Chapter - IV

Autonomy of Jammu and Kashmir in the Context of Indian Constitution
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The State of Jammu and Kashmir: A Historical Overview

The history of Kashmir dates back to 4000 B.C. and nearly twenty-one different dynasties of Buddhists, Kushans, Huns, Jains, Zoroastrians, Hindus and Muslims had ruled over Kashmir. The three regions of Jammu, Kashmir and Ladakh that constitute the present State of Jammu and Kashmir were for the first time united in a single political entity by Maharaja Gulab Singh of Jammu in 1846 after the disintegration of Sikh power. Subsequently, state of Jammu and Kashmir came into existence as one of the new princely State of erstwhile India in 1846 A.D. It occurred when a British-Dogra pact known as “Treaty of Amritsar” signed in the Punjab city of Amritsar on March 16, 1846, between the British rulers and Maharaja Gulab Singh under which Kashmir was sold to Gulab Singh for a sum of 75 lakhs (Nanukshahee). The Treaty of Amritsar, consisting of ten articles and had no mention of rights, interests and future of the people of Kashmir. While the Kashmir had been added to the Dogra’s possessions, they considered Jammu as their home and the valley as their conquered territory and it were only Muslims who suffered the most at their hands. Although, the Muslims constituted 85% population of the state, they were compelled to pay some special taxes, like a tax on Shariat marriages and a religious tax called “Dharmarth”, which was used for repair of old temples. Even if a Muslim was suspected of slaughtering a cow, he was imprisoned in chains for the rest of his life.

After Gulab Singh’s death, his son Ranbir Singh ascended the throne in 1856 but the condition of people remained the same. Sir Francis Younghusband remarked, “in the early sixties cultivation was decreasing, the people were wretchedly poor, there were few respectable men, none of wealthy appearance.” Then followed a rule of 40 years of Maharaja Pratap Singh, which was very difficult to reconcile with the angriness of Brahman officials who operated the hated machine of government in his name. Maharaja Pratap Singh was succeeded by Maharaja Hari Singh, the last Dogra ruler, in 1925, who was an absolute autocratic ruler and his army “instead of donkeys and horses, were using Kashmiri Muslims for transportation of goods across the far-flung areas”. During his rule, Kashmiri’s felt highly alienated, they were treated as what Sir Albion Bannerji, Foreign and Political Minister of Maharaja Hari Singh, said, “Like dumb-driven cattle.” Throughout his 23 years of rule (1925-1947), he remained
in apparent indifference to the welfare of his subjects which has given rise to the movement known as “Kashmir for the Kashmiri’s” encouraged by educated class of Kashmiri’s.10

Mobilization of Kashmiri Muslims and freedom Struggle in Jammu and Kashmir

It was in 1930’s that the era of popular politics in Kashmir arrived with the emergence of new generation of political leaders and activists headed by a school teacher called Sheikh Mohammad Abdullah, an Aligarh educated Kashmiri, a celebrated institution of learning in northern India.11 Sheikh Abdullah was a passionate orator who raised his voice against the policies of Maharaja Hari Singh and became to be known as “Shere-i-Kashmir” – The Lion of Kashmir.12 Sheikh Abdullah with his group of energetic and educated young men established a Reading Room Party (RRP) in Fateh Kadal, Srinagar, to awaken the youth about their human rights. The Reading Room Party took up the cause of the educationally and economically backward Muslim community. It prepared the ground for a political campaign against the injustice and suppressive policies of the Maharaja which became the foundation of the Kashmir freedom struggle. Reading Room Party organized a big meeting on 21 June 1931, at Khanqah-e-Mohla in order to elect a representative body of Kashmiri Muslims to submit a memorandum of their grievances. In this historic gathering, a Pathan from Northeast Frontier Province of British India, Abdul Qadeer Khan spoke against Maharaja and exhorting the people to fight for their rights. He pointed his finger towards the Maharaja’s palace and raised slogans to destroy its every brick. The result was that he was arrested on 25 June 1931 and prosecuted on the charges of sedition in the court of Sessions Judge.13

The event of 13 July 1931 was the beginning of an organized and mass movement against the despotic and autocratic ruler of Jammu and Kashmir, Maharaja Hari Singh. This date has its own importance in the freedom struggle of Kashmir history. On this historic day, while Abdul Qadeer’s trial was in progress at the Central Jail in Srinagar, in between the Court proceedings a scuffle took place between a huge mob of Muslims, who had gathered outside the Jail and a group of Dogra Sepoys took place. The Sepoys opened the fire and twenty-one people were killed.14 This event marked a turning point in the history of political struggle in Kashmir. In the words of the Kashmiri historian Mohammad Ishaq Khan:
13 July 1931 was a historic day in the records of Srinagar. The ‘dumb-driven cattle’ raised the standard of revolt. The people were never to be browbeaten again by punitive police action. Even the women joined the struggle and to them belongs the honor of facing cavalry charges in Srinagar’s Maisuma bazaar.

Hence, the freedom movement of Jammu and Kashmir started to gain strength day by day. It assumed the shape of Civil Disobedience Movement and when the state government could not control law and order situation they arrested Sheikh Abdullah and his associates. In order to enquire into the various complaints and to examine grievances of communal and general nature that had caused the disturbances, the Maharaja appointed a commission consisting four non-official members with B.J. Glancy as its chairman on 12 November 1931, known as Glancy Commission. The Glancy Commission published its report on April 1932 and highlighted the message of 13 July 1931 event as “the fight for Human Rights is just and right.”

While Sheikh Abdullah and the other political leaders were detained in Srinagar Central Jail, they discussed the formation of a political party. After released from prison in June 1932, they founded Jammu and Kashmir’s first mass freedom organization, called, the All–Jammu and Kashmir Muslim Conference (MC) in October 1932. Its leaders were Sheikh Abdullah from the Valley and Chaudhary Ghulam Abbas from the Jammu region. Sheikh Abdullah became President and Ghulam Abbas the first General Secretary. Sheikh Mohammad Abdullah and Prem Nath Bazaz had already made it clear in July, 1932, that “the Kashmir freedom struggle will be conducted on secular, progressive and democratic lines”. In March 1938, Sheikh Abdullah, the chief architect of the transformation, declared that the first condition to achieve is ‘Responsible Government’ in the state. We do not demand responsible government for 80 lakhs Muslims only but all the 100% state subjects and we must build a common national front by universal suffrage on the basis of joint electorate. Finally, in the Party’s special session on June 1939, where the historic change was registered as the Muslim Conference (MC) was accordingly renamed as the All-Jammu and Kashmir National Conference (NC). Out of 176 delegates who were present at the session, 173 approved the change and only three expressed their doubts against this change. These critics expressed their worries that a secular organization would drift towards the Indian National Congress, the party leading
India’s independence movement, and “that the Hindu-Sikh element in the party would undermine the movement because of their vested interests in Dogra rule.”

The doubts of these critics were not baseless and unjustified. In 1940, Sheikh Abdullah invited Jawaharlal Nehru (a Kashmiri Pandit and India’s first Prime Minister), who cherished this secularist trend in Jammu and Kashmir politics. The two movements he pointed out progressively developed on national lines and in Kashmir I am glad to say a number of wise and far-seeing Hindus and Sikhs threw their weight on the side of the popular movement and supported the “National Demand” which asked for responsible government. In 1944, it was the turn of the Muslim League’s leader, Mohammed Ali Jinnah, to visit Kashmir however he was shocked to see the condition of the Muslim population in the state and advised that they should join under one flag and one platform. In the meantime, Sheikh Abdullah was busy with his plan for a ‘New Kashmir’, which was one of the most advanced socialist programmes of its time. In this plan, the National Conference went beyond demands for improving the conditions of Muslim and to seek a reformation in the political and economic systems of Jammu and Kashmir State. The Bill of Rights, which set equality of rights to all its citizens irrespective of nationality, religion, colour, race, etc. reached out to all classes of people in the state. In addition, a predetermined effort was made to gain the support of large sections of society by incorporating the Peasants Charter, which stipulated the transfer of all agricultural land to actual tillers of the soil; the Workers Charter, which guaranteed basic rights and better working conditions; and the Charter of Women’s Rights in all spheres, in social, political, legal, economic, educational, and cultural fields.

The Indian National Congress raised the slogan of “Quit India” in 1947 and asking the British imperialists to leave, in May-June 1946. The National Conference in the state of Jammu and Kashmir too followed the same path and asked the Dogra Maharaja to quit the Kashmir with bag and baggage, so as to enable the people of Kashmir to shape their own future. The Quit Kashmir movement is a landmark in the history of political mobilization in Kashmir in which Sheikh Abdullah declared that, “The time has come to tear up the Treaty of Amritsar and Sovereignty is not the birthright of Maharaja Hari Singh. Quit Kashmir is not a question of revolt. It is a matter of right.” Sheikh Abdullah’s Quit Kashmir movement had also come under criticism from his political opponents in the Muslim League. The critics claimed that Sheikh
Abdullah had started the agitation in order to boost his popularity, which he was losing because of his pro-India stance. In 1946, the leader of the Muslim League, Chaudhary Ghulam Abbas was taken into custody after he led a ‘Direct Action Day’ similar to Jinnah’s in British India. Ghulam Abbas and Sheikh Abdullah were held in the same jail, where they discussed in night-long conversations the possibility of reconciliation and resumption of the common struggle, which, however, never materialized.27

In this dramatic gesture, Jawaharlal Nehru attempted to visit Kashmir again in July 1946 with the intention of defending Sheikh Abdullah at his trial. But his entry in valley was refused; he stood at the border for five hours and was immediately arrested by the authorities.28 Karan Singh, the maharaja’s son, believed that this episode marked a turning point in relations between his father’s government and the future prime minister of India, instead of welcoming him and seeking his cooperation, they had arrested him.29 In July 1947, just a month before a partition, Mahatma Gandhi found time to visit Kashmir where he said India that had been overwhelmed by darkness all around, Kashmir is the only hope with its peace amongst regions.30 On 18 July, 1947, the British Government passed the Indian Independence Act, the paramountcy lapsed and sovereignty went back to the States and on 14 and 15 August 1947, the two new dominions Pakistan and India became independent respectively. The British had envisaged that the princely states were free to accede either India or Pakistan. However, Maharaja Hari Singh could not decide between India and Pakistan before the British Empire surrendered the power.31

At the time of Independence, there were 565 princely states or native states, though these states theoretically reverted to sovereignty upon the withdrawal of colonial power and their real choices were confined to merge either with India or Pakistan.32 By 15 August, all states acceded and absorbed either with India or Pakistan smoothly except the following three states – Hyderabad, Junagadh and Jammu and Kashmir.33 There was problem only with these three States regarding their smooth integration with India.

