Kashmir) Order 1950 and 1954. Article 357 dealing with exercise of legislative powers is also applicable to the State of Jammu and Kashmir with Clause (2) substituted by Constitution (Application to Jammu and Kashmir) Order 1950 and 1954. In the case of the State of Jammu and Kashmir, Article 358 dealing with suspension of provisions of Article 19 during emergencies, has been

6.6 SUPREMACY OF THE CONSTITUTION OF INDIA

The demand for responsible government and the right to frame a constitution for the Jammu and Kashmir State was the demand of the people of Kashmir much prior to the Indian independence. The convening of the Constituent Assembly in 1951 is a natural outcome of the desire of the people of the State to have a democratic government responsible to the legislature, elected by the people.  

1 The Jammu and Kashmir Constituent Assembly was established in September 1951 and started its work on 5th November 1951. The State of Jammu and Kashmir is the only State within the Indian Union to have a separate Constitution. However the right to have a separate Constitution is been guaranteed by the Constitution of India 1950 itself. The question is, whether the existence of a separate Constitution for the State of Jammu and Kashmir is repugnant to the Constitution of India in any manner whatsoever and whether the separate

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Constitution of the State has usurped any of the powers of the Union as provided under the Indian Constitution.

The above discussion has pointed out some of the modifications made in the Constitution of India in areas such as Union and State Relations and emergency provisions. The Constitution of Jammu and Kashmir 1957 has been drafted in such a manner so as to avoid the possibility of any repugnancy with the Constitution of India. It has been pointed out that 'the Constitution of Kashmir is in no way repugnant to the Constitution of India but is complementary to it. It is to be read with that Constitution insofar as that is applicable to the State. It is in conformity with the Constitution of India and is so evolved that a clash seems unlikely.' In order to avoid any confusion Section 3 of the Constitution of Jammu and Kashmir 1957 makes it absolutely clear that 'The State of Jammu and Kashmir is and shall be an integral part of the Union of India. Section 5 of the Constitution of Jammu and Kashmir deals with the extent of Executive and Legislative Power of the State and states 'the executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India. In order to avoid any future conflict between the Centre and the State, both Sections 3 and 5 of the Constitution

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of Jammu and Kashmir 1957 have been kept beyond the scope of Section 147\(^1\) of the Constitution of Jammu and Kashmir 1957, which deals with the amendment of the Constitution. List III in the Seventh Schedule of the Constitution of India, referred to, as the Concurrent List was not made applicable to the State of Jammu and Kashmir in order to avoid any conflict between the Centre and the State. However, by virtue of the Constitution (Application to Jammu and Kashmir) Amendment Order 1963, List III dealing with concurrent powers of legislation has been made applicable to the State of Jammu and Kashmir with certain modifications.

The two Constitutions have been framed in such a manner that both may co-exist harmoniously with the minimum possibility of any conflict. Both the Constitutions exist in the true spirit of a federal system where there are separate Constitutions for the Central and State Governments. There is little scope for the Constitution of Jammu and Kashmir to offend any of the provisions of the Indian Constitution. However, since the State of Jammu and Kashmir is the only State in the Indian Union having a separate Constitution, it creates an anomaly compared to the other Indian States. The existence of a separate Constitution for the State of Jammu and Kashmir, does not threaten the Constitution of India and the doctrine of Supremacy of the Constitution applies to the Indian Constitution without

any exception. The Constitution of India 1950 is beyond doubt supreme and the existence of a separate Constitution for the State of Jammu and Kashmir does not in any manner effect such supremacy.