ARTICLE 370 OF THE CONSTITUTION OF INDIA AND THE CONSTITUTION OF JAMMU AND KASHMIR
CHAPTER 4 : ARTICLE 370 OF THE CONSTITUTION OF INDIA AND THE CONSTITUTION OF JAMMU AND KASHMIR.

4.1 FRAMING OF THE CONSTITUTION OF INDIA 1950

British rule in India came to an end on and from 15th August 1947. The main object of the Indian Independence Act 1947 was to set up two independent Dominions in India known as India and Pakistan and after 15th August 1947, His Majesty’s Government in the United Kingdom was to have no responsibility over the Government of India or Pakistan. From that date onwards, the paramountcy of the British Crown over the Indian States was to lapse also. The Indian Independence Act 1947, received Royal assent on 18th July 1947 and came into force on 15th August 1947. The Constituent Assembly set up in 1946 according to the Cabinet Mission Plan was not a Sovereign body. The Indian Independence Act 1947, established the sovereign character of the Constituent Assembly, which became free of all limitations.1 It functioned as a sovereign body unfettered by any restrictions on its powers, for it had to frame a Constitution for India alone.2

After India became independent on 15th August 1947, it fell upon the Constituent Assembly to take up the tremendous task of drafting a Constitution for the country. On 29th August 1947 the Constituent Assembly...
Assembly appointed a Drafting Committee to prepare the Draft of the Constitution. The Draft Constitution as settled by the Drafting Committee was introduced in the Constituent Assembly on 4th November 1948. B. R Ambedkar, the Chairman of the Drafting Committee, moved for its consideration on the same and in his speech stated that,-

"No constitution is perfect and the Drafting Committee itself is suggesting certain amendments to improve the Draft Constitution. But the debates in the Provincial Assemblies give me courage to say that the constitution as settled by the Drafting Committee is good enough to make this country start with. I feel that it is workable, it is flexible and it is strong enough to hold the country together both in peace time and war time. Indeed, if I may say so, if things go wrong under the new Constitution, the reason will not be that we had a bad Constitution. What we will have to say is, that Man was vile".¹

The Drafting Committee prepared a Draft Constitution containing 315 Articles and 8 Schedules that was considered at great length at the Second reading stage and under went several amendments. The Draft Constitution was finalized by the Constituent Assembly on 26th November 1949 and came into force on 26th January 1950. It took the Constituent Assembly about three years to frame the Indian Constitution which is the Worlds longest Constitution. The tremendous efforts of the Constituent

Assembly are recorded in the twelve volumes of Constituent Assembly Debates.

The Indian Independence Act 1947, gave birth to the two independent dominions of India and Pakistan and over 560 odd Indian Princely States obtained sovereignty and became absolutely independent. All (roughly about 562) Indian States but three States (Junagad, Hyderabad and Kashmir) acceded to either Dominion.¹ [The Indian States entered the Constituent Assembly of India on the basis that they would accede to the Union of India by suitable instruments, and that the internal Constitutions of these States would be framed by their own Constituent Assemblies. It was however soon realized that, if each Indian State or Union of Indian States was to frame its own Constitution without any guidance from the Centre, there might be such large differences among them as to result in a veritable jigsaw puzzle. A committee with B. N. Rao as chairman was appointed to prepare a model Constitution to serve as a guide in framing the Constitution for the respective States. However it was ultimately decided that the Constitutions of the States should also be framed by the Constituent Assembly of India and should form an integral part of the Constitution of India; and that an appropriate procedure should be decided upon for the ratification of the whole Constitution of India by the States and Unions along with the part relating to the internal Constitutions of the

States.\(^1\) However, when the Drafting Committee began its work the problem of Federation with the Native States had ceased to exist, as the Native States which acceded with India merged in India, their former rulers retaining only their titular dignity and certain personal privileges.\(^2\)

Regarding the State of Jammu and Kashmir various difficulties arose, which the Government of India had to consider carefully. Maharaja Hari Singh wanted that the accession of the State should be in respect of three subjects: Defence, Foreign affairs and Communications. The Drafting Committee pointed out that under the provisions of the Draft Constitution all States in Part III would accept List I, List II, all provisions relating to fundamental rights and the provisions relating to High Courts and Supreme Court. However, with regard to the State of Jammu and Kashmir the Government of India decided that the accession of the State should continue on the existing basis until the State could be brought at par with other States. For this purpose a special provision was made in respect of the State of Jammu and Kashmir.

The Ministry of States suggested for consideration of the Drafting Committee the following approach to this Question:

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\(^1\) Framing of India's Constitution: Selected Documents - Vol. IV - Page 547 & 548 - Indian Institution of Public Administration, New Delhi

(1) Jammu and Kashmir State may be treated as a part of Indian territory and shown in States specified in Part III of Schedule I.

(2) A special provision may be made in the Constitution to the effect that until Parliament provides by law that all the provisions of the Constitution applicable to the States specified in Part III will apply to this State, the power of Parliament to make laws for the State will be limited to the items specified in the Schedule to the Instrument of Accession governing the accession of this State to the Dominion of India or to the corresponding entries in List I of the new Constitution.¹

Not only in the announcement of the Honourable Minister for States, but also in the address of Lord Mountbatten to the Princes, it had been made clear that accession on three subjects did not imply any financial liability on the part of the States and that there was no intention either to encroach on the internal autonomy or the sovereignty of the States or to fetter their discretion in respect of the new Constitution. It was against these commitments that the State Ministry had to approach the Rulers for

the integration of their States.\textsuperscript{1} In the case of Sayec vs Ameer Ruler Sadiq Mohammad Abbari Bhawalpur\textsuperscript{2} it has been held that the effect of the Instrument of Accession was not to make any State a part of the Dominion.