1. **Hyderabad**: Here the ruler was a Muslim and the majority of the populations were Hindus. The ruler who was so called Nizam wanted to remain independent without joining either of the two dominions. India offered the proposal of plebiscite to settle
the issue of accession which the Nizam never accepted and the people became upset which led to anarchy in the state. In early September 1948, the Indian Government became intolerant and took the decision to invade Hyderabad in what was termed a police action. The accession of the State to India was formally accomplished on September 17, 1948, by the Nizam himself.34

2. Junagadh: Junagadh was fairly a small state in what is now Gujarat, i.e. the north western state bordering Pakistan, but its geographical situation was very complicated. Here the ruler was also a Muslim Nawab and the majority of the populations were Hindus. On 15th August 1947, the Nawab announced accession to Pakistan and Pakistan also accepted it. Though, the accession on the basis of the ruler’s power under the Indian Independence Act was legally valid. The decision of the ruler disappointed Indian Government for various reasons: in the first place, it would be a violation of the principle of geographical compulsion if any State acceded to the Dominion which had no border with it. Secondly, its potentialities in terms of deepening the communal discord in Western India could be enormous. Finally, the open revolt of this tiny state could well set an example for the two bigger states, Hyderabad and Kashmir, to follow.35 Consequently, the Nawab took refuge in Pakistan in October 1947 and on November 9, 1947; India took over the administration of Junagadh on the request of new Dewan (Prime Minister) of Junagadh. Later a plebiscite was held for conforming the people’s wish to join India by an overwhelming majority. Pakistan, however, could not digest it easily but did not send any troops to defend it.36

3. Jammu and Kashmir: The state of Jammu and Kashmir had unique features not shared by any other princely states as it was geographically contiguous and neighboring to both India and the Pakistan. The situation in the state was also totally different, unlike Junagadh and Hyderabad, here the ruler Maharaja Hari Singh was Hindu and majority of the population were Muslims. Following the partitioning of India on 14-15 August, Jammu and Kashmir became an independent nation, with an understanding that it would soon decide its future. The Kisan Mazdoor Conference announced in September 1947, that the State of Jammu and Kashmir should cede to Pakistan due to its majority Muslim population and the fact that the three main highways and all the rivers of the State flow into Pakistan.37
Karan Singh admits that when this crucial moment came to his father, Hari Singh, he found himself alone and helpless. He was not able to come with the terms of National Conference as it posed a great threat to the Dogra dynasty. He was also very unfriendly to the Congress Party dominated by Gandhi, Nehru and Patel, partly because of Nehru’s close friendship with Abdullah. Though, Muslim League supported the ruler’s ‘right to determine the future of their states’, Hari Singh opposed its policies. Joining Pakistan would leave a substantial number of Hindus in Jammu as a minority as well as Buddhists in Ladakh. Joining India would be contrary to the advice given by the British that due consideration should be given to numerical majority and geographical contiguity. In retrospect, Karan Singh concluded that for Maharaja Hari Singh hoped that keeping Kashmir independent would be a peaceful solution for both the State of India and Pakistan.\(^3\) However, Lord Mountbatten was unwilling and most unreceptive for this third option and offering a “Standstill Agreement” of Jammu and Kashmir with both India and Pakistan.\(^4\)

**Standstill Agreement**

Standstill agreement was a device which emerged from the mechanics of the Indian Independence Act of July 1947. It would enable a state, while making up its mind what to do following the lapse of British Paramountcy, to ensure that the old arrangements of trade, communications and services continued with what had hitherto been in British India. On 12 August 1947, the new Prime Minister of Jammu and Kashmir, Janak Singh, decided to negotiate the Standstill Agreement with both India and Pakistan. India postponed, arguing that the matter needed to be negotiated by an official from the state to visit to New Delhi for discussion. No such official was ever dispatched and for this purpose no Standstill Agreement ever concluded.\(^5\) On contrary, Pakistan agreed it on 15 August 1947 and under Standstill Agreement, the Pakistan government accepts the sovereignty of Kashmir and assumed its charges of post and telegraphs system and also obliged to supply the state with foodstuffs and other essential items and commodities. The Pakistan knew that geographical contiguity and religious demography favoured Jammu and Kashmir’s accession to Pakistan.\(^6\)
Accession of Kashmir to India

The state of Jammu and Kashmir was inclined to the dreadful events of July 1947, when armed rebellion broke out in the Sudhnuti tract of Poonch district in Jammu division. Soon the rebellion assumed a militant and separatist character and the Maharaja’s police forces responded it with tremendous brutality. In Jammu, Hindu and Sikh Communalists, supported by the Jan Sangh (National Volunteer Organization, RSS) and the Sikh Akali Dal (Akali Party), attacked Muslim villages and set them on fire, displacing some 500,000 residents.\(^{42}\) By September, 1947, the armed rebellion in Poonch was supported by Muhammad Ibrahim, with a view that the Maharaja of Kashmir is merely a British appointed employee and had no right to call Indian army in the state. This resulted the crisis that reached at its climax on 20\(^{th}\) – 22\(^{nd}\) October, when some people of Azad Kashmir equipped with arms and the active support of tribesmen took control of Muzaffarabad side. On 24\(^{th}\) October 1947, they formed their own government, which is today known as “Azad Kashmir”. The tribesmen from North-West Frontier Province (NWFP), who were mostly provoked and motivated by the massacre of Muslims in Jammu Province at the hands of Hindu extremists descended on Baramullah, only 30 miles from Srinagar on October 24-26 and opened up Gulmarg front to control the Kashmir valley.\(^{43}\)

The sequence of events from the moment, the Maharaja requested help from the Government of India on 24 October to the time when Indian troops arrived on 27 October has been a subject of great debate ever since. The official record relies on the memories of V.P. Menon, who, at the Defence Committee meeting, came to Srinagar immediately on 25 October in order to study the situation on the spot and to report to the Government of India. Menon reported accordingly that, “I was oppressed by the stillness of a graveyard all round. There were practically no state forces left and the raiders had almost reached the outskirts of Baramullah”.\(^{44}\)

Subsequently, Maharaja Hari Singh wrote a letter to Lord Mountbatten on 26\(^{th}\) October 1947, the crux of the letter reads:

> I have to inform Your Excellency that a grave emergency has arisen in my state and requested the immediate assistance of your Government. With the conditions obtaining at present in my State, I have no option but to ask for help from the Indian Dominion. Naturally, they cannot send the help asked for by me without my state
acceding the Dominion of India. I have accordingly decided to do so, and attach the Instruments of Accession for acceptance by your Government. The other alternative is to leave my State and people to free booters. On this basis no civilized government can existed or be maintained. This alternative I will never allow to happen so long as I am the ruler of the State and I have life to defend my country. I may also inform Your Excellency’s Government that it is my intention at once to set up an Interim Government and to ask Sheikh Abdullah to carry the responsibilities in the emergency with my Prime Minister. If my State is to be saved, immediate assistance must be available at Srinagar. Mr. V.P. Menon is fully aware of the gravity of the situation and will explain it to you, if further explanation is needed.45

In the meantime, Lord Mountbatten replied to Maharaja Hari Singh through a letter, which reads:

My dear Maharaja Sahib, Your Highness’ letter dated 26th October 1947 has been delivered to me by Mr. V.P. Menon. In the circumstances mentioned by Your Highness, my Government has decided to accept the accession of Kashmir State to the Dominion of India. In consistence with their policy that in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of people of the State. It is my Government’s wish that, as soon as law and order have been restored in Kashmir and its soil cleared of the invader, the question of the State’s accession should be settled by a reference to the people.46

On 27th October, the Government of India declared that the Hindu ruler had acceded to Indian Dominion which was also supported by the largest political party in the State, the National Conference.47 The invasion of Kashmir by the tribal raiders and the subsequent accession of the state to India became the most controversial issue and one of the bitter and unresolved disputes for the past 60 years. Clearly, there is no simple solution to the problems that exist because the issue is not only just territorial rather it became a great cause of power rivalry or power hegemony between the Indian and Pakistan in the subcontinent. Both India and Pakistan claims that Kashmir is a part of their own territory and both countries have fought three major wars and other minor wars on Kashmir. In fact, Kashmir dispute is a core of hostility and resentment between the two countries. Several times negotiations took place between the two countries but ultimately ended without constructive result. India never accepted any proposal concerning demilitarization and holding a plebiscite in
Kashmir. In this perspective Kashmir is still a most important irritant between India and Pakistan. Both Pakistan and India believe that they have a rightful claim over Kashmir and both have maintained almost antithetical positions on the circumstances which surrounded the invasion and accession.

**India’s position on Jammu and Kashmir**

India asserts that the assistance which Pakistan gave to the tribesmen, who invaded the state, was a hostile act and the involvement of the Pakistani regular army was invasion on Indian territory. India maintained that her armies were in Kashmir as a matter of right; her control of the defense, communications and external affairs of the state was as a direct consequence of the act of accession. Thus, the basic foundation constituted the legality of India’s presence in the State and her control over it is ‘by virtue of Accession of October 1947 signed by the Maharaja and the then Governor-General, Lord Mountbatten’, which the Indian Government then as now considered is legal and real. At the core of Indian position on Kashmir is New Delhi’s claim that the decision of the Maharaja Hari Singh to accede to the Indian Union, regardless of its circumstances, is “final and legal and it cannot be disputed”. From an Indian perspective, the plebiscite, to which Nehru had agreed, would be to confirm the accession which was, in all respects, already complete. India further maintains that the UN Resolutions calling for the will of the people to be ascertained are no longer tenable.

**Pakistan’s stand on Jammu and Kashmir**

Historically, the Government of Pakistan has maintained that the state of Jammu and Kashmir has been a disputed territory. Pakistan stand on the state is based on the contention that the accession of the state of Jammu and Kashmir to India was illegal. Pakistan claims that the Maharaja of Jammu and Kashmir had no authority to execute an Instrument of Accession on 26 October 1947. The Azad Movement was indigenous and spontaneous, as a result of repression and misrule by the Maharaja’s government. The tribal invasion was likewise spontaneous and arose as a result of reports of atrocities and cruelties perpetrated on the Muslims of Kashmir and East Punjab. The people had successfully revolted, had overthrown his government and had compelled him to flee from Srinagar. The act of accession was brought about by violence and fraud and as such it was invalid from the very beginning. It is in this
context that on 4 November 1951, Liaquat Ali Khan, the then Prime Minister of Pakistani told the nation that, “the accession of Kashmir to India is a fraud, perpetuated on the people of Kashmir by its cowardly ruler with the aggressive help of the Indian government”. In addition, Pakistan also claims and accuse that the Maharaja’s offer of accession was accepted by the Governor-General of India, Lord Mountbatten, on the condition that as soon as law and order had been restored, the question of accession of the state would be decided by a reference to the people but India is violating the commitment to hold a Plebiscite on its future.

Third Party’s Mediation and Role of United Nations in Kashmir Dispute

British government’s particularly Lord Mountbatten’s belief that the third party viz The United Nations would be able to perform practical role in resolving the Kashmir dispute made it one of the first major disputes brought to the United Nations. However, it is necessary to mention here that the UN resolutions regarding the Kashmir issue are not self-enforceable. In other words, the resolutions are recommendatory in nature and can be enforced only if the parties to the dispute, viz. India and Pakistan, consent to their application. The issue of Kashmir was first taken by India in the United Nations Security Council on January 1, 1948 in which they filed a complaint against Pakistan under Article 35 (Chapter VI) of the UN Charter. Under the Article 35 (Chapter VI), Pakistan was accused of aiding the tribal infiltration in the areas of Kashmir but two weeks later Pakistan denied the charges and accused India of annexing Kashmir and destabilizing Pakistan in its infancy.

