



Special Status of Jammu & Kashmir

Under Article 1 of the Indian Constitution, the State of Jammu and Kashmir (J&K) is a constituent state of Indian Union and its territory forms a part of the territory of India. On the other hand, Article 370 in Part XXI of the Constitution grants a special status to it. Accordingly, all the provisions of the Constitution of India do not apply to it. It is also the only state in the Indian Union which has its own separate state Constitution—the Constitution of Jammu and Kashmir.

Under the same Part (XXI) of the Constitution, twelve other states¹ of the Indian Union also enjoy special status but only in certain minor matters. On the other hand, the special status enjoyed by the State of J&K (as mentioned above) is unparalleled.

ACCESSION OF J&K TO INDIA

With the end of the British paramountcy, the State of Jammu and Kashmir (J&K) became independent on 15 August 1947. Initially its ruler, Maharaja Hari Singh, decided not to join India or Pakistan and thereby remain independent. On 20 October 1947, the Azad Kashmir Forces supported by the Pakistan army attacked the frontiers of the state. Under this unusual and extraordinary political circumstance, the ruler of the state decided to accede

the state to India. Accordingly, the 'Instrument of Accession of Jammu and Kashmir to India' was signed by Pandit Jawaharlal Nehru and Maharaja Hari Singh on 26 October 1947.² Under this, the state surrendered only three subjects (defence, external affairs and communications) to the Dominion of India. At that time, the Government of India made a commitment that 'the people of this state, through their own Constituent Assembly, would determine the internal Constitution of this state and the nature and extent of the jurisdiction of the Union of India over the state, and until the decision of the Constituent Assembly of the State, the Constitution of India could only provide an interim arrangement regarding the state.'³ In pursuance of this commitment, Article 370 was incorporated in the Constitution of India. It clearly states that the provisions with respect to the State of J&K are only temporary and not permanent. It became operative on 17 November 1952, with the following provisions:

1. The provisions of Article 238 (dealing with the administration of Part B states) is not applicable to the state of J&K. The state of J&K was specified in the category of Part B states in the original Constitution (1950). This Article in Part VII was subsequently omitted from the Constitution by the 7th Constitutional Amendment Act (1956) in the wake of the reorganisation of states.
2. The power of Parliament to make laws for the state is limited to: (a) Those matters in the Union List and the Concurrent List which correspond to matters specified in the state's Instrument of Accession. These matters are to be declared by the president in consultation with the state government. The Instrument of Accession contained matters classified under four heads, namely, external affairs, defence, communications and ancillary matters. (b) Such other matters in the Union List and the Concurrent List which are specified by the president with the concurrence of the state government. This means that laws can be made on these matters only with the consent of the State of J&K.
3. The provisions of Article 1 (declaring India as a Union of states and its territory) and this Article (that is, Article 370) are applicable to the State of J&K.
4. Besides above, the other provisions of the Constitution can be applied to the state with such exceptions and modifications as specified by the

President in consultation with the state government or with the concurrence of the state government.

5. The President can declare that Article 370 ceases to be operative or operates with exceptions and modifications. However, this can be done by the President only on the recommendation of Constituent Assembly of the state.

Therefore, Article 370 makes Article 1 and Article 370 itself applicable to the State of J&K at once and authorises the president to extend other Articles to the state.

PRESENT RELATIONSHIP BETWEEN J&K AND INDIA

In pursuance of the provisions of Article 370, the President issued an order called the Constitution (Application to Jammu and Kashmir) Order, 1950, to specify the Union's jurisdiction over the state. In 1952, the Government of India and the State of J&K entered into an agreement at Delhi regarding their future relationship. In 1954, the Constituent Assembly of J&K approved the state's accession to India as well as the Delhi Agreement. Then, the President issued another order with the same title, that is, the Constitution (Application to Jammu and Kashmir), Order, 1954. This order superseded the earlier order of 1950 and extended the Union's jurisdiction over the state. This is the basic order that, as amended and modified from time to time, regulates the constitutional position of the state and its relationship with the Union.⁴ At present, this is as follows:

1. Jammu and Kashmir is a constituent state of the Indian Union and has its place in Part I and Schedule I of the Constitution of India (dealing with the Union and its Territory). But its name, area or boundary cannot be changed by the Union without the consent of its legislature.
2. The State of J & K has its own Constitution and is administered according to that Constitution. Hence, Part VI of the Constitution of India (dealing with state governments) is not applicable to this state. The very definition of 'state' under this part does not include the State of J&K.
3. Parliament can make laws in relation to the state on most of the subjects enumerated in the Union List and on a good number of subjects enumerated in the Concurrent List.⁵ But, the residuary power belongs to

the state legislature except in few matters like prevention of activities involving terrorist acts, questioning or disrupting the sovereignty and territorial integrity of India and causing insult to the National Flag, National Anthem and the Constitution of India. Further, the power to make laws of preventive detention in the state belongs to the state legislature. This means that the preventive detention laws made by the Parliament are not applicable to the state.