\textbf{4.2 RELATIONSHIP OF THE STATE OF JAMMU AND KASHMIR WITH THE UNION OF INDIA}

The relationship of the State of Jammu and Kashmir with India after the signing of the Instrument of Accession was determined by various provisions of the Constitution of India, which came into force on 26\textsuperscript{th} January 1950. Article 1 of the Constitution of India 1950, which deals with the name and territory of the Union clearly includes the State of Jammu and Kashmir as a part of the Indian territory and the name of the State is also included in the First Schedule of the Constitution. Article 370 of the Constitution of India 1950, further clarifies the relationship of Kashmir with India by enumerating the heads in which the Indian Parliament would have power to make laws for the State of Jammu and Kashmir. As by the Instrument of Accession only Defense, External Affairs and Communications were acceded to India, Article 370 of the Constitution of India 1950, provided Parliament with power only to make laws for the State of Jammu and Kashmir with regards to Defense, External Affairs and Communications. Article 370 of the Constitution of India 1950 further

\textsuperscript{1} Framing of India’s Constitution: Selected Documents – Vol. IV – Page 560 – Indian Institution of Public Administration, New Delhi
\textsuperscript{2} (1952)1 All ER 326 @ 328.
provided the State of Jammu and Kashmir with the right to form a Constituent Assembly to draft a Constitution for the State. On 26th January 1957 the Constitution of Jammu and Kashmir 1957, was enacted and under Section 3 of the said Constitution, the relationship of the State with the Union of India was further clarified wherein it is clearly stated that the State of Jammu and Kashmir is an integral part of the Constitution of India.

Article 1 the Constitution of India, 1950, deals with the name and territory of the Union\(^1\). It states as follows:

1. **Name and territory of the Union.** -

   (1) India that is Bharat, shall be a Union of States.

   (2) The States and territories thereof shall be specified in the First Schedule.

   (3) The territory of India shall comprise-

      (a) the territories of the States;

      (b) the Union territories specified in the First Schedule; and

      (c) such other territories as may be acquired.

According to Article 1 of the Constitution of India the State of Jammu and Kashmir forms a part of the territory of India. Presently, the

\(^1\) See - Constitution of India 1950 – Article 1
State of Jammu and Kashmir is the fifteenth State included in the First Schedule of the Constitution of India. Previously the State of Jammu and Kashmir was specified under the First Schedule as a Part B State but by the passing of the States Reorganisation Act 1956, Part B of the First Schedule was abolished and by the Constitution (7th Amendment) Act 1956, the State of Jammu and Kashmir was transferred with some other States of Part B to Part A of the First Schedule of the Constitution of India. Thereafter only one category of states was included in the First Schedule of the Constitution of India.

By virtue of Article 2 of the Constitution of India, 1950, Parliament may by law admit into the Union, or establish, new States on such terms and conditions as it thinks fit.1 The words “as it thinks fit” gives a discretion to the Parliament to confer a special status on a State2 since there is no “theory of equality of status”3 in India. After the debates of the Constituent Assembly held mainly on 17th October 1949, where Mr. N. Gopalaswamy Ayyangar enumerated the special conditions prevailing in Jammu and Kashmir4 special status was granted to the State.

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1 The Constitution of India, 1950, Article 2.
4 Constituent Assembly Debates, Book No. 5, Vol. No. X-XII published by Lok Sabha Secretariat
By virtue of Article 3 of the Constitution of India, 1950, Parliament may by law form new States and alter the areas, boundaries or names of existing States.¹ Power of Parliament to diminish the area of any State under Article 3(c) means the power to take a part of a State and add it to another State but by no means includes the power to take a part of a State and add it to a foreign country. Parliament can even cut away the entire area of a State to form a new State or to increase the area of another State.² There is no Constitutional guarantee to continue a State existing at the commencement of the Constitution.³ It should be noted that under Article 3(c) Parliament has absolutely no power to make any law ceding Indian Territory to a foreign State. The area diminished from any State under Article 3(c) should and must continue to be a part of the territory of India.⁴ Hence no Indian State, including the State of Jammu and Kashmir, can be ceded to a foreign State. The State of Jammu and Kashmir is further safeguarded by a proviso to Article 3, which read as follows: “Provided further that no bill providing for the increasing or diminishing the area of the state of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of that State.”⁵

¹ The Constitution of India, 1950, Article 3.
³ Sri Kishan v. State – AIR 1957 AP 347
⁴ In re Berubari Union and Exchange of enclaves – AIR 1960 SC 845.
Jammu and Kashmir is no doubt a part of the territory of India. But it would be possible for the Parliament of India to increase or diminish the area of Jammu and Kashmir or to alter its name or boundaries in the manner provided in Article 3-4 only if the legislature of Jammu and Kashmir consents. Herein the status of Jammu and Kashmir differs from that of other States. In the case of other States, only the views of their legislatures are ascertained by the President before recommending the introduction of a bill relating to these matters [Proviso to Art. 3], but in the case of Jammu and Kashmir no such bill shall be introduced in Parliament unless the legislature of that State consents.¹

Kashmir enjoys a special position within the Indian Dominion by virtue of Article 370 of the Indian Constitution. The position, guaranteed by Article 370 was not even changed when the State was transferred to Part A from Part B of Schedule 1 of the Indian Constitution. The special constitutional position Jammu and Kashmir enjoyed under Article 306A of the original Constitution has been maintained. Hence, all the provisions of the Constitution of India relating to the States in the First Schedule are not applicable to Jammu and Kashmir even though it is one of the States specified in that Schedule.²

Under Article 370 of the Indian Constitution the State of Jammu and Kashmir enjoys a unique position. The said Article reads as follows:

370. Temporary provisions with respect to the State of Jammu and Kashmir.-

(1) Notwithstanding anything in this Constitution,-

(a) the provisions of article 238 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 Concurrent 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 the State; and

(ii) such other matters in the said list as, with the concurrence of the Government of the State, the President may by order 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 office under the Maharaja's Proclamation dated the 5th day of March, 1948

(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 the 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 the matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of Clause (1) or in the proviso 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.