After hearing from both Indian and Pakistani representatives, the Security Council opened the debate on the Kashmir issue first time on 7 January, 1948 at Lake Success, New York. To stop the fighting, the UN Security Council passed its first resolution (Resolution 38) on Kashmir conflict on 17 January 1948, calling India and Pakistan (in order to exercise restraint and ease tensions) to ceasefire and refrain from aggravating the situation. The Resolution stated: “Having heard statements on the situation in Kashmir, from the representatives of the Governments of India and Pakistan…” and have concluded that the basis of the complaint was affirmed and that the situation was the result of action by the armed forces and Government of Pakistan. However, Pakistan raised many legalistic and ancillary issues of their base in the matter of their involvement in Kashmir’s invasion, including one of its accessions to
India.\textsuperscript{55} Three days later, on 20 January 1948, the Security Council passed another resolution (Resolution 39), creating the United Nations Commission for Indian and Pakistan (UNCIP) to investigate the dispute and mediate between the two countries led by Britain and the United States of America.\textsuperscript{56}

The UN Security Council passed another resolution (Resolution 47) on 21 April 1948, which enlarged the membership of the UNCIP from 3 to 5. It called the end of hostilities between India and Pakistan, withdrawal of all Pakistani troops and tribesmen and bulk of Indian troops, allowing return of refugees, release of political prisoners and holding of UN supervised plebiscite in the princely state of Jammu and Kashmir to determine the aspirations of her people. The plebiscite was to be held by UN appointed plebiscite administrator. The UN Security Council passed another resolution on 3 June 1948, which reaffirmed the previous resolutions and asked the UNCIP to proceed to the “disputed areas” to carry out its mission as stated under Resolution 47 of 21 April 1948.\textsuperscript{57}

In nutshell, during the course of its engagement with the Kashmir conflict, the United Nations spanning 23 years between 1948-1971 and passed in different cases a number of resolutions (23 resolutions) which were aimed at mediation and the resolution of the conflict. However, among these Resolutions, there are only four Resolutions passed by the United Nations Security Council which are noteworthy here –

1. 21 April 1948
2. 13 August 1948
3. 5 January 1948 and
4. 2 December 1957.

In all these four resolutions the Security Council’s conclusion was that the question of accession of the state of Jammu and Kashmir to India or Pakistan will be decided through the democratic method of a free and impartial plebiscite and out of all the resolutions, the resolution of 13 August, 1948 was very important. It had three parts:

The United Nations was aware of India’s statement to seek the will of the people of Jammu and Kashmir to settle the matter of accession, after the state had been cleared of all invading forces and after the normalization of situation and restoration of peace and order in the state. It also noted Pakistan’s support for a plebiscite in Kashmir. It
is, in this light, that the Resolution of August 13, 1948, must be read, while quoting the relevant extracts.

Part I of the Resolution provided for ceasefire, non-augmentation of the military potential on either India or Pakistan and maintenance of a peaceful atmosphere conducive to further negotiations. Under Part II of the resolution after (i) the tribesmen and Pakistani nationals had withdrawn, thereby terminating the situation represented in the Indian complaint to the United Nations and (ii) the Pakistani forces were being withdrawn, the Government of India was to begin withdraw the bulk of its forces. Part III of the resolution states that “both the Governments of India and Pakistan reaffirm their wish that the future status of the state of Jammu and Kashmir shall be determined in accordance with the wishes of the people in a peaceful manner. It seems that the Part III of the resolution could come into operation only after Part I and II had been fully implemented. It has been India’s view that Pakistan continued to ignore Part I and Part II of the resolution (which was to withdraw its forces from the occupied part of Kashmir) and concentrated on Part III in the classic manner of putting the cart before the horse. Pakistan on contrary responded that India should first demilitarize the region. This is a result that the plebiscite was not held in Jammu and Kashmir and is still pending from last seventy years. It is very irony to say therefore that Kashmir Issue is still continue between these two countries and needs a complete and permanent solution.\(^5^8\)

**Special Status of Jammu and Kashmir under Article 370 of the Indian Constitution**

After the execution of Instrument of Accession on 26\(^{th}\) October, 1947, and commencement of the Constitution, Article 370 of the Indian Constitution came into being which governs the relationship between the Union of India and the State of Jammu and Kashmir. The Jammu and Kashmir State enjoys very special status and unique position as compared to other states in India in regard to its relations with the Centre Government and to its internal administration. This unique position has been given to the State under this Article 370 of the Indian Constitution which is mentioned in Part XXI under the heading of **Temporary, Transitional and Special Provisions**. In the original draft of the constitution which was prepared by the Drafting Committee headed by Dr. B.R. Ambedkar, this Article was not there. It was added
later on in the Draft Constitution of India under Article 306-A as a result of an agreement between the leaders of the state and the government of India.\textsuperscript{59}

\textbf{Genesis and Dilemma of Article 370 of the Indian Constitution}

The accession of the state of Jammu and Kashmir to India imposed an obligation on the dominion of India to defend the State. With the accession of the state of Jammu and Kashmir to India on 26\textsuperscript{th} October, 1947, the state had acceded in respect of only three subjects over which the Government of India has jurisdiction to make laws, these are – Defence, Communications and External Affairs.\textsuperscript{60} While all other 564 Princely States decided to surrender their autonomy and accepted all the terms of the Indian Constitution in complete sense. However, the state of Jammu and Kashmir decided to retain its autonomy and kept the doors open for further integration if and when the Union and the state considered it fit according to circumstances.\textsuperscript{61} As a result, even after execution of Instrument of Accession, the Government of Jammu and Kashmir continued to be governed by the old Jammu and Kashmir Constitution Act, 1939 and did not accept the constitution of India as a future constitution for the State.\textsuperscript{62} As mentioned in Clause 7 of the Instrument of Accession:

\begin{quote}
Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future Constitution.\textsuperscript{63}
\end{quote}

Even internal sovereignty of the state of Jammu and Kashmir remained with the ruler of the state; this too was provided by virtue of Clause 8 of the Instrument of Accession:

\begin{quote}
Nothing in this Instrument effects the continuance of my sovereignty in and over this State, or save as provided by or under this Instrument, the exercise of any power, authority and right now enjoyed by me as a Ruler of this State or the validity of any law at present in force in this State.\textsuperscript{64}
\end{quote}

While discussions and negotiations between the state ministry and the ministers of India were in progress regarding the relation of Indian Government and the state of Jammu and Kashmir and for this purpose Delhi Conference was held on 15 and 16 May 1949. However, there were many points of disagreement between these two which led to the end of Conference. Shortly after the end of Delhi Conference, Pandit
Nehru visited Srinagar, where he had further discussion with Sheikh Mohammad Abdullah on the position of state in the Indian federal system. Nehru assured Sheikh Abdullah that in the division of powers between the Union of India and the State of Jammu and Kashmir, the state would be ensured complete autonomy and the Union Government would exercise authority only over those subjects which are mentioned in the Instrument of Accession i.e. defence, communications and foreign affairs. After many discussions and meetings, the National Conference leaders appeared with calm satisfaction but they bided time to Nehru and waited for Hari Singh to leave the State, who was the Rajpramukh of the State. After this settlement reached with the National Conference leaders, Nehru immediately informed Patel to explain Hari Singh about it. Nehru wrote to Patel:

I hope you will explain to the Maharaja as well as the Yuvraj, the agreement arrived, at between us and Sheikh Abdullah and his colleagues. The written agreement rightly does not say anything about the Maharaja’s going out of the State. But we have naturally to abide by it.”

On 9 June 1949, Maharaja Hari Singh announced by a proclamation his decision to leave the state and appoint his son, Yuvraj Karan Singh, the Regent of the State. He, therefore, issued another proclamation of 20th June, 1949:

Now, therefore, I hereby declare that all powers and functions whether legislative, executive or judicial exercised by me in relation to the State and its government including in particular my right and prerogative of making laws, of issuing orders and ordinances, remitting or commuting sentences or pardoning of offenders, shall during the period of my absence from the State be exercisable by Yuvraj Karan Singh Bahadur.

**Article 306-A: Article 370 was Article 306-A of the draft Constitution of India**

Soon after Hari Singh left the state, the leaders of National Conference, who were now in complete control of the government of the state, evolved several ‘basic principles’ on which they claimed that the future relation between the Union of India and the state could be based. The Drafting Committee of the Constituent Assembly of India drew up a separate set of constitutional provisions for the state of Jammu and Kashmir and these basic principles were embodied in the draft Article 306-A (present Article 370) of the constitution of India. Article 306-A was a Bill for a special constitutional provision for the state of Jammu and Kashmir prepared by Pandit Nehru
in consultation with Sheikh Abdullah. It was moved in Constituent Assembly of India by Gopalaswamy Ayyangar, the minister without portfolio in Nehru’s government. However, Sardar Patel was not taken into confidence while drafting this Article.67

After finalizing the draft, Pandit Nehru had gone abroad on tour and instructing Gopalaswamy Ayyangar to see and look after the Government affairs as well as the draft through the Constituent Assembly. With this factual background, Ayyangar put the draft before the party meeting and there were wide opposition and protests coming from the many party members. The situation may be simply described by saying that both Gopalaswamy Ayyangar and his proposal were torn to pieces by the party. In the words of V. Shankar (Private Secretary to the Ministers of Home of Affairs at that time):

In the Congress Party, there was a strong body of opinion which looked doubtfully at any suggestion of discrimination between Jammu and Kashmir State and other States as members of the future Indian Union and was not ready to go beyond certain limits in providing for the special position of Jammu and Kashmir. Sardar was himself fully in accord with this opinion, but due to his usual policy of not standing in the way of Pandit Nehru and Gopalaswamy Ayyangar, who sorted out problems in background. In fact, he had not taken any part in framing the draft when Gopalaswamy announced these to the Congress party.68

In September 1949, the draft provisions were sent to the National Conference leaders of the State for their considerations but this draft was very different from the items mentioned in the previous discussions between Sheikh Abdullah and Nehru. As a result, Sheikh Abdullah acted very passionately and without any delay he communicated Gopalaswamy Ayyangar on 12 October, 1949, that the Working Committee of the Conference did not agree the constitutional provisions incorporated in draft Article 306-A. He informed him that the Working Committee has disapproved the application of the constitution of India to the state except in respect of those provisions which corresponded to the terms of the Instrument of Accession. Furthermore, the Working Committee expressed fears, that the application of the provisions of the constitution of India, pertaining to the Indian Citizenship, the Fundamental Rights and the Directive Principles of the State Policy would prejudice the domiciliary State-Subject Rules. Sheikh Abdullah then sent another draft to Gopalaswamy Ayyangar, which fixed the application of only such provisions of the
constitution of India to the State, as similar to the provisions of the Instrument of Accession.69

After receiving another draft, Ayyanger felt upset and distressed because he did not find any adequate excuse for these changes. He found himself to be the lone defender, with Maulana Azad, a weak supporter. Shankar further records: “Ayyangar felt that only Sardar’s intervention could save the situation and therefore he appealed him for help. Sardar listened to him and came forward”. The intervention by the Sardar Patel, in the party meeting, softened the stand of the aggressive members and cooled them. In fact, Sardar Patel intervened to plead because of international complications and to work out final future relationship of the state with the rest of India. Sheikh Abdullah on whose advice, Nehru finalized the draft, wanted to take out something more for himself but on the pretext of the people of Jammu and Kashmir. Ayyangar altered the draft to suit Sheikh Abdullah and reported this change to the Sardar. The Sardar shot down the changes, and wrote to Ayyangar:

I do not at all like any change after our party has approved of the whole arrangement in the presence of the Sheikh Abdullah himself. Whenever Sheikh Abdullah wants to back out, he always confront us with his duty to the people of Jammu and Kashmir. Of course, he owes no duty to India, or to the Indian Government, or even on a personal basis to you and the Prime Minister who has gone all out to accommodate him. In these circumstances, the question of my approval does not arise.70