4. Part III (dealing with Fundamental Rights) is applicable to the state with some exceptions and conditions. The Fundamental Right to Property is still guaranteed in the state. Also, certain special rights are granted to the permanent residents of the state with regard to public employment, acquisition of immovable property, settlement and government scholarships.
5. Part IV (dealing with Directive Principles of State Policy) and Part IVA (dealing with Fundamental Duties) are not applicable to the state.
6. A National Emergency declared on the ground of internal disturbance will not have effect in the state except with the concurrence of the state government.⁶
7. The President has no power to declare a financial emergency in relation to the state.
8. The President has no power to suspend the Constitution of the state on the ground of failure to comply with the directions given by him.
9. The State Emergency (President's Rule) is applicable to the state. However, this emergency can be imposed in the state on the ground of failure of the constitutional machinery under the provisions of state Constitution and not Indian Constitution. In fact, two types of Emergencies can be declared in the state, namely, President's Rule under the Indian Constitution and Governor's Rule under the state Constitution. In 1986, the President's Rule was imposed in the state for the first time.
10. International treaty or agreement affecting the disposition of any part of the territory of the state can be made by the Centre only with the consent of the state legislature.
11. An amendment made to the Constitution of India does not apply to the state unless it is extended by a presidential order.
12. Official language provisions are applicable to the state only in so far as

they relate to the official language of the Union, the official language of inter-state and Centre–state communications and the language of the Supreme Court proceedings.

13. The Fifth Schedule (dealing with administration and control of schedule areas and scheduled tribes) and the Sixth Schedule (dealing with administration of tribal areas) do not apply to the state.
14. The special leave jurisdiction of the Supreme Court and the jurisdictions of the Election Commission and the comptroller and auditor general are applicable to the state.
15. The High Court of J&K can issue writs only for the enforcement of the fundamental rights and not for any other purpose.
16. The provisions of Part II regarding the denial of citizenship rights of migrants to Pakistan are not applicable to the permanent residents of J&K, who after having so migrated to Pakistan return to the state for resettlement. Every such person is deemed to be a citizen of India.

Therefore, the two characteristic features of the special relationship between the State of J&K and the Union of India are: (a) the state has a much greater measure of autonomy and power than enjoyed by the other states; and (b) Centre's jurisdiction within the state is more limited than what it has with respect to other states.⁷

FEATURES OF J&K CONSTITUTION

In September–October 1951, the Constituent Assembly of J&K was elected by the people of the state on the basis of adult franchise to prepare the future Constitution of the state and to determine its relationship with the Union of India. This sovereign body met for the first time on 31 October 1951, and took about five years to complete its task.

The Constitution of J&K was adopted on 17 November 1956, and came into force on 26 January 1957. Its salient features (as amended from time to time) are as follows:

1. It declares the State of J&K to be an integral part of India.
2. It secures justice, liberty, equality and fraternity to the people of the state.
3. It says that the State of J&K comprises all the territory that was under the ruler of the state on 15 August 1947. This means that the territory of the

state also includes the area which is under the occupation of Pakistan.