Under Article 370(1) of the Constitution of India the power of Parliament to make laws for the State of Jammu and Kashmir was limited only to matters in the Union List and the Concurrent 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 of the State to the Dominion of India. Article 370(1) of the Constitution of India clarified the subjects mentioned in the Instrument of Accession over which the Indian Government would have jurisdiction with regard to the State of Jammu and Kashmir. This was further clarified by the Delhi Agreement in 1952 according to which sovereignty in all matters other than those specified in the Instrument of Accession continues to reside in the State. It was also agreed by the Government of India that the residuary powers of legislature would vest in the State of Jammu and Kashmir, unlike the case of other States where the residuary legislative power vested in the Union.\(^1\) The provisions of Article 370 were further ratified by the Constitution (Application to Jammu and Kashmir) Order 1954, which was

\(^{1}\) The Constitution of India 1950 – Article 248
adopted in February 1954. Hence, on reading the Instrument of Accession 1947, Article 370 of the Constitution of India 1950, the Delhi Agreement 1952 and the Constitution (Application to Jammu and Kashmir) Order 1954, it may be said that the matters with respect the Dominion Legislature may make laws for the State were, A. Defence, B. External Affairs, C, Communications and D. Ancillary.¹

Under Article 370(2) of the Constitution of India the State was given power to form a Constituent Assembly for the purpose of drafting a Constitution for the State. The said Constituent Assembly came into existence on 31st October 1951. The Constituent Assembly set up a Drafting Committee for the purpose of drafting a Constitution for the State. Surprisingly, the question of Accession was still left open to the Constituent Assembly and alternatives like accession to Pakistan and independence of Kashmir were kept open for consideration of the Constituent Assembly. The Constituent Assembly of Jammu and Kashmir ratified the terms and conditions of the Instrument of Accession and the Delhi Agreement. In order to implement the Delhi Agreement as ratified by the Constituent Assembly the Constitution (Application to Jammu and Kashmir) Order, 1954, was passed by the President in consultation with the State Government. The order deals with the entire constitutional position of

the State within the framework of the Constitution of India, excepting only the internal constitution of the State Government, which was to be framed by the Constituent Assembly of the State.¹

The first official act of the Constituent Assembly was to put an end to Monarchy by forcing Maharaja Hari Singh to abdicate in June 1949. However, his son Yuvaraj Karan Singh was elected as the Sadar-I-Riyasat (or Governor) of the State. By October 1956 the Drafting Committee completed the Draft Constitution, which was ultimately adopted on 17th November 1956 and came into force form 26th January 1957. The State of Jammu and Kashmir thus acquired the distinction of having a separate Constitution for the administration of the State, in place of the provisions of Part VI of the Constitution of India, which govern all the other State’s of the Union.²

The Constitution of Jammu and Kashmir, 1957, is unique in nature as it is the only State constitution within the Indian Dominion. However, the Constitution of Jammu and Kashmir, 1957 is not a rival the Constitution of India 1950. It is the Constitution of India that provides for the framing of a separate constitution for the State under Article 370(2). The Constitution of Jammu and Kashmir, 1957, also helps determine the

relationship of the State with the Union of India. The Preamble of the Constitution of Jammu and Kashmir, 1957, inter alia, states that the object of the Constitution is to “further define the existing relationship of the State with the Union of India as an integral part thereof.”1 The relationship of the State with the Union of India is dealt with in Section 3 of the Constitution of Jammu and Kashmir 1957, which reads as follows: -

Section 3 - Relationship of the State with the Union of India - The State of Jammu and Kashmir is and shall be an integral part of the Union of India.

The area and territory of the State of Jammu and Kashmir that is now an integral part of the Union of India is further defined in Section 4 of the Constitution of Jammu and Kashmir 1957, which reads as follows:

Section 4 – Territory of the State – The territory of the State shall comprise of all the territories which on the 15th day of August, 1947, were under the sovereignty of suzerainty of the Ruler of the State.

Section 3 of the Constitution of Jammu and Kashmir, 1957 is a permanent provision and is protected by being kept beyond the amending powers of the State Legislature.2 The object of Section 3 of the Constitution of Jammu and Kashmir, 1957, is to safeguard the sacred character of

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national unity. According to Section 4 of the Constitution of Jammu and Kashmir, 1957, the territory of the State shall comprise of all the territories, which on the 15th day of August 1947, were under the sovereignty of suzerainty of the Ruler of the State. This also includes the Pakistan-occupied area of Jammu and Kashmir and for this reason the Constituent Assembly of the State thought it prudent that until the area of the State under the occupation of Pakistan ceases to be so occupied and the people residing in that area elect their representatives, twenty-four seats in the Legislative Assembly shall remain vacant and shall not be taken into account for reckoning the total membership of the assembly. Even though the State of Jammu and Kashmir enjoys a unique and special position, the State is an integral and inseparable part of the Union of India. The relationship of the State with the Union as provided under Section 3 of the Constitution of Jammu and Kashmir 1957, is rigid and beyond the scope of amendment of the Legislative Assembly of the State.

It is pertinent to mention that the relationship between the Union and the State of Jammu and Kashmir was further defined on 13th November 1974, by an agreement between the Prime Minister of India and Sheikh Mohammed Abdullah. The said agreement, referred to as the Kashmir

3 Constitution of Jammu and Kashmir, 1957, Section 48(a)
Accord¹, states that, “The State of Jammu and Kashmir, which is constituent unit of the Union of India, shall, in its relations with the Union, will continue to be governed by Article 370 of the Constitution of India.”

Form a study of the various statute books it is seen that the different definitions of ‘India’ are conflicting and confusing. Many of the Central Statutes start with the words that this Act ‘extends to the whole of India except the State of Jammu and Kashmir’. Though such words are used for the purpose of jurisdiction, they are disturbing and such words are seldom used for any other State within the Union of India. The definition of India given in the General Clauses Act 1897 is quite comprehensive and does not create much anomaly. Section 3(5) of the General Clauses Act 1897, defines British India as follows:

“British India” shall mean, as respects the period before the commencement of Part III of the Government of India Act 1935, all territories and places within His Majesty’s Dominions which for the time being governed by His Majesty through the Governor General of India or through any Governor or officer subordinate to the Governor General of India, and as respects any period after that date and before the date of the establishment of the Dominion of India means all territories for the time being comprised within the Governors’ provinces and the Chief

Commissioners' provinces, except that a reference to British India in an Indian law passed or made before the commencement of Part III of the Government of India Act 1935, shall not include a reference to Berar.