It may perhaps be the only incident in the history of Indian democracy that the measure proposed by the ruling party came to be bitterly opposed tooth and nail by its members in the party meeting. However, it was ultimately accepted by the Constituent Assembly without any word in the opposition. The credit must go to the Sardar Patel for this endeavor, who knowing fully well and genuinely acknowledged that though the measure would breed divisive and disruptive tendencies in the long run which are bad for the country. There was no better alternative available at that particular moment therefore accepted the measure for the time being for the purpose of integrating the state of Jammu and Kashmir with the rest of India.71 These special provisions of draft Article 306-A were finally embodied in Article 370 of the Constitution of India. Thus, the draft Article 306-A was renumbered Article 370, at the revision stage.72
Autonomy of the State under Article 370 of the Indian Constitution

The contents of Article 306-A was discussed in the Constituent Assembly of India for just two days and was approved on 17th October, 1949. It was done just 40 days before the draft of the Constitution was given a final touch, by the signature of its President Dr. Rajendra Prasad on November 26, 1949. Some 16 Articles of the constitution of India came into force at once and the remaining provisions of this constitution on the 26th day of January, 1950, which is technically called under its Article 394 as the day of the commencement of this Constitution. But Article 370 (Draft Article 306-A) became operative only on 17th November 1952, when in exercise of the powers conferred by this Article, the President of India on the recommendation of the Constituent Assembly of the State of Jammu and Kashmir, declared it so.73

Temporary Provisions with the respect to the State of Jammu and Kashmir Status:

When Article 370 was incorporated in the Constitution of India, it was included under Part XXI of the Constitution of India, which was originally labeled as ‘Temporary and Transitional Provisions’ and Article 370 itself was dubbed as ‘Temporary provisions with respect to the state of Jammu and Kashmir’. By the Constitution (Thirteenth Amendment) Act 1962, the title of Part XXI of the constitution was changed to ‘Temporary, Transitional and Special Provisions’, the word ‘Special’ being the significant addition to the previous title. Subsequent, constitutional amendments were enacted and added as ‘Special Provisions’ of one kind or other for various States of the Indian Union Part XXI of the Constitution. However, Article 370 has continued under the ‘Temporary’ Status.74 The word ‘temporary’ was included in the title to Article 370 because the State of Jammu and Kashmir had not notified its decision by that time, as the Constituent Assembly in the State which had special power to finalise it, was not constituted at that time.75

Text of Article 370 and Its Content Analysis

In view of the fact that Article 370 is the sole repository of the constitutional morality which is governing the relationship of India with the state of Jammu Kashmir. It
would be therefore important to mention the ideals and provisions embodied in it. Article 370 of the Constitution of India reads as under:

1. Notwithstanding anything in this Constitution:-

   (a) The provisions of Article shall not apply in relation to the State of Jammu and Kashmir;

   (b) The power of Parliament to make laws for the said State shall be limited to:

   (i) Those matters in the Union List and the Current List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

   (ii) Such other matters in the said Lists as, with the concurrence of the Government of the State, the President may order by specify.

Explanation:- For the purposes of this article, the government of the state means the person for the time being recognized by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in official under the Maharaja’s proclamation dated the fifth Day of March 1948.76

   (c) The provisions of Article 1 and of this Article shall apply in relation to that State;

   (d) Such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:
Provided further that no such order which relates to matters other than those referred in the last preceding provision shall be issued except with the concurrent of that Government.\textsuperscript{77}

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in second provision to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the president issues such a notification.\textsuperscript{78}

\textbf{The Prelude:}

Beginning with the words ‘Notwithstanding anything in this Constitution’ before the hard text, the preface indicates that Article 370 applies without having to depend on any other provision of the Constitution of India for its enforcement. This prelude has not been often used in the rest of the Indian Constitution.\textsuperscript{79} The sum and substances of Article 370 of the Indian Constitution are like this. There are three main clauses and a few sub-clauses in this Article.

\textbf{Sub-clause (a) of Clause (1) of Article 370:}

Article 370 (1) (a) says that the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir. It excluded the application of Article 238 of the Constitution of India dealing with the States in Part B of its First Schedule in relation to the State of Jammu and Kashmir. In Part B of the First Schedule were enlisted the erstwhile princely States including Jammu and Kashmir, which had not been merged with any province. These States were eight in number: 1, Hyderabad 2, Jammu and Kashmir 3, Madhya Bharat 4, Mysore 5, Patiala and East Punjab States Union (PEPSU) 6, Rajasthan 7, Saurashtra, and 8, Travancore-Cochin. However, while all
the princely States of Part B had accepted the Constitution of India, Jammu & Kashmir had reserved the right to frame its own Constitution. Since Article 238 was meant to govern the constitutional relationship between the Union and the princely States, it could not be applied to Jammu & Kashmir State. Furthermore, Article 238 was repealed by the Seventh Constitutional Amendment Act, 1956, so this provision of Article 370 has since fallen out of use.  

Sub-clause (b) of Clause (1) of Article 370:

The essence of clauses (1)(b)(i) and (1)(b)(ii) combined is that laws of Parliament on matters in the Union List and the Concurrent List can be made for Jammu and Kashmir State only after the ‘consultation’ with the State government or after the ‘concurrence’ of the State government depending on the subject matter of the law. Under (1) (b) (i), Parliamentary laws on the subjects mentioned in the two said Lists conforming to Defence, Communications and External Affairs, the matters approved to India by the Instrument of Accession, need ‘consultation’ with the State Government; under (1)(b)(ii), Parliament’s laws on all other subjects will require the State’s “concurrence” before they are applied to the State.

This Clause of Article limits the powers of Parliament to make laws for the State of Jammu and Kashmir. The power of Indian Parliament to make laws for this State shall be limited to only three subjects which were specified in the Instrument of Accession governing the accession of all the states including the State of Jammu and Kashmir to the Dominion of India. These subjects were International Affairs, Defence and Communications but in respect of other matters mentioned in the Union List and Concurrent List only in consultation with the Government of the state. So, briefly, while the Union Parliament has free powers to make laws for all the States in respect of items included in the Union and Concurrent Lists of the Constitution, it can do so with regard to Jammu and Kashmir only with the consent of the State Government. Thus, the provision of Article 370 clearly and explicitly prescribes the orbit of the power of the Parliament to make laws for the said state and also simultaneously lays down the procedure for enlarging the sphere of legislative competence of the Parliament vis-à-vis that state. It means a plain reading of the above clause (1)(b)(ii) of Article 370 suggests that excluding those items conforming to Defence, External Affairs and Communications, Parliamentary laws on the subjects totaling 151 items
on the two said Lists can be made applicable to Jammu and Kashmir provided concurrence of that state’s government is secured. It means, this one single fact, apart from so many others, decidedly puts the Jammu and Kashmir State on special footing.\textsuperscript{83}

\textbf{Sub-clause (c) of Clause 1}

It declares that the provisions of Article 1 and of this Article 370 shall apply in relation to that State of their own force. Article 1 of the Indian Constitution defines the territory of India which consists of all the territories of States and the Union Territories specified in the First Schedule. The state of Jammu and Kashmir falls at serial number 15 of the Schedule.\textsuperscript{84}

\textbf{Sub-clause (d) of Clause 1:}

It empowers the President of India in consultation with the Government of the State to impose Constitutional Order in the State for the application of other Articles of the Consultation. Clause (1)(d) is also based on the same principle of clauses (1)(b)(i) and (1)(b)(ii) pertaining to application of Parliamentary laws to that State of Jammu and Kashmir. Application to Jammu and Kashmir State of the Indian Constitution’s provision pertaining to Defence, External Affairs and Communications require ‘consultation’ with the state government and all other provisions require that Government’s ‘concurrence’ of the state government.\textsuperscript{85}

\textbf{Clause 2 of Article 370:}

It authorizes the President of India with the concurrences of the government of the state of Jammu and Kashmir to convene a separate Constituent Assembly for the framing of the separate constitution of the state. With this object in view, people of the state elected a sovereign Constituent Assembly which met for the first time on October 31, 1951, (The details of this provision are discussed in a separate chapter of this thesis). The State Constituent Assembly on August 19, 1952 ratified not only the accession of the State to India but also the provisions (Article 370) in respect of its special Status in the Indian Union.\textsuperscript{86}
**Summing up:**

The various contents of Article 370 may have merits or demerits as per one’s perspective but there’s no doubt that its text as published by the Government of India needs a spring cleaning so as to update it to the actual contemporary status. However, no one but the Bharatiya Janta Party (BJP) along with Rashtriya Sanghat Sabha (RSS) at present is prepared to even attempt the most minimum about Article 370 of the Indian Constitution. Such wave and fear is generated by the ‘special position’ that Article 370 of the Indian Constitution occupies in the country’s spirit.\(^{87}\)

**Abrogation and Repealing of Article 370 of the Indian Constitution**

During the debates in the Constituent Assembly of India in 1949, the Article 370 of Indian Constitution was attacked by many and it divided the Assembly members into two groups. Even today, one group opposes its inclusion in the Constitution of India and advocates its complete abolition, while another group not only supports its introduction in the Constitution of India but also opposes its repealing. The argument forwarded by the supporters group of people is that the unique conditions of accession demanded special treatment to the state. Hence, Article 370 of the Indian Constitution would help to integrate the state with the rest of India. For them, it is a bridge or a bond which joins the state with the rest of India.\(^{88}\) The opponent group of people argues that Indian leadership had mishandled the political and constitutional relationship with the state of Jammu and Kashmir, wrongly granted the state a special status and shortsightedly introduced Article 370 in the Indian Constitution. For them, the drawbacks and pitfall in this Article are – 1, it defeats the cause of national integration; 2, it has given an opportunity to the neighboring country like, Pakistan to make a false propaganda that there is no complete merger of the state with India; 3, it created asymmetrical federal tendency in Indian Constitution as other states like Assam, Punjab and Tamil Nadu claim similarly favoured status for them; 4, finally, the secessionist elements have been able to raise their heads under the label of Article 370 of the Indian Constitution as it represents unjustified ‘discrimination’.\(^{89}\) Thus, these critics tend to believe that Article 370 of the Indian Constitution is the source of all troubles and problems not only in whole India but also in the state of Jammu and Kashmir. For them, it sowed the seeds of disunity and separation and strengthening autonomy and other privileges there in Kashmir. The solution therefore completely
lies at the abrogation of Article 370 of the Indian Constitution. However in actual practice, the history of Kashmir's accession to India, and the political and emotional ferment that preceded and accompanied it, is distinct and not comparable with other states. The Article 370 of the Indian Constitution is the result of a freely negotiated contract between the people and constitutional authority of the state of Jammu and Kashmir, and the people and constitutional authority of India. It is thus a basic feature of the constitutional scheme that has evolved for the future governance of the state and is beyond any power of modification. Thus, no repeal or even amendment of this disputed Article is possible.

The right and wrong of this debate is very difficult to determine, let us examine the views of some authorities on this controversial matter. Jagmohan, who had been the Governor of the State of Jammu and Kashmir for two terms and has also produced a voluminous book on the subject says that, “The very heading of Part XXI of the Constitution reads: “Temporary, Transitional and Special Provisions.” Thus, for him at the time when Article 370 was framed, the understanding was that it would stay for a short time and cover the transitional period. Since the State’s Constituent Assembly no longer exists, the question of its consent under Article 370 does not arise. Consent of a dead body or a non-existent body has no meaning. The Constitution can, therefore, be amended under Article 368 by the Union Parliament which represents the people of the state also. Therefore, the aforesaid provision requiring the recommendation of the Constituent Assembly could be deleted. After this deletion has been carried out, the President can make the necessary declaration and Article 370 would stand abrogated.