4. It lays down that a citizen of India is treated as a 'permanent resident' of the state if on 14 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 10 years prior to that date, or (c) any person who before 14 May, 1954 was a state subject of Class I or Class II and who, having migrated to Pakistan after 1 March 1947, returns to the state for resettlement.
5. It clarifies that the permanent residents of the state are entitled to all rights guaranteed under the Constitution of India. But, any change in the definition of 'permanent' can be made by the state legislature only.
6. It contains a list of directive principles that are to be treated as fundamental in the governance of the state. However, they are not judicially enforceable.
7. It provides for a bicameral legislature consisting of the legislative assembly and the legislative council. The assembly consists of 111 members directly elected by the people.⁸ Out of this, 24 seats are to remain vacant as they are allotted for the area that is under the occupation of Pakistan. Hence, as an interim measure, the total strength of the Assembly is to be taken as 87 for all practical purposes. The council consists of 36 members, most of them are elected in an indirect manner and some of them are nominated by the Governor, who is also an integral part of the state legislature.
8. It vests the executive powers of the state in the governor appointed by the president for a term of five years. It provides for a council of ministers headed by the chief minister to aid and advise the governor in the exercise of his functions. The council of ministers is collectively responsible to the assembly. Under the original Constitution of J&K (1957), the head of the state and head of the government were designated as *Sadar-i-Riyasat* (President) and *Wazir-i-Azam* (Prime Minister) respectively. In 1965, they were redesignated as governor and chief Minister respectively. Also, the head of the state was to be elected by the state assembly.
9. It establishes a high court consisting of a chief justice and two or more other judges. They are appointed by the president in consultation with the Chief Justice of India and the Governor of the state. The High Court of

J&K is a court of record and enjoys original, appellate and writ jurisdictions. However, it can issue writs only for the enforcement of fundamental rights and not for any other purpose.

10. It provides for Governor's Rule. Hence, the governor, with the concurrence of the President of India, can assume to himself all the powers of the state government, except those of the high court. He can dissolve the assembly and dismiss the council of ministers. The Governor's Rule can be imposed when the state administration cannot be carried on in accordance with the provisions of the J&K Constitution. It was imposed for the first time in 1977. Notably, in 1964, Article 356 of the Indian Constitution (dealing with the imposition of President's Rule in a state) was extended to the state of J&K.
11. It declares **Urdu** as the official language of the state. It also permits the use of English for official purposes unless the state legislature provides otherwise.
12. It lays down the procedure for its amendment. It can be amended by a bill passed in each house of the state legislature by a majority of two-thirds of the total membership of that house. Such a bill must be introduced in the assembly only. However, no bill of constitutional amendment can be moved in either House if it seeks to change the relationship of the state with the Union of India.

J&K AUTONOMY RESOLUTION REJECTED

On June 26, 2000, in a historic move, the Jammu and Kashmir Legislative Assembly adopted by voice vote a resolution accepting the report of the State Autonomy Committee, recommending greater autonomy to the State. The Assembly sought the following:

1. The word 'temporary' in Article 370 to be substituted with 'special'.
2. Only defence, foreign affairs, communications and ancillary subjects to be with the Centre.
3. Article 356 not to apply to J&K.
4. Election Commission of India to have no role.
5. J&K Assembly to have final say on Central role in case of external aggression / internal emergency.

6. No room for All-India Services (IAS, IPS and IFS) in J&K.
7. Governor and Chief Minister to be called Sadar-e-Riyasat and Wazir-e-Azam.
8. Separate charter of fundamental rights for J&K.
9. Parliament's and President's role over J&K to be sharply curtailed.
10. No special leave to appeal by the Supreme Court.
11. No special provisions for scheduled castes/tribes and backward classes.
12. Centre to lose adjudication rights relating to inter-state rivers or river valleys.
13. No jurisdiction of the Supreme Court in appeals from the High Court in civil and criminal matters.
14. Parliament not to be empowered to amend the Constitution and procedure with respect to J&K.

On July 14, 2000, the Union Cabinet rejected as unacceptable the June 26 autonomy resolution of the Jammu and Kashmir Assembly, though at the same time committing itself to a greater devolution of powers to all states. The Cabinet found the June 26 resolution unacceptable because essentially it was a plea for restoration of the pre-1953 status to the state.

The Cabinet was unanimous in its judgement that the June 26 resolution could not be accepted, fully or even partially, because it would set the clock back and reverse the natural process of harmonizing the aspirations of the people of Jammu and Kashmir with the integrity of the nation.

Specifically about Jammu and Kashmir, the Cabinet wanted the people and the state government to join hands in the endeavour to address the real problems facing the state: to root out insurgency and cross-border terrorism, and to ensure accelerated development.

GROUP OF INTERLOCUTORS FOR J & K

The Group of Interlocutors for Jammu and Kashmir was appointed by the Central Government in October 2010 under the Chairmanship of the eminent journalist Dileep Padgaonkar⁹. It was tasked to hold wide – ranging discussions with all sections of opinion in Jammu and Kashmir in order to identify the political contours of a solution to the problems of the state.

The Group submitted its report to the Union Home Minister in October

2011. The report is entitled “*A New Compact with the People of Jammu and Kashmir*”.

The Group did not recommend a pure and simple return to the pre-1953 situation. This would create a dangerous constitutional vacuum in the Centre-state relationship. The clock cannot be set back.