Section 3(28) of the General Clauses Act 1897, goes on to define India as follows:

"India" shall mean –

(a) as respects any period before the establishment of the dominion of India, British India together with all territories of Indian Rulers then under the suzerainty of His Majesty, all territories under the suzerainty of such an Indian Ruler, and the tribal areas;

(b) as respects any period after the establishment of the Dominion of India and before the commencement of the Constitution, all territories for the time being included in that Dominion; and

(c) as respects any period after the commencement of the Constitution, all territories for the time being comprised in the territory of India.

Section 2(1) of the Indian Independence Act 1947, describes the territories of the new Dominions as follows:

Section 2(1): Subject to the provisions of sub-sections (3) and (4) of this section, the territories of India shall be the territories under the sovereignty of His Majesty, which, immediately before the appointed day, were
included in British India except the territories which, under sub-section (2) of this section, are to be territories of Pakistan.

Section 2(4) of the Indian Independence Act 1947 further adds that without prejudice to the generality of the provisions of sub-section (3) of this section, nothing in this section shall be construed as preventing the accession of Indian States to either of the new Dominions.¹

However, Section 1 of the Indian Evidence Act 1872, states that the Indian Evidence Act 1872 extends to the whole of India except the State of Jammu and Kashmir. According to Section 3 of the said Act "India" means the territory of India excluding the State of Jammu and Kashmir.² Section 1(2) of the Code of Criminal Procedure 1973, states that the Act extends to the whole of India except the State of Jammu and Kashmir. According to Section 2(f) "India" means the territories to which this code extends.³ Section 1 of the Indian Penal Code 1860 states that this Act shall extend to the whole of India except the State of Jammu and Kashmir. Section 18 of the Indian Penal Code 1860 further states that "India" means the territory of India excluding the State of Jammu and Kashmir.⁴ It has been held that this exclusion of the State of Jammu and Kashmir is not violative of Article 1 and the First Schedule of the Constitution of India 1950.⁵ It has been held

¹ See Indian Independence Act 1947 – Section 2
² See Indian Evidence Act 1872 – Sections 1 and 3
⁴ See Indian Penal Code 1860 – Sections 1 and 18.
⁵ K.R.K. Vara Prasad v. Union of India – AIR 1980 AP 243
that the exclusion of a territory postulates the existence of a territory itself; the State of Jammu and Kashmir cannot be taken as a foreign territory.\(^1\)

Since the First Schedule of the Constitution of India specifically includes Jammu and Kashmir as a part of the territories of India, the exclusion of the State of Jammu and Kashmir from Section 18 of the Penal Code only means that for the purposes of the application of the provisions of the Indian Penal Code that the State shall not be considered as a part of India. In fact Section 1 of the Code itself makes this position abundantly clear.\(^2\)

Section 1(3)(a) of the Code of Civil Procedure 1908 states that this Act extends to the whole of India except the State of Jammu and Kashmir. Section 2(7B) of the said Code states that “India” except in sections 1, 29, 43, 44, 44A, 78, 79, 82, 83 and 87A, means the territory of India excluding the State of Jammu and Kashmir.\(^3\) Section 1(2) of the Limitation Act 1963 states that the Act extends to the whole of India except the State of Jammu and Kashmir.

The list of major Central Statutes from which the State of Jammu and Kashmir has been excluded is never ending and this exclusion is only for the purpose of jurisdiction and is not violative of Article 1 and the First Schedule of the Constitution of India 1950.\(^4\) These definitions of ‘India’

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\(^1\) Virender Singh v. General Officer Commanding, - 1974 J & KLR 101 (FB)
\(^3\) See Code of Civil Procedure 1908 – Sections 1(3)(a) and 2(7B).
not only exclude the State of Jammu and Kashmir from the jurisdiction of
the numerous Central statutes applicable to all the other States of the Union
of India but also create a sense of division in the minds of the people of
India. Even so many years after independence the definition of India as
appears in various statute books still continue to exclude the State of
Jammu and Kashmir from the territory of India.

4.3 MAJOR CONSTITUTIONAL ACTS AND ORDERS PRIOR TO
THE FRAMING OF THE CONSTITUTION OF JAMMU AND
KASHMIR

Before dealing with the Constitution of Jammu and Kashmir 1957,
it is necessary to go through the various Constitutional Acts and Orders,
which were passed within the State, prior to the framing of the Constitution
of 1957. Many of the provisions of these Constitutional Acts and Orders
have had some effect on the present Constitution of Jammu and Kashmir,
1957. As most of the Constitutional Acts and Orders have already been
dealt with in the preceding chapters only those of major significance have
been dealt with in this chapter.

On 31st January 1927, Maharaja Hari Singh issued an order defining
the term 'Mulkis', i.e. the State Subjects. The said Order, inter alia,
provided that State Subjects would be preferred over outsiders in cases of
employment in the Government services and that outsiders would be
unable to purchase immovable property within the State of Jammu and Kashmir. Later, on 20\textsuperscript{th} April 1927 the Maharaja issued a Notification No. I-L/84, defining the State Subjects.\textsuperscript{1} This Notification has been retained in Section 6 of the Constitution of Jammu and Kashmir, 1957.\textsuperscript{2} On 22\textsuperscript{nd} April 1934, Maharaja Hari Singh enacted the Regulation No 1 of Samvat 1991 (1934 AD) by which a Legislative Assembly called the Praja Sabha consisting of a total of 75 members was constituted. Of the 75 members, 33 members were elected members of whom 21 members were Muslims, 10 members were Hindus and 2 members were Sikhs. On 7\textsuperscript{th} September 1939 the Jammu and Kashmir Constitution Act 1939 was enacted. This Act made major alterations in the State’s legislative, executive and judicial systems. By virtue of Section 14 of the said Act the number of elected members of the Praja Sabha was increased from 33 to 40. The total number of members being 75, the Praja Sabha now had an elected majority over the previous official majority.\textsuperscript{3} In 1944 the National Conference approved the New Kashmir Manifesto. On 2\textsuperscript{nd} October 1944 Maharaja Hari Singh accepted the proposal of diarchy. Diarchy however did not satisfy the people of Kashmir.