On the other hand, Ram Jethmalani, ex-Union Law Minister of India asserts that “Article 370 of the Indian constitution cannot be removed or abrogated as it was written within the constitution that no amendment would apply to this article, unless by the approval of the Constituent Assembly. Since the Constituent Assembly has ceased to exist, then it required the consent of the Jammu and Kashmir government. Therefore, there is no way that the Article 370 can be repealed unless there is a coup”. Ram Jethmalani also clarified that the repeal of Article 370 is not possible by any constitutional method. It can only be done by a constitutional coup, which even our Supreme Court will declare ultra vires and void. He elaborated it in a following
manner that Article 370 provides for its own repeal not by legislation by Parliament of India, but by Presidential action under Clause 3 of the Article, which reads as under:

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

“Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification”.

No such recommendation has been obtained and none is feasible now or in the foreseeable future. 94

Another authority on the subject Mohan Kishen Teng, in his “Kashmir Article 370” states, “The power to amend the provisions of Article 370 of the Indian Constitution, were vested with the Parliament of India, which was not subject to any limitation imposed by Article 370 or any other provision of the Constitution of India. There is nothing which stood in the way of the Parliament to repeal the limitation as well as abrogate or amend the provisions of the Article 370 of the Indian Constitution.” 95 On this argument, an eminent Jurist, a leading politician and authoritarian on Kashmir autonomy – A.G. Noorani counter argued that Article 370 of the Indian Constitution cannot be abrogated or amended by recourse to the amending provisions of the Constitution of India which apply to all the other States; namely, Article 368. According to him, in relation to the state of Jammu and Kashmir, Article 368 has a provision which says that no Constitutional Amendment ‘shall have effect in relation to the state of Jammu and Kashmir’ unless applied by Order of the President under Article 370 of the Indian Constitution. That requires the concurrence of the state’s government and ratification by its Constituent Assembly. 96

Among the Indian national political parties, only the Bharatiya Janata Party (BJP) along with Rashtriya Sanghat Sabha (RSS) takes stand very clearly to put an end to this Article of the Indian Constitution. They have given the following grounds, that “the makers of the Constitution of India intended that the special status was granted to Jammu and Kashmir, only as a temporary measure, and that is why Article 370 was included in Part XXI under the label – ‘Temporary, Transitional and Special
Provisions’ and Clause (3) was appended to Article 370.” However, Sheikh Mohammad Abdullah had already made it clear in the state Constituent Assembly on August 11, 1952 that:

The fact that Article 370 has been mentioned as temporary provision in the Constitution does not mean that it is capable of being abrogated, modified or replaced unilaterally. In actual fact, the temporary nature of this Article arises merely from the fact that the power to finalise the constitutional relationship between the State and the Union has been specifically vested in the Jammu and Kashmir Constituent Assembly.” This power ceases to be one of imparting finality if, even after the Assembly’s dispersal, modifications to the Constitution and amusement of power by the Centre can take place with the concurrence of another executive body, the State Government.

On 11 October, 2015, in a landmark judgment, Jammu and Kashmir High Court has ruled that Article 370 of the Indian Constitution granting special status to the state of Jammu and Kashmir State has assumed place of permanence in the constitution and is therefore beyond of amendment, repeal or abrogation. The High Court in the presence of a division bench of Justice Hasnain Massodi and Justice Janak Raj Kotwal ruled in a 60-page judgment that:

Article 370 though titled as “Temporary Provision” and Included in Para XXI titled “Temporary, Transitional and Special Provisions” has assumed place of permanence in the Constitution. It is beyond amendment, repeal or abrogation and only Jammu and Kashmir Constituent Assembly was empowered to recommend abrogation of Article 370 of the Indian Constitution. The Constituent Assembly did not make such recommendation before its dissolution on January 25th, 1957. Resultantly, Article 370, notwithstanding its title showing it a “temporary provision,” is a permanent provision of the Constitution. The High Court also stated that the state of Jammu and Kashmir, while acceding to Dominion of India, retained limited sovereignty and did not merge with Dominion of India like other Princely States. Therefore, the State continues to enjoy special status to the extent of limited sovereignty retained by it.

In addition, Article 370 was authoritatively explained by its mover in the Constituent Assembly, Mr. N. Gopalaswamy Ayyanger, contemporaneously and in 1952 by the President of the Assembly, who became the first President of India, Dr. Rajendra Prasad. Mr. Ayyanger said in the Constituent Assembly on October 17, 1949, we have
also agreed that the will of the people through the Instrument of the Constituent Assembly will determine the constitution of the state as well as the sphere of Union jurisdiction over the state. In fact, several clauses of the Article provides for the concurrence of the government of Jammu and Kashmir State. Now, these relate particularly to matters which are not mentioned in the Instrument of Accession and it is one of our commitments to the people and government of Kashmir that:

No such additions should be made except with the consent of the Constituent Assembly which may be called in the State for the purpose of framing its Constitution. In other words, what we are committed to is that these additions are matters for the determination of the Constituent Assembly of the State.\textsuperscript{101}

In the light of divergent opinions on the matter, it is difficult to arrive at a definite conclusion. It is a known fact that the Article 370 of the Indian Constitution came into being as a result of the freely negotiated contract between the people and constitutional authority of the state of Jammu and Kashmir, and the people and constitutional authority of India. However, some opinions might be subjective in character and political in tone. Since the matter is basically a constitutional one it would be better to seek the advice of the judiciary in this matter as Judiciary is the final interpreter of our Constitution. Recently, the days after the Jammu and Kashmir High Court observed that Article 370 of the Indian Constitution is a “permanent” provision of the Constitution, the Supreme Court, which is at apex Court in the country on 25 December, 2015 ruled out that only Parliament can take a call on scrapping Article 370 that accords special autonomous status to Jammu and Kashmir and it immediately refused to entertain a PIL that wanted Article 370 removed from the Constitution.\textsuperscript{102}

From the above discussion, it has been proved that the Article 370 of the Indian Constitution is beyond of abolition and repealing. However, if we examine the working of the provision of special status in respect of the state of Jammu and Kashmir under Article 370 of the Indian Constitution, we find that during the first forty years of its working it has never stood in the way of smooth functioning for a united India. It exempted the state from the provisions of the Indian Constitution provided for the internal governance of the state. It not only allowed the state having its own separate state constitution as a federating unit. Rather, it appears as a bridge and a bond of relationship between the Union of India and the state of Jammu and
Kashmir. However, Indian Government has been quite successful in achieving the step by step integration of the state with the rest of India. Through this Article from last sixty years, the first major step in this direction was taken by means of a Presidential Order issued in 1954, and this Order has been amended many times (which has been discussed in next chapter). The Constitution Order-1954 as a result made the process of erosion of autonomy so rapid and on such a massive scale that entire Article 370 of the Constitution of India which was supposed to guarantee and preserve the special status of the state in the Indian Union was drained and emptied of its substantive content (which is discussed in next chapter).

The Constitutional Development of the State of Jammu and Kashmir

The Constitutional reforms in the state of Jammu and Kashmir were started in early 1930’s due to the internal disturbances of the state. In order to get rid off these disturbances, the Maharaja appointed the Constitutional Reforms Commission known as “Glancy Commission” on 12 November, 1931, under the chairmanship of Bertrand J. Glancy. After the implementation of its recommendations, the Constitutional Act of 1934 was promulgated by the Maharaja in April 1934. The Constitutional Act-1934 for the first time envisaged the representative institution in the State which comprised of: (i) The Legislative Assembly whose membership was fixed at seventy five with a fixed tenure for three years, and (ii) the Council of Ministers who were appointed by the Maharaja and responsible to him. On February 11, 1939, His Highness the Maharaja Bahadur ordered the repeal of the Constitutional Act of 1934 for further Constitutional advancement on September 7, 1939 and promulgated a new Constitutional Act for the governance of the State known as Constitutional Act-1939, which has an outstanding importance in the history of the State.

The new Constitutional Act-1939 consists of 78 Sections and 5 Schedules and the provisions were merely aimed to pacify the rising temper of the people in the state and to accommodate their never-ending demand for self-government. The broad principles of the Constitutional Act-1939 did not differ substantially from the previous Act-1934 except that the law relating to the High Court was incorporated in the Act and the number of elected members in the Praja Sabha was increased to forty. As a matter of fact, the new enactment did not envisage any devolution of authority - the inherent powers were retained by the Maharaja. It was the Constitutional Act of
1939 which remains as the basis of the state administration even after the execution of Instrument of Accession of State to India in October 1947. After the enforcement of the Indian Constitution on 26th January 1950, the Government of Jammu and Kashmir did not accept the Constitution of India as Constitution for the State. This was because the Government of India had committed that the people of Kashmir should frame their own Constitution. It also held that the Government of India could not force the State to accept the Constitution for that would violate the agreed terms and conclusions of association of Kashmir with India. Later in 1950, the Article 370 of the Indian Constitution came into being to govern the relationship of the state with the Indian Government.


It was in 1950’s that a need was felt to provide an accommodation to the state of Jammu and Kashmir in the newly formed Union so that the people of Jammu and Kashmir could decide their own future and fulfill their long awaited desire and legitimate aspirations. The first step towards the application of provisions of the Indian Constitution to the state of Jammu and Kashmir took place in 1950. It is clause (1)(d) of Article 370 that authorises the President of India to issue orders exempting Jammu and Kashmir State from certain provisions of the Constitution of India or applying them to that State in a modified form and each such order is designated as ‘Constitution (Application to Jammu and Kashmir) Amendment Order’. The first such Constitutional Order was issued on 26th January 1950, the day on which Article 370 and the rest of the Indian Constitution came into full effect. This Order governed the constitutional relationship between the state of Jammu and Kashmir and the Union of India. Its essence was that it extended the powers of the Union Parliament with regard to that state beyond the terms of the Instrument of Accession.

The sections of the Indian Constitution which the Order of 1950 extended (with some exceptions and modifications) to the state of Jammu and Kashmir were Part V (dealing with the Union Executive), Part XI (dealing with Legislative Relations between the Union and the States), Part XII (dealing with Finance), Part XV (dealing with Elections), Part XVI (contains special provisions regarding Anglo-Indians, Scheduled Castes, Scheduled Tribes and Scheduled Areas), Part XVIII (dealing with Official Language), Part XIX (contains the Miscellaneous provisions of the Indian
Constitution), Part XX (contains only one Article 368, which sets out the procedure for amending the Constitution) and Part XXI (dealing with Temporary and Transitional provisions). The provisions of Part XXII dealing with ‘Short Title’ in Article 393; the commencement of the Constitution in Article 394 and Article 395 repealing the Indian Independence Act, 1947 and the Government of India Act, 1935, were made applicable to the State. Out of eight Schedules in the Constitution of India only five were made applicable to the State. These were: Schedule I which named and determined Part A, Part B and Part C States and their territories; Schedule II, which prescribed the emoluments of high officials; Schedule III, which contains Oaths of offices; Schedule IV, which deals with the representation in the Council of States and Schedule VIII, which recognized official languages.

The parts of the Constitution of India which did not apply to the State included Part III, deals with the “Fundamental Rights”. Part IV of the Indian Constitution which defines the Directive Principles of State Policy and Part XIV of the Indian Constitution deals with the Civil Services under the Union and the states. By virtue of Article 238, this declares that the reference to states in Part XIV shall be construed as not including the state of Jammu and Kashmir, was also not applicable to the state of Jammu and Kashmir. Part XVIII which deals with the Proclamations of Emergency, via proclamation national emergency (Article 352), the proclamation of state emergency (Article 356) and the proclamation of financial emergency (Article 360) were also not extended to the State. However, there was a complete understanding between the state government and the Government of India that if a situation arose which threatened the national integrity and security; it would request the President to issue such a proclamation also. Thus, from the above discussion of this Order, it is evident that the powers of the Union Parliament with regard to this state were extended beyond what was originally surrendered under the Instrument of Accession.