Under the Government of India Act 1935, Section 6 governed Accession to the Indian Dominion. The said Act contemplated a Federal

\textsuperscript{1} See Notification No. I-L/84 of 1927, defining the State Subjects
structure wherein the rulers of the Princely States had the sole right to determine the question of accession of their respective States to the Indian Federation and the State Subjects had absolutely no say in the matter. However, the Indian Federation as contemplated under the Government of India Act 1935 never came into existence. Under the Indian Independence Act, 1947, the right of accession with either of the Dominions of India and Pakistan vested solely in the ruler of the Princely State and the State subjects had no say in the matter of accession. The criterion of accession of the State was solely the decision of the Ruler of that particular State. On 26th October 1947 Maharaja Hari Singh signed the Instrument of Accession. The circumstances that lead to the signing of the Instrument of accession 1947 have already been elaborated above. The Instrument of Accession states, ‘I Shriman Mahandar Rajrareshwar Maharajadhiraj Shri Hari Singhji, Jammu and Kashmir Naresh Tatha Tibbet adi Deshadhipati, Ruler of Jammu and Kashmir State in exercise of my sovereignty in and over my said State do hereby execute this my Instrument of Accession’.\[1\]

Clause 1 of the said Instrument of Accession states as follows:

I hereby declare that I accede to the Dominion of India with the intent that the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purpose of the Dominion shall, by virtue of this Instrument of Accession, but subject always to the terms thereof,

and for the purposes of the Dominion, exercise in relation to the State of Jammu and Kashmir (hereinafter referred to as "this State") such functions as may be vested in them by or under the Government of India Act, 1935 as in force in the Dominion of India on the 15th day of August 1947 (which Act as so in force is hereinafter referred to as "the Act").

Clause 3 of the said Instrument of Accession further states:

I accept the matters specified in the schedule hereto as the matters specified in the schedule hereto as the matters with respect to which the Dominion Legislature may make laws for this State.

As far as the internal administration of the State was concerned the Government of India had no power to make laws and the State internally was to continue under the sovereignty of the Ruler. This was guaranteed under Clause 8 of the Instrument of Accession which provides:

Nothing in this Instrument affects the continuance of my sovereignty in and over this State, or save as provided by or under this Instrument, the exercise of any powers, authority or rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.
By virtue of the Instrument of Accession the Dominion of India now had jurisdiction only over three subjects, i.e. external affairs, defence and communications of the state of Jammu and Kashmir. However, for the internal administration of the State an Interim Constitution for the State of Jammu and Kashmir became necessary and on 5th March 1948 a national Interim Government was formed. The task of adopting the New Kashmir Constitution fell upon the Praja Sabha. The first Amendment Act was enacted by Sri Yuvraj Karan, son of Maharaja Hari Singh for the purpose of delegating the power of legislation to the Constituent Assembly, which was duly elected in September 1951.¹

The Jammu and Kashmir Constitution (Amendment) Act, 2008, (1951 AD) introduced, inter alia, the following amendments. Section 5 of the Jammu and Kashmir Constitution Act, 1939 [Act XIV of Samwat 1996 (1939AD)] dealing with the inherent powers of His Highness was omitted. The Council of Ministers was no longer responsible to His Highness and henceforth the Prime Minister and other Ministers were collectively responsible to the Legislative Assembly of the State. Power to make rules and standing orders was transferred to the Legislative Assembly. By virtue of this amendment the Legislative Assembly now had power to legislate on all matters concerning the State and the reserve matters under Section 24 of the Constitution Act of 1939 were omitted from the Act. This amendment


The Jammu and Kashmir Constitution (Amendment) Act, 2009, [Act XV of 2009, (1952 AD)] was the Second Amendment Act. This Amendment Act was passed by the Constituent Assembly for the purpose of putting an absolute end to monarchy in the State. The Maharaja henceforth would to cease to be a constitutional head or titular head of the State and the Amendment Act provided that the Head of the State shall be designated as the Sadar-I-Riyasat and shall be elected by the State Legislature and recognized by the President of India.

The Jammu and Kashmir Constitution (Amendment) Act, 2011, [Act XLVIII of 2011 (1954 AD)] was the final amendment Act to The Jammu and Kashmir Constitution Act, 1996, (1939 AD). This Amendment Act and the Constitution (Application to Jammu and Kashmir) Order, 1954 both came into to effect on 14th May 1954. The major feature of this Amendment was that the term State Subject was omitted and new provisions for the Permanent Residents were introduced and all appeals and proceeding pending were now transferred to the Supreme Court of India. The Constitution Act, 1939 with these various amendments served as the
‘Interim Constitution’ of the Jammu and Kashmir State, pending the enactment of a fully democratic Constitution by the State Constituent Assembly.¹ The Constitution of Jammu and Kashmir, 1957 framed by the State Constituent Assembly came into force on 26th January 1957 and the previous Constitution Act of 1939 with all amendments stood finally repealed.²

Under Article 370(1)(ii) of the Constitution of India, 1950 the President of India, after consultation with the Government of the State, had power to issue orders specifying the matters on which the Union Parliament would have power make laws for the State.³ By virtue of the powers conferred upon the President of India by Article 370(1)(ii), the President of India issued the Constitution (Application to Jammu and Kashmir) Order, 1950. The main purpose of the Constitution (Application to Jammu and Kashmir) Order 1950 was to elaborate the subjects mentioned in the Instrument of Accession though it did make certain additions to the subjects already specified. The following are some of the noteworthy additions made to the subjects already specified in the Instrument of Accession. Subject to certain exceptions and modifications Part V of the Constitution of India 1950 dealing with the Union Executive, Part XI of the Constitution of India 1950 dealing with relations between the Union and

the States, Part XII of the Constitution of India 1950 dealing with finance and Part XV of the Constitution of India 1950 dealing with elections were made applicable to the State of Jammu and Kashmir subject to certain exceptions and modifications. However, it is interesting to note that by the said Order, Part III of the Constitution of India 1950 dealing with Fundamental Rights and Part IV of the Constitution of India 1950 dealing with Directive Principles, were not made applicable to the State. Provisions of the Constitution of India 1950 dealing with Emergency powers were also not applicable in the State of Jammu and Kashmir in case of 'internal disturbance' or 'failure of Constitutional machinery in the State'.

In 1952 the representatives of the Kashmir Government and the Indian Government signed the Delhi Agreement.1 The object of this agreement was to further clarify the subjects over which Parliament would have power to make laws with regards to Kashmir. It was agreed that the State of Jammu and Kashmir would have sovereignty in all matters except those specified in the Instrument of Accession and that residuary powers of legislation, which in case of other Indian States vested in the Center, in the case of Jammu and Kashmir would vest in the State. It was also agreed that persons who have their domicile in Jammu and Kashmir shall be regarded as citizens of India, but the State legislature was given power to make laws.

for conferring special rights and privileges on the ‘State Subjects’. It was also agreed that the State should also have its own flag in addition to the Union flag. However, the State flag was not a rival to the Indian flag and was recognized for its connection with the freedom movement of the State. Kashmir is the only State in the Union of India having a separate flag. It was agreed that the President of India would command the same respect in the State of Jammu and Kashmir as he does in the other States of India and Article 52 to 62 of the Constitution of India 1950 dealing with the President was made applicable to the State. With respect to the Sadar-I-Riyasat it was agreed that the Sadar-I-Riyasat was to be first elected by the State Legislature then recognized by the President of India before installation as such. In case of other Indian States the Head of the State was appointed by the President of India and as such was his nominee in contrast to the Sadar-I-Riyasat who was elected by the State Legislature. It was agreed the people were to have certain fundamental rights, but the entire chapter relating to fundamental rights of the Indian Constitution could not be made applicable to the State. With regards to the jurisdiction of the Supreme Court of India it was accepted for the time being the Supreme Court should have only appellate jurisdiction. With regards to the ‘Emergency Powers’ the State Government it was agreed that in event of war or external aggression the government of India would have full power to take steps and proclaim emergency but would have no power to proclaim general emergency on account of internal emergency.
On 14th May 1954 the Constitution (Application to Jammu and Kashmir) Order 1954 was issued by the President of India with the concurrence of the Government of Jammu and Kashmir. The said order defines precisely the scope and extent of the limitations on States sovereignty, consequent upon its accession to India.\(^1\) This Order implements the Delhi Agreement as ratified by the Constituent Assembly and also supersedes the Order of 1950.\(^2\) The Order deals with the entire constitutional position of the State within the framework of the Constitution of India, excepting only the internal Constitution of the State Government, which was to be framed by the Constituent Assembly of the State.\(^3\) The said order of 1954 underwent amendment numerous times. The effect of all these amendments has been to bring the position prevailing in the State more at par with the rest of the Country and further strengthen the bonds of harmonious association of the State with the rest of the Country.\(^4\)

The Constitution (Application to Jammu and Kashmir) Order 1954, which settled the constitutional relationship of the State of Jammu and Kashmir, did not disturb the previous assurances as regards the framing of the internal Constitution of the State by its own people.\(^5\)

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4.4 FRAMING OF THE CONSTITUTION OF JAMMU AND KASHMIR

The history of the State had developed in such a manner that the framing of a separate Constitution for the State had become almost inevitable. By virtue of the Instrument of Accession the Dominion of India now had jurisdiction only over three subjects, i.e. external affairs, defence and communications of the state of Jammu and Kashmir. However, for the internal administration of the State an Interim Constitution for the State of Jammu and Kashmir became necessary and on 5th March 1948 a national Interim Government was formed. Maharaja Hari Singh by a declaration dated 5th March 1948 also declared that as soon as normal conditions were restored in the State a National assembly would be duly elected for the purpose of framing a Constitution for the State. The task of adopting the New Kashmir Constitution fell upon the Praja Sabha. Yuvraj Karan Singh, son of Maharaja Hari Singh, delegated the power of legislation to the Constituent Assembly of Jammu and Kashmir, which was formed in September 1951 and took up the task of framing a Constitution for the State on 5th November 1951.

There can be no doubt regarding the legality of the framing of the Constitution of Jammu and Kashmir 1957. The right to frame a separate
Constitution for the State was guaranteed to the people throughout and even Article 370(2) of the Constitution of India 1950 guarantees such right. By virtue of the right envisaged in the Constitution of India 1950 and the Proclamation of Yuvraj Karan Singh dated 1\textsuperscript{st} May 1951 a Constituent Assembly that was duly elected on the basis of adult suffrage for the purpose of framing a Constitution for the State. The Constitution (Application to Jammu and Kashmir) Order 1954, which settled the constitutional relationship of the State of Jammu and Kashmir, did not disturb the previous assurances as regards the framing of the internal Constitution of the State by its own people. In October 1956 the Drafting Committee presented the Draft Constitution, which after discussion, was finally adopted on 17\textsuperscript{th} November 1956 and the Constitution of Jammu and Kashmir 1957 was ultimately given effect to from 26\textsuperscript{th} January 1957. The Constituent Assembly of the State was a duly elected and sovereign body and hence the Constitution of Jammu and Kashmir 1957 is not a piece of ordinary legislation or even subordinate legislation.\textsuperscript{1} The State of Jammu and Kashmir thus acquired the distinction of having a separate Constitution for the administration of the State, in place of the provisions of Part VI of the Constitution of India, which govern all the other States of the Union.\textsuperscript{2}

4.5 FEATURES OF THE CONSTITUTION OF JAMMU AND KASHMIR

The State of Jammu and Kashmir is the only State within the Union of India having a separate Constitution and this gives rise to an apparently anomalous situation. Whether such a constitution can exist within the framework of the Indian Constitution is a debatable question and the validity of such a constitution would largely depend upon the interpretation of the various provisions of both the constitutions read in the light of one another. However, in order to understand the position of the Constitution of Jammu and Kashmir 1957, in relation to the Constitution of India 1950 it is essential to study the salient features of the Constitution of Jammu and Kashmir 1957.