**Setting up the Constituent Assembly for the State of Jammu and Kashmir**

One of the most important provisions in the Article 370 is that a separate Constituent Assembly would be constituted for the State of Jammu and Kashmir to draft the constitution of the state. Subsequently, on 1st May, 1951, Yuvraj Karan Singh, issued a proclamation and ordered the institution of the Constituent Assembly in the state on
the basis of adult franchise by secret ballot. The first election for the State Assembly took place in September-October-1951 and its first meeting was held on October 31, 1951 and Constituent Assembly was finally inaugurated on November 5, 1951. The opening speech was delivered by Sheikh Abdullah, the leader of the National Conference Party which had swept the elections.\textsuperscript{111} He called the Assembly as a sovereign authority and called this day as “the day of destiny – a day which comes only once in the life of a nation”.\textsuperscript{112} Sheikh Abdullah then listed the main objectives and functions of the Constituent Assembly as follows:

(a) To frame a constitution for the future governance of the state of Jammu and Kashmir,

(b) To decide about the future of the Royal dynasty via, the institution of hereditary rulership shall be abolished, and

(c) To decide whether compensation should be paid to the landowners for the expropriation of the Big Landed Estates carried out in pursuance of the Land Abolition Act of 1950.\textsuperscript{113}

\textbf{Delhi Agreement of July, 1952}

The year of 1952 proved a very important year in the state’s constitutional development. The National Conference led by Sheikh Abdullah was pledged to radical programme covering a wide range of subjects such as land reforms, termination of institution of hereditary rulership in the state and that of the office of Head of the state shall be elective, etc. After long deliberations and discussions, a historical settlement was finally reached between the National Conference leaders, Sheikh Abdullah and the Indian leaders, Pt. Jawaharlal Nehru. The settlement was embodied in an agreement, which later came to be known as the ‘Delhi Agreement’ in July 24, 1952. The agreement was drawn up by the representatives of the two sides on most of the constitutional problems. It is related to the application of the provisions of the constitution of India with regard to citizenship, fundamental Rights, the jurisdiction of the Supreme Court and the division of powers between the Union and the states. An agreement was also reached with regard to the abolition of the Dogra rule, separate flag and official language of the state. It was agreed that the State government would place the terms of the agreement before the Constituent Assembly.
Subsequently, the Constituent Assembly presented the necessary recommendations to the President of India in order to effect the amendments in Article 370 of the Indian Constitution.114

The major 10 points of Delhi Agreement included the following:

1. In view of the uniform and constant stand taken up by the Jammu and Kashmir Constituent Assembly that sovereignty in all matters other than those specified in the Instrument of Accession continues to reside in the state. The Government of India agreed that, while the residuary powers of legislature vested in the Centre in respect of all states other than Jammu and Kashmir, in the case of the latter they vested in the state itself.

2. It was agreed between the two governments that in accordance with Article 5 of the Indian Constitution, persons who have their domicile in Jammu and Kashmir shall be regarded as citizens of India. However, the state legislature was given power to make laws for conferring special rights and privileges on the ‘State Subjects’ in view of the ‘State Subject Notifications of 1927 and 1932. The State Legislature was also empowered to make laws for the ‘State Subjects’ who had gone to Pakistan on account of the communal disturbances of 1947, in the event of their return to Kashmir.

3. It was agreed that the President of India will command the same respect in the state as he does in other states of India and Articles 52 to 62 of Indian Constitution related to him should be applicable to the state. It was further agreed that the President’s power to grant pardon, reprieves, remission or commute death sentence would also apply to the state.

4. There was a great deal of discussion with regard to the ‘Emergency Powers’; the Government of India under Article 352 empowers President to declare emergency in the state. The state government argued that in exercise of its powers over defence (Item 1 in the Union List), in the event of War or External Aggression, the government of India would have full authority to take steps and proclaim emergency. However, in case of internal emergency occurring on internal disturbance, the Union’s powers would extend to the state only with the concurrence of state government. It means it is averse to
the President exercising the power to proclaim a general emergency on account of internal disturbances.

5. With regard to the jurisdiction of the Supreme Court of India, it was accepted that for the time being, due to the existence of the Board of Judicial Advisors in the state, which was the highest judicial authority in the state, the Supreme Court should have only appellate jurisdiction.

6. The Union Government agreed that the state should have its own flag in addition to the Union flag. However, it was agreed by the state government that the state flag would not be a rival of the Union flag. It was also recognized that the Union flag should have the same status and position in Jammu and Kashmir as in the rest of India, but for historical reasons connected with the freedom struggle in the state, the need for continuance of the State flag was recognized.115

7. With regard to the Fundamental Rights of the Indian Constitution, some basic principles were agreed between the parties and were enunciated. It was accepted that the people of the state were to have Fundamental Rights but in view of the peculiar position in which the State was placed, the whole Chapter relating to ‘Fundamental Rights’ of the Indian Constitution could not be made applicable to the state. The Chapter on Fundamental Rights would apply to Jammu and Kashmir except those rights which (a) might come in the way of their land reforms legislation including the compulsory acquisition of property without compensation and the liquidation of the debts of the peasantry and (b) which might hamper the state’s extra precautions against infiltration, sabotage or espionage by the enemy from across the border. So that the Big Land Estates Abolition Act by which the state had abolished Zamindari and confiscated property, in excess of the ceiling of 22.75 acres, without compensation and Preventive detention laws were declared immune from the operation of Fundamental Rights. It was also conceded that the state government may continue to bar non-residents from acquiring property in Kashmir.

8. It was agreed that the hereditary rule of the Dogras would be abolished and the Head of the State would be recognized by the President of India on the
recommendations of the State Legislature and hold office for a period of five years.

9. It was agreed that the Urdu would be the official language in the state.\textsuperscript{116}

10. As regards the state’s financial integration with India including the agreement on customs it was agreed to carry on further consideration.\textsuperscript{117}

The Constitutional deadlock so created was finally sought to be resolved by these mutual negotiations between the Central and state governments. Thus, the position of the state in the Union was settled in what is popularly known as “Delhi Agreement” announced on July 24, 1952. India agreed to give a special position and status to the state of Jammu and Kashmir in the constitution whereby complete internal autonomy was assured to the State.\textsuperscript{118} On one hand this agreement spelt out the details of the autonomy of the state within the Union of India and on the other hand, it affirmed that Jammu and Kashmir as an integral part of India. At the same time it also seems that several subjects that had not been conceded to the Union of India in the Instrument of Accession were granted now.\textsuperscript{119} Sheikh Abdullah restated its terms in these words

Our government was to secure a position for the state which could be consistent with the requirement of maximum autonomy for the local organs of the State power, which are the ultimate source of authority in the State, while discharging obligations as a unit of the federation.\textsuperscript{120}

Thus, Delhi Agreement signified a mutual recognition of imperative national cohesion and of the essential interest of the state with an unhindered implementation of their programme for land reforms and of protecting the state from economic exploitation by non-resident Indians. Balraj Puri has rightly remarked that the Delhi Agreement was ‘\textit{perhaps the happiest solution of the Kashmir problem}’.\textsuperscript{121}

\textbf{Sadar-e-Riyasat or Prime Minister as the Head of State}

Immediately after the Delhi Agreement was signed, the recommendations of the Drafting Committee regarding the Dogra rule which it settled down on August 19, 1952, were accepted by the Constituent Assembly on August 21, 1952. In November, the Constitutional Act of 1939 was amended to incorporate the provisions of the resolutions passed by the State Assembly. In accordance with the Amendment Act, the institution of the hereditary monarchy was abolished and it was declared that the
Head of the State was designated as the “Sadar-I-Riyasat”. The state government was to be headed by the Sadar-e-Riyasat, who was elected by the State Legislature and confirmed by the President of India. The qualifications which were required to be fulfilled by a candidate for the election to the office of the Sadar-e-Riyasat were laid down by the constitution. No candidate could be nominated for the election unless he was a “Permanent Resident” of the state, was more than twenty-five years in age and was qualified to be elected to the Legislative Assembly. He was elected by the members of the Legislative Assembly with a fixed tenure of five years and he remained in office during the pleasure of the President of India. The salary and other emoluments of Sadar-e-Riyasat were to be charged on the Consolidated Fund of the state. The ‘Sadar-I-Riyasat’ before entered upon his office was required to make and subscribe an oath of affirmation to devote himself to the “service and well-being of the people of the State” and “to preserve, protect and defend the constitution of the state”.

The Sadar-e-Riyasat was an integral part of the State Legislature. All the executive powers of the state, which extended to all matters not transferred to the Union, were vested with the Sadar-e-Riyasat. The Sadar-e-Riyasat was to exercise these powers himself or through his officers in his name. He was empowered to appoint the Prime Minister of the state and on his advice the other members of the Council of Ministers. He was also empowered to grant pardon and reprieve, and suspend, remit and commute sentences awarded to persons convicted of offences against any law relating to matters over which the executive powers of the state extended. On November 12, 1952, the Constituent Assembly in Srinagar formally adopted an amendment to the constitution replacing the Maharaja’s rulership by that of an elected “Head of the State”, Sadar-e-Riyasat. Two days later, the twenty-one-year old Yuvraj, the Prince-Regent, was elected to the office. His election was formally recognized by the President of India and incidentally it brought to an end the hereditary rule of the Dogra Dynasty.

Dismissal of Sheikh Abdullah and his Arrest

In fact, Delhi Agreement spelt out the detail of the state’s autonomy within the Union of India on one hand and affirmed that Kashmir as an integral part of India on the other. However, in the months that followed the Delhi Agreement, the relations
between the State leaders and the Government of India deteriorated and things began to go wrong shortly thereafter. At the end of 1952, the Praja Parishad launched a massive agitation for one Constitution, one flag and one President for Kashmir and the rest of India. It caused fresh misgivings and doubts among many Muslims Kashmiri who began to feel that their entity seems in danger. These developments shook the foundations of the nationalist traditions in the state. The growth of Hindu communalism and the weak position of Nehru justified Abdullah’s fears. Sheikh realized that, “there was no middle course between full integration and full autonomy, and as the majority in Kashmir would not accept the first alternative, there was no choice but to accept the second.”

H.A. War tells it in these words thus:

Sheikh Abdullah now came into the conclusion that the intensity of the State’s autonomy through the Delhi Agreement was a legal blunder. He therefore hesitated to give full effect to the Delhi Agreement of 1952. He insisted on a review and amendment of the Delhi Agreement but the New Delhi Government refused to do so and insisted on Sheikh Abdullah to adhere to the already executed Delhi Agreement. Thus, a controversy starts between Sheikh Abdullah and Pt. Jawaharlal Nehru.

On 9 August, 1953, Sheikh Abdullah was staying at the government guest house in Gulmarg with his family on tour. In the morning, he was woken by his alarmed Secretary who told him that the guest house had been surrounded by the police force. When, Sheikh asked the police superintendent why he had paraded and the police superintendent on contrary produced a warrant for his arrest. Sheikh Abdullah then realized that he had been deceived by those who had sworn loyalty to him and by those who claimed to cherish their ideological commitments with him. Sheikh Abdullah then prepared to go into imprisonment. Soon, the aide-de-camp of Karan Singh, regent of the State of Jammu and Kashmir, delivered a letter to him in which he had ironically sympathized with the Sheikh Abdullah. The letter also brought to the Sheikh’s notice that he had been, without prior notification or consultation, dismissed as head of government by the Regent.

The rationale and the basis provided for the Sheikh’s arbitrary dismissal was that his colleagues in the Legislative Assembly of Jammu and Kashmir, Bakshi Ghulam Mohammad, Shyam Lal Saraf and Girdhari Lal Dogra, has lost confidence in his leadership. Some sections of political opinion in India levied the charges for his arrest for creating an Independent Kashmir. These critics quoted some of his speeches to
prove the point. There are also some circumstantial evidence in the form of press opinion in the Western countries and statements given by Western leaders and commentators in order to prove that Abdullah was involved in an international “plot” to create an independent Kashmir. The Communist Party of India, for example, charged Abdullah of “plotting” for independence. The communist view was contained in a statement issued by the party on 9 August, which said inter alia, “Sheikh Abdullah fell in line with the American intrigues and came out for an independent Kashmir to be guaranteed by the UNO, i.e. Americans.” The evidence compiled by the Communist Party to prove its point was later published in the form of a pamphlet entitled, “Anglo-American Plot in Kashmir” by Vijay Kumar.128

It was in this situation that the Government of India led by Nehru joined hands with the Hindu-communal lobby and employed undemocratic tricks and strategies to remove him from the position of Prime Minister. They feared that he might now raise the demand for an ‘Independent Kashmir’. However, it would be wrong to conclude here that Sheikh Abdullah was planning to make an independent Kashmir or to take Jammu and Kashmir into Pakistan. The reality is that the idea of an independent Kashmir was not acceptable to either India or Pakistan. Again the stand which was supposed to have been taken by Abdullah could not in any way help Indo-Pakistan rapprochement or an understanding on Kashmir. He was angling and demanded for a special status – ‘just short of independence’ to the State of Jammu and Kashmir. The allegations launched were fragile enough to warrant an objective investigation. It was a tactical ploy to exercise greater control over Kashmir. In nutshell, Sheikh was arrested during the dark hours of the mid-night about 4:00 a.m. on 9 August, 1953, and on the same day Bakshi Ghulam Mohammad, the Deputy Prime Minister in the disbanded ministry, was appointed as the new Prime Minister or Sadar-I-Riyasat of the State. The arrest of Sheikh Abdullah led to the beginning and gradual erosion of autonomy and other rights in the state of Jammu and Kashmir which also resulted that India has lost its moral moorings in the state of Jammu and Kashmir after Sheikh Abdullah’s arrest.129

In October 1953, the Constituent Assembly was assembled to finalise the principles on which the constitution of the state would be based and consider the implementation of the Delhi Agreement pertaining to the federal relations between the state and the Union. Sheikh Mohammad Abdullah’s successor, Bakshi Ghulam Mohammad did not
formally deviate from the original political line of his leader and allowed frequent
inroads into the autonomy of the state. On 4 January, 1954, a Joint Sub-Committee
was constituted to draft a proposal on the implementation of the Delhi Agreement
which presented its report to the Constituent Assembly on February 11, 1954. An
annexure, which defined the jurisdiction of the Union, was appointed to the report.
The annexure embodied the provisions of the Delhi Agreement with modifications
which were introduced in it after the Advisory Committee on Citizenship and
Fundamental Rights was reconstituted and the approval of the Union Government was
secured. The report along with the annexure was presented to the President of India
after it was approved by the Constituent Assembly and the President of India in
consultation with the state government issued the Constitution (Application to Jammu
superseded and reversed the Constitution Order-1950 and made Union Parliament
capable of legislating in respect of almost all the Parts of the State Constitution, of
course, with some exceptions and modifications. The Constitution Order-1954 as a
result made the process of erosion of autonomy so rapid and on such a massive scale
that the entire Article 370 of the Constitution of India which was supposed to
guarantee and preserve the special status of the state in the Indian Union was drained
and emptied of its substantive content.

The Separate Constitution of the State of Jammu and Kashmir

The Constituent Assembly of the state completed its work of making the constitution
on the 12th Session held from September 29, 1956 and finally the constitution was
adopted on 17th November, 1956. Thus, for the first time in the history of Jammu and
Kashmir, the state assumed the status of a constitutional state. The constitutional
provisions were by and large patterned on the relevant provisions of the constitution
of India, with some exceptions, such as the powers of the Head of the State and the
Directive Principles of the State Policy. Some very important eight provisions of the
Constitution concerning the relationship of the state with India and character of
permanent residents of the state came into force at once and the remaining provisions
of the constitution came into force on the 26th January 1957.

The constitution of the Jammu and Kashmir State is a written document consisting of
158 Sections (Articles) divided into 13 Parts and six Schedules attached to it. The
Jammu and Kashmir constitution is partly rigid and partly flexible. The Preamble of the constitution which generally intended to expresses the political, moral and religious values to be promoted also confirms the accession of the state of Jammu and Kashmir with the Union of India.\textsuperscript{132}

\textbf{Preamble}

“We the people of the state of Jammu and Kashmir, having solemnly resolved, in pursuance of the accession of this state to India which took place on the twenty-seventh day of October, 1947, to further define the existing relationship of the state with the Union of India as an integral part thereof and to secure to ourselves –

Justice, social economic and political;

Liberty of thought, expression, belief, faith and worship;

Equality of status and of opportunity and to promote among us all;

Fraternity assuring the dignity of the individual and the unity of the Nation;

In our Constitution Assembly, this seventeenth day of November, 1956, do hereby Adopt, Enact and Give to Ourselves This Constitution.\textsuperscript{133}

\textbf{Salient Features of the State Constitution of Jammu and Kashmir}

\textbf{Part I: Preliminary}

\textbf{Short Title and Commencement}

1. (1) This Constitution may be called the Constitution of Jammu and Kashmir.

   (2) This section and section 2, 3, 4, 5, 6, 7, 8 and 158 shall come into force at once and the remaining provisions of this Constitution shall come into force on the twenty-sixth day of January, 1957, which day is referred to in this Constitution as the commencement of this Constitution.\textsuperscript{134}

\textbf{Part II: The State}

\textbf{Relationship of the State with the Union of India}

2. The state of Jammu and Kashmir is said and shall be an integral part of the Union of India.
Territory of the State

3. The Indian constitution includes only those territories of the state in the Indian Union which immediately before the commencement of the constitution was comprised in the Indian side of Jammu and Kashmir (First Schedule entry No. 15 of the Indian Constitution). The state constitution on the other hand provides all the territories of the state which on the fifteenth day of August, 1947 were under the sovereignty or suzerainty of the ruler of the state. Consequently, it includes also the part of the territory which is illegally occupied by Pakistan. The Parliament of India that is empowered to form new states and alter the areas, boundaries or names of the existing states in India has no power to increase or diminish the area or altering the name or boundary of Jammu and Kashmir State without the consent of the State Legislature.  

Extent of Executive and Legislative Power of the State

4. 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.

Part III: Permanent Residents

Permanent Residents

5. (1) Every person who is, or is deemed to be, a citizen of India under the provisions of the constitution of India shall be a permanent resident of the state, if on the fourteenth day of May, 1954:-

(a) He was a State Subject of Class I or Class II; or

(b) Having lawfully acquired immovable property in the state, he has been ordinarily resident in the state for not less than ten years prior to that date.

(2) Any person who, before the fourteenth day of May, 1954, was a State Subject of Class I or of Class II and who, having migrated after the first day of March, 1947, to the territory now included in Pakistan, returns to the state under a permit for resettlement in the state or for permanent return issued by or under the authority of any law made by the State Legislature shall on such return be a permanent resident of the state.
(3) In this section, the expression ‘State Subject of Class I or of Class II’ shall have the same meaning as in State Notification No. I-L/84 dated the twentieth April, 1927, read with State Notification No. 13/L dated the twenty-seventh June, 1932.

Construction of References to State Subjects in Existing Laws

6. Unless the context otherwise requires, all references in any existing law to hereditary State Subjects or to State Subject of Class I or of Class II or of Class III shall be construed as references to permanent residents of the state.

Legislature to Define Permanent Residents

7. Nothing in the foregoing provisions of this Part shall derogate from the power of the State Legislature to make any law defining the classes of persons who are, or shall be, permanent residents of the state.

Special Provision for Bills Relating to Permanent Residents

8. A Bill making provision for any of the following matters, namely:-

(a) Defining or altering the definition of, the classes of persons who are, or shall be, permanent residents of the state;

(b) Conferring on permanent residents any special rights or privileges;

(c) Regulating or modifying any special rights or privileges enjoyed by permanent residents; shall be deemed to be passed by either House of the Legislature only if it is passed by a majority of not less than two-thirds of the total membership of that House.

Rights of the Permanent Residents

9. The permanent residents of the state shall have all the rights guaranteed to them under the Constitution of India.137
Part V: The Executive

The Sadar-e-Riyasat: Head of the State

10. The Head of the State shall be designated as the Sadar-e-Riyasat. The executive powers of the state, which extended to all matters not transferred to the Union, were vested the Sadar-e-Riyasat who exercised these powers by himself either directly or indirectly through his officers in his name.138

Dual Citizenship:

11. Generally in a federal set up a person is a citizen not only of the state in which he resides but also of the federation and consequently owes allegiance to both. But the Indian Constitution, like the Canadian Constitution introduces only one citizenship. The Citizenship of India and birth or residence in a particular state does not confer any separate status as a citizen of that state. Here an important but very controversial exception has been made through the Constitution of India for the permanent residents of the state of Jammu and Kashmir. The State Constitution grants dual citizenship to its permanent residents. A separate Part III of the State Constitution is exclusively devoted to various rights and special privileges. The permanent residents of the state enjoy all the rights guaranteed under the constitution of India both Fundamental and non-Fundamental to the citizen of the country (Section 10 of the State Constitution). No such special rights are granted to the permanent residents of other states in India nor can any citizen of India claim such benefits in this state. For example, the recruitment of persons to the administrative and other allied cadres is solely done on merit through examinations conducted by the UPSC at national level. There is no ban on the residents of this state of Jammu and Kashmir qualifying for the various services. But on the other hand as for the recruitment to the various services of the state of Jammu and Kashmir are concerned, this falls within the jurisdiction of the state’s own selection board and the appointments made by it are, however, restricted only to state residents. Apart from this, a permanent resident of Jammu and Kashmir state can contest elections from anywhere of the country but not otherwise. Under Sections 51 and 140 of the state constitution only the permanent resident of the state can vote and contest
election for the State Legislature. Hence, every permanent resident of this state enjoys double status – as a citizen of India as well as a permanent resident of this State. The other citizens of India cannot be a permanent resident of the State (Section 8 of the State Constitution). Thus, to conclude we can say that the citizens of India are not *ipso-facto* the citizen of the State. Even if they have been residing in the state for years, they cannot acquire this right.¹³⁹

**Part VI: Bicameral Legislature with a Difference:**

12. The state constitution provided for a bicameral legislature empowered to make laws on the subjects reserved for the state government. The lower house called, Legislative Assembly consists 111 members chosen by direct election from territorial constituencies in the state on the basis of universal adult franchise. There is one very remarkable point in this respect, under Section 48(a) of the state constitution, 24 seats in the Legislative Assembly shall remain vacant for the people residing in Pakistan occupied territory to elect their representatives for the Assembly. The upper house called, Legislative Council consists 36 members among which eleven members are elected by the members of the Legislative Assembly from amongst persons who are residents of the province of Kashmir and are not the members of the Legislative Assembly. Provided that of the members so elected at least one shall be a resident of Tehsil Ladakh and at least one shall be a resident of Tehsil Kargil. Similarly, eleven members are elected from the province of Jammu, six by the members of the Municipal Councils and Panchayats in the State. Eight members are nominated by the Governor having special knowledge in respect of matters such as literature, science, art, co-operative movement and social service. It is a permanent House and is not subject to dissolution. Only one-third of its members shall retire as soon as may be on the expiration of every second year. The normal term of the Assembly shall be six years (Under Section 52). It was extended in 1976 through an amendment in the state constitution so as to establish parity with what was done by the 42nd Constitutional Amendment Act in case of all other Legislative Assemblies including the Lok Sabha. But when *status quo* was restored in this respect by 44th Amendment Act, 1978, the state of Jammu and Kashmir preferred to stick to the earlier change. So now in case of other State Assemblies and the Lok
Sabha the regular term is again five years but in case of Jammu and Kashmir it is 6 years.\textsuperscript{140}