A constitution may be defined as a body of fundamental rules, which regulate the activities of a State. Every State must have a constitution. James Bryce says, "The constitution of a State or Nation consists of those of its rules or laws which determine the forms of government and the respective rights and duties of it towards its citizens and of citizens towards the government." It may be described as a basic and supreme law and is distinct from a statute. In a pure Federal system the States or provinces are known to have their own constitutions. Even though it has been held by the

1 An Introduction to Politics – Shibnath Chakraborty – fifteenth edition – Page 280
Supreme Court of India that federalism envisaged in our Constitution is one of its basic features and is indestructible,¹ none of the States have their own separate Constitutions except the State of Jammu and Kashmir.

The salient features of the Constitution of Jammu and Kashmir 1957 are:

**Written Constitution:** Constitutions of the world are either written or unwritten. The classification of Constitutions as written and unwritten is unscientific and is now considered to be outdated. However, the Constitution of Jammu and Kashmir is a written Constitution having 158 Sections and 6 Schedules.

**Partly rigid and partly flexible:** A more scientific classification is to classify modern constitutions into Flexible and Rigid. The basis of this classification rests on whether the process of constitutional amendment is or is not the same as ordinary law-making process.² A flexible Constitution is one which is elastic and therefore can be changed easily. A rigid Constitution on the other hand, is one which is very difficult to change.³ The Kashmir Constitution is partly rigid and partly flexible.⁴ Matters relating to defence, external affairs and communications along with those features specified in the proviso

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² See – Studies in History and Jurisprudence - James Bryce
³ An Introduction to Politics – Shibnath Chakraborty – fifteenth edition – Page 282
to section 147 of the Constitution of Jammu and Kashmir 1957, that
is, sections 3 and 5 are considered to be rigid.\(^1\) All other provisions
of the Constitution of Jammu and Kashmir 1957 are considered to
be flexible.

**Not repugnant to the Constitution of India:** the Constitution of
Jammu and Kashmir is complementary to Indian Constitution and
not repugnant to the Constitution of India. The Constitution of India
It is in conformity with the Constitution of India and is so evolved
that a clash seems unlikely.\(^2\) However the Constitution of Jammu
and Kashmir does create an anomaly as none of the other Indian
States have a separate Constitution.

### 4.6 INDO-PAKISTAN DIALOGUE ON KASHMIR

Though the Accession of Kashmir is a matter only concerning India,
after the cease-fire and the intervention of the United Nations in 1949,
Pakistan has somehow managed to have some say in the Kashmir issue and
to this India has too often obliged. Having almost one-third of Kashmir
under its occupation and some international support, India has often agreed
to enter into dialogue with Pakistan, though there was no legal obligation to
do so.

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Page 195 – A. S. Anand
Tashkent Declaration 1966: On 10th January 1966, by the Tashkent Declaration the Prime Minister of India and the President of Pakistan agreed that both sides would exert all efforts to create good neighbourly relations between India and Pakistan in accordance with the United Nations Charter. They reaffirmed their obligation under the charter not to recourse to force and to settle their disputes through peaceful means. It was considered that the interest of peace in the region, particularly in the Indo-Pakistan sub-continent and the interest of the people of India and Pakistan were not served by the continuance of tension between the two countries. It was against this background that Jammu and Kashmir was discussed, and each of the sides set forth its respective position. Clause II of the Declaration states that the Prime Minister of India and the President of Pakistan have agreed that all armed personnel of the two countries shall be withdrawn not later than 25 February 1966 to the positions that they held prior to 5 August 1965, and both sides shall observe the cease-fire terms on the cease-fire line. Clause III of the Declaration states that the Prime Minister of India and the President of Pakistan have agreed that the relations between India and Pakistan shall be based on the principle non-interference in the internal affairs of each other.

1 See the Tashkent Declaration 1966.
Simla Agreement 1972- after the defeat of Pakistan by India in December 1971, President Bhutto and Smt Indira Gandhi after a five day summit meeting at Simla, on 3rd July 1972 signed an agreement\(^1\) wherein the Government of India and the Government of Pakistan resolved that the two countries put an end to the conflict and confrontation that have hitherto marred their relations and work for the promotion of friendly and harmonious relationship and the establishment of durable peace in the sub-continent, so that both countries may henceforth devote their resources and energies to the pressing task of advancing the welfare of their people. In the said agreement it was further agreed that in Jammu and Kashmir, the line of control resulting from the cease-fire of December 17, 1971 shall be respected by both sides without prejudice to the recognized position of either side. Neither side shall to alter it unilaterally, irrespective of mutual differences and legal interpretations. Both sides further undertake to refrain from the threat or the use of force in violation of this line. It was further agreed that the Heads of the two nations would again meet in the future to find, inter alia, a final settlement to the Kashmir issue. The Shimla Pact 1972 marked India's effort to confer legitimacy on the status quo.\(^2\) However it has been said that the damage done by the Tashkent and Shimla Agreements to the basic and international status of the Kashmir issue is irreparable.\(^3\)

\(^1\) See Simla Agreement 1972
\(^2\) The Sunday Statesman – 21st September 1999 – Kashmir Today – I
\(^3\) The Sunday Statesman – 22nd September 1999 – Kashmir Today – II
Since the signing of Simla Agreement various summits have been held between India and Pakistan with hope of amicably resolving the differences between the two nations. The various summits briefly are as follows:

1972-Simla: Indira Gandhi and Z. A. Bhutto signed The Simla Pact. It was agreed to uphold the Line of Control and settle disputes by collateral negotiations. Bhutto gives private assurances of making the Line of Control the international border.

1987-New Delhi: General Zia-ul-Haq and Rajiv Gandhi agree to de-escalate tensions and withdraw troops from the border.

1989-Islamabad: Rajiv Gandhi and Benazir Bhutto agree not to attack each other’s nuclear installations. An agreement on Saichen is stillborn.

1997-Male: I. K. Gujral and Nawaz Sharif agree to resume talks and establish a hot line between Delhi and Islamabad.

1999-Lahore: A. B. Vajpayee and Nawaz Sharif sign the Lahore Declaration to intensify efforts to resolve disputes, including Kashmir, and reduce risk of accidental or unauthorized use of nuclear weapons.