**Legislative Autonomy:**

13. In the sphere of law-making, the State Legislature enjoys a substantial amount of autonomy as compared to the other states. The Constitution of India enumerates elaborately the legislative powers of the Union and the States in Part XI of the Constitution. It is further qualified by providing three lists – the Union List with 100 subjects, the Concurrent List with 47 subjects and the State List with 66 subjects. In this division of power an exception has been made in case of the state of the Jammu and Kashmir. At the time of the accession of the state of Jammu and Kashmir, the Union Government was given the authority only in respect of three spheres, i.e. Defence, Foreign Affairs and Communication. With the passage of time and necessity, the Union Government can make laws from the Union List for the state of Jammu and Kashmir only in consultation with the government of the state. So far as the Concurrent List is concerned, only 17 subjects are common and the rest are with the state. The state has absolute control over the State List and all residuary law making powers. Further the jurisdiction of Parliament cannot be extended in the national interest (Article 249) or for giving effect to international agreements (Article 253) State. Thus, we find that the scope of law making powers of the Union is on true federal principles recognized in this world in respect of Jammu and Kashmir in the Indian Union. Though, it is not true in case of other federal units of the country. This situation is definitely enviable for the rest of the units of the Indian Union.\textsuperscript{141}

**Provisions in Case of Breakdown of Constitutional Machinery in the State**

14. Section 92 (1) if at any time the Sadar-e-Riyasat is satisfied that a situation has arisen in which the government of the state cannot be carried on in accordance with provisions of this constitution. The Sadar-e-Riyasat may then by proclamation assume himself all or any of the power or functions of the government of the state and all or any of the powers vested in or exercisable by anybody or authority in the state. Hence in case of other states it is called President’s Rule but in case of this state it is Governor’s Rule. Under Article
352 on account of external aggression or armed rebellion in the country it is not automatically applicable to this state like other states. It shall have its effect in the State only with the concurrence of the government of the state. The President of India declared National Emergency on June 26, 1975; it was made applicable to this state only on June 29, 1975 after obtaining the concurrence of the state. At the same time, the provision of Financial Emergency issued by the President under Article 360 is not at all applicable to this State even with the concurrence of the state government. Moreover, the Centre has no power to suspend the constitution of this state on the ground of failure to comply with the directions given by the centre in the exercise of the executive power of the Union which is applicable to all other States (Article 365). Here too the state has been given a long area.\textsuperscript{142}

**In Matters of Fundamental Rights and Duties:**

15. The state constitution does not contain any chapter on Fundamental Rights for the permanent residents of the state. The provisions of Fundamental Rights of Indian Constitution (Part III) are equally enjoyed by them with some ‘ifs’ and ‘buts’ (Section 10). For example, the provisions of Rights to Freedom were subject to some special restrictions for a period of 20 years since May 14, 1954 (The Constitution Application to Jammu and Kashmir Order, 1954). Similarly in respect of the provision ‘protection against arrest and detention’ under Article 22 of the Constitution of India, it is the State Legislature and not the Parliament of India, which is empowered to Legislate laws in order to govern the detention. The state does not need the assent of the President for the laws duly made by the State Legislature relating to compulsory acquisition of property (Article 31-A). The word ‘estate’ is defined in a broader way in respect of this Article \textit{vis-à-vis} the Government of the state of Jammu and Kashmir in respect of the Right to Constitutional Remedies, the Supreme Court has been empowered to issue an appropriate writ for the enforcement of the Fundamental Rights. And Parliament may by law empower any other court to exercise within the local limits of its jurisdiction to do the same. But in the case of Jammu and Kashmir this provision is not applicable.
Right to Property

The Constitution of India had a three-fold provision for safeguarding the right to private property. It not only guaranteed the right of private ownership but also the right to enjoy and dispose or arrange of property free from restrictions other than reasonable restrictions. Firstly, it guaranteed to every citizen the right to acquire any property by any lawful means such as inheritance, personal earning or otherwise, to hold it as his own and to dispose it freely (Article 19(1)(f)). Secondly, the constitution guaranteed that no person shall be deprived of his property save by the authority of law (Article 31(1)). Thirdly, the constitution enjoined that if the state wants to acquire the private property of an individual or to requisition it (that is, to take over its possession for a temporary period), it could do so only on two grounds:

(a) That the acquisition or requisitioning is for a public purpose;

(b) That when such a law is passed, it must provide for payment of an amount to the owner, either by fixing the amount or by specifying the principle upon which it is to be determined and given [Article 31(2)]. The 44th Amendment Act, 1978 abolished the Right to Property by all its three-fold provisions as discussed above but in its application an exception was made only in case of the state of Jammu and Kashmir. So, Right to Property is still intact as a fundamental right of the people of Jammu and Kashmir. Whereas, for the rest of the country this right is only legal right this can be regulated by the legal ordinary law.143

Chapter on Fundamental Duties is not applicable:

Similarly when by the 42nd Constitution Amendment Act, 1976 incorporated in Article 51A (Part IV-A) a list of 10 Fundamental Duties for the citizen of the country, the state of Jammu and Kashmir was exempted. Since, it is also not present in the Constitution of Jammu and Kashmir; the permanent residents of this state are free from the obligations which are supposed to operate hand-in-hand with the Rights. Till today, the permanent residents of the state of Jammu and Kashmir are enjoying the benefits of all Fundamental Right including Right to Property without doing any duty. Rights and Duties go together. A valid claim is both a right and duty. But this exception in case the state of Jammu and Kashmir is unique and singular.144
Part XII: Amendment of the Constitution

16. Provisions were included in the constitution according to which it could be amended. A Bill to amend the constitution could only be introduced in the Legislative Assembly. Section 147, an amendment of this constitution may be initiated only by the introduction of a Bill for the purpose in the Legislative Assembly. When the Bill is passed in each House by a majority of not less than two-thirds of the total membership of that House, it shall be presented to the Sadar-e-Riyasat for his assent and upon such assent being given to the Bill, the constitution shall amended in accordance with the terms of the Bill. Express limitation was imposed on amendments which affected the accession of the state and the provisions of Article 370 or sought to change the division of powers between the Government of India and the state or sought to change the procedure laid down for the amendment of the constitution. No amendment Bill pertaining to these subjects could be introduced in either of the two Houses of the State Legislature.145

Separate Directive Principles:

17. The most characteristic feature of the constitution was the embodiment of progressive and comprehensive list of the Directive Principles of State Policy. The inclusion of the Directive Principles in the constitution was modeled after the Directive Principles of State Policy enumerated in the constitution of India. The philosophy of the constitution of India is explained in Part IV under the title Directive Principles of State Policy. It expresses ideals particularly, economic, social and some Gandhian principles. In like manner, Part IV of the Jammu and Kashmir constitution (Section 11 to 25) enlists a few principles which are treated as fundamental in the governance of the state. Though the nature and tone of these principles is not largely different from the parallel principles laid down in the Constitution of India, the content of these principles is more specific. The State is to establish a socialist order and not a social order as is laid down in the constitution of India, for the promotion of welfare of the people. The state shall endeavour to secure the right to free education up to the university level for its permanent residents. Right to education and other rights for children and women are enlisted in detail and
another most important and distinct provision is about the adoption of the term ‘secularism’ to foster brotherhood and equality among all communities in the state.\(^\text{146}\)

High Court at the apex:

18. A noteworthy feature of the constitution was the inclusion of the provisions for an independent judicial structure with the High Court at the apex. Express provisions with regard to the appointment, tenure and removal of the judges of the court were included in the constitution to secure the independence of judiciary. The court was reserved the jurisdiction which the High Court of the state exercised before the constitution was enforced. Subject to the general provisions of the constitution and law for the time being in force, the original and appellate jurisdiction, the High Court at the time the constitution came into force, was preserved. In addition to the original and the appellate jurisdiction the Court retained, the constitution explicitly vested the Court with the powers to:

(i) Transfer cases to itself from the subordinate courts;
(ii) Superintend and control the subordinate courts;
(iii) Control its own staff; and
(iv) Exercise the power of the Court of Record.

A significant aspect of the powers vested with the Court was that regarding the enforcement of the Fundamental Rights. The High Court was empowered to issue writs and orders in the nature of Habeas Corpus, Mandamus, Prohibition, Quo-Warranto and Certiorari for the enforcement of Fundamental Rights, provided for by the constitution of India and made available to the people of the state by the Presidential Proclamation of 1954. The power of the Court to issue writs was not confined to the enforcement of the Fundamental Rights only. The Court was vested with the power to issue writs and orders for other purposes also. Whenever, the High Court found that any person within its jurisdiction acted in any way not authorized by law or violated the rights of the citizens, the Court was empowered to issue orders for remedies and redress.\(^\text{147}\)
Official Language of the State

19. Section 145, the official language of the state shall be Urdu but the English language shall, unless the Legislature by law otherwise provides, continue to be used for all the official purposes of the state for which it was being used immediately before the commencement of this constitution.\textsuperscript{148}

Separate Flag of the State

20. Yet another but very important and significant exception has been made in case of only this state. The Constitution of the state of Jammu and Kashmir (under Sec. 144) provides a separate flag of the state. It states:

The flag of the State shall be rectangular in shape and red in colour with three equidistant white vertical stripes of equal width next to the staff and a white plough in the middle with the handle facing the strips and the ratio of the length of the flag to its width shall be 3:2.\textsuperscript{149}

From the above discussion, the state of Jammu and Kashmir constitutes a special position as compared to other states within the Union of India. It is the only state of Indian Union which has its own separate constitution and the separate flag. The scope and approach of the separate constitution of the Jammu and Kashmir state is more clear and specific. There is no parallel to it in the Indian federal polity with regard to quantum of autonomy and other rights enjoyed by it. Thus, after examining the scope of constitutional autonomy being enjoyed by the state of Jammu and Kashmir, we find that the state enjoys sufficient amount of freedom in the internal administration as compared to other states of Indian Union which are very distinctive variation in Indian federal system.
Notes


8 Newspaper Article entitled – July 13, 1931: The day of an Idea by Engineer Hilal Ahmad War in Greater Kashmir.


13 Newspaper Article entitled – July 13, 1931: The day of an Idea by Engineer Hilal Ahmad War in Greater Kashmir.

46 Ibid p. 43.
51 Ibid p. 33-34.
57 Ibid p. 43.
71 Ibid p. 80.
91 Ibid p. 22
96 Ibid p. 23


Directly accessed on 16-03-2016 at: http://indianexpress.com/article/india/india-news-india/only-parliament-can-decide-on-scraping-article-370-supreme-court/


107 Ibid P. 134.


110 Ibid p. 141-144.


123 Ibid p. 211.


Ibid pp. 31-56.


Ibid p. 240.


Ibid p. 292-93.


Ibid p. 229.