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1 India Today -July 16, 2001-Pg 32
However the meeting at Agra in the year 2001 between A. B. Vajpayee and President Parveez Musharaf was a futile attempt between the two leaders to establish peace in the sub-continent. The India-Pakistan Summit failed because the two sides could not agree on the contents of a joint statement. According to foreign ministry spokesperson, “Although the commencement of the process and beginning of the journey has taken place, the destination of an agreed joint statement has not been reached.” Ultimately no agreement was signed.

4.7 POSITION OF PAKISTAN OCCUPIED KASHMIR

Regarding the territories of the State of Jammu and Kashmir under the occupation of Pakistan, referred to as Pakistan Occupied Kashmir, it may be noted that the Government of India did not cede the said territories to Pakistan. They were occupied by Pakistan by force and India still claims back the areas of Pakistan Occupied Kashmir. Parliament adopted a resolution on 22nd February 1994, re-affirming that Pakistan must vacate the areas of the Indian State of Jammu and Kashmir, which they have occupied through aggression. So-called Pakistan Occupied Kashmir or Azad Kashmir comprises primarily of five districts, Muzaffarabad, Bagh, Rawlakot, Kotli and Mirpur. Besides these five districts the territories of Gilgit and Baltistan that were kept under the direct control of Pakistan were

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3 BJP Today – August 1-15 – Page 9
handed over to China by Pakistan in 1963. Schedule I of the Constitution of India 1950, describes the territory of the State of Jammu and Kashmir as the territory, which immediately before the commencement of this Constitution, was comprised in the Indian State of Jammu and Kashmir.¹

Section 4 of the Constitution of Jammu and Kashmir 1957 further describes the territory of the State. According to Section 4, the territory of the State shall comprise all territories, which on the fifteenth day of August 1947, were under the sovereignty or suzerainty of the Ruler of the State.² In other words as per the provisions of the Indian Constitution and the Constitution of Jammu and Kashmir, the State also includes the territories under the occupation of Pakistan as well as the territories handed over to China by Pakistan in 1963. Thus, the territory includes the area of the State at present held by tribesmen and which is not de facto under India’s control.³ It is interesting to note that even though the territories of Pakistan Occupied Kashmir were occupied way back in 1948, the Constitution of Pakistan 1973,⁴ did not include the State of Jammu and Kashmir within her territorial limits. Instead, Article 257⁵ of the Constitution of Pakistan 1973, states that: “When the people of the State of Jammu and Kashmir decide to

¹ See – Schedule I of the Constitution of India 1950.
⁴ See – Constitution of Pakistan 1973
accede to the Pakistan, the relationship of Pakistan and that State shall be determined in accordance with the wishes of the people of that State.” In the light of these provisions of the Constitution of Pakistan 1973, the Chief Justice of the High Court of Azad Kashmir, the Hon’ble Mr. Justice Abdul Majeed Mallick on 8th March 1993 was pleased to observe¹ that the Northern Areas do not form a part of the territories of Pakistan as defined in the Constitution of Pakistan 1973, and therefore these areas are part of the State of Jammu and Kashmir. The said decision clarifies the position of Pakistan-occupied-Kashmir with Pakistan and is of some significance to India with regards to the Kashmir issue.

According to Amanullah Khan, founder of the Jammu and Kashmir Liberation Front, Kashmir’s first militant group, the only solution is for the divided Jammu and Kashmir State, including Gilgit-Baltistan, to be reunited under international supervision in peaceful phases. It has to be made an independent country with a democratic, federal and secular system of Government. He further states, after 15 years, let there be a referendum supervised by the UN or any other international organization in which the Kashmiris will determine whether independence should be given to it or whether it should become part of India or Pakistan. That popular verdict must be accepted by India, Pakistan and the Kashmiris as a final

settlement.¹ According to Khan elections are held regularly in POK and there is an elected President and Prime Minister, a Supreme Court, High Court, Election Commission, Legislative Assembly and Public Service Commissions.² An ex-President of Azad Kashmir has described the Government of Azad Kashmir as a “government of Azad Kashmir by Pakistanis for Pakistan.”³ However there are certain flaws in the election laws. In order to contest elections in POK one has to declare in writing that he favours accession to Pakistan. The Decree states, “No person or political party in Azad Jammu and Kashmir shall be permitted to propagate against the state’s accession to Pakistan.” On the other hand in order to contest elections in the Srinagar Assembly the one has to declare his allegiance to the Indian Constitution. In other words one has to accept Kashmir as an integral part of India. It should be noted that for the territories under the occupation of Pakistan, twenty-four seats in the Legislative Assembly are kept vacant and are not be taken into account for reckoning the total membership of the assembly⁴.

⁴ Constitution of Jammu and Kashmir, 1957, Section 48(a)
4.8 POLITICAL TREND IN THE STATE OF JAMMU AND KASHMIR

The recent elections in Kashmir reflect the present political scenario in the State. After the elections the various political parties have found it difficult to form a Government for the State even by coalition. This is basically the picture all over the country both at the State and National level. The recently held elections in the State reflect the unstable position in the State and it appears that even after more than 50 years since accession none of the political parties have managed to cater to the hope and aspirations of the people of Kashmir. In Ladakh this election nobody voted.\(^1\) The results of the elections\(^2\) are set out below:

<table>
<thead>
<tr>
<th>Party</th>
<th>Seats</th>
</tr>
</thead>
<tbody>
<tr>
<td>National Conference</td>
<td>28</td>
</tr>
<tr>
<td>Congress</td>
<td>20</td>
</tr>
<tr>
<td>P. D. P.</td>
<td>16</td>
</tr>
<tr>
<td>B. J. P.</td>
<td>1</td>
</tr>
<tr>
<td>C. P. M.</td>
<td>2</td>
</tr>
<tr>
<td>B. S. P.</td>
<td>1</td>
</tr>
<tr>
<td>Independent</td>
<td>13</td>
</tr>
<tr>
<td>Others</td>
<td>6</td>
</tr>
<tr>
<td><strong>TOTAL</strong></td>
<td><strong>87</strong></td>
</tr>
</tbody>
</table>

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\(^2\) Anandabazar Patrika - 23rd October 2002.