Instead, the Group recommended the establishment of a Constitutional Committee to review all Central Acts and Articles of the Constitution of India extended to the state of Jammu and Kashmir after signing of the Delhi Agreement of 1952¹⁰.

The Constitutional Committee should be headed by a distinguished jurist who enjoys esteem and respect in the state and in the rest of the country. Its members should be constitutional / legal experts from the state and the rest of India. Their choice should be acceptable to all stake-holders.

In the exercise of its mandate, the Constitutional Committee should bear in mind the dual character of Jammu and Kashmir, *viz.*, that it is a constituent unit of the Indian Union and that it enjoys a special status in the said Union, enshrined in Article 370 of the Constitution of India. It should also bear in mind the dual character of the people of the state, *viz* that they are both state subjects and Indian citizens. The review should, therefore, have to determine whether – and to what extent – the Central Acts and Articles of the Constitution of India, extended with or without amendment to the state, have dented Jammu and Kashmir’s special status and abridged the state government’s powers to cater to the welfare of its people.

The Constitutional Committee should be future-oriented in that it should conduct its review solely on the basis of the powers that the state needs to address the political, economic, social and cultural interests, concerns, grievances and aspirations of the people in all the three regions of the state – Jammu, Kashmir and Ladakh – and all its sub-regions and communities. In this connection, the Committee should also need to reflect on the quantum of legislative, financial and administrative powers that the state government should delegate to the three regions at all levels of governance – the regional, district and panchayat / municipality.

The Constitutional Committee should be requested to complete its work within six months. Its recommendations must be reached through consensus

so that they are acceptable to all stake-holders represented in the State Assembly and in Parliament. The next step would be for the President, in exercise of the powers conferred by Clauses (1) and (3) of Article 370 of the Constitution, to issue an order incorporating the recommendations of the Constitutional Committee. The order would need to be ratified by a bill in both Houses of Parliament and by each House in the State Legislature by a margin of not less than two-thirds majority of the total membership present and voting in each House. It would then be presented to the President for assent. Once this process is over, Clauses (1) and (3) of Article 370 shall cease to be operative and no orders shall be made by the President hereafter under the said clauses as from the date of the final order.

The recommendations of the Group on certain issues of contention are as follows:

1. Delete the word 'temporary' from the heading of Article 370 and from the title of Part XXI of the Constitution. Replace it with the word 'special' as it has been used for other States under article 371 (Maharashtra and Gujarat); Article 371A (Nagaland); 371B (Assam); 371C (Manipur); 371D and E (Andhra Pradesh); 371F (Sikkim); 371G (Mizoram); 371H (Arunachal Pradesh); 371I (Goa).
2. On the Governor: The state government, after consultations with opposition parties, should submit a list of three names to the President. The President can ask for more suggestions if required. The Governor should be appointed by the President and hold office at the pleasure of the President.
3. Article 356: The action of the Governor is now justiciable in the Supreme Court. The present arrangement should continue with the proviso that the Governor should keep the State Legislature under suspended animation and hold fresh elections within three months.
4. Article 312: The proportion of officers from the all-India services should be gradually reduced in favour of officers from the state civil service without curbing administrative efficiency.
5. The nomenclatures in English of the Governor and the Chief Minister should continue as at present. Equivalent nomenclatures in Urdu may be used while referring to the two offices in Urdu.
6. Create three Regional Councils, one each for Jammu, Kashmir and

Ladakh. (The latter would no longer be a division of Kashmir). Devolve certain legislative, executive and financial powers to them. A further devolution of executive and financial powers to Panchayati Raj institutions – at the level of a district, a village panchayat, a municipality or a corporation – would be part of the overall package. All these bodies should be elected. Provisions should be made for representation of women, SC/ST, backward clans and minorities. MLAs should be *ex-officio* members with voting rights.

7. Parliament should make no laws applicable to the state unless it relates to the country's internal and external security and its vital economic interest, especially in the areas of energy and access to water resources.
8. Extend the writ of autonomous and statutory institutions to the state and ensure that their functioning conforms to the provisions of the Constitution of Jammu and Kashmir.
9. These changes should be harmonised in all parts of the former princely state. All opportunities for cross-LOC cooperation should be promoted. This would require substantial constitutional changes in Pakistan-administered Jammu and Kashmir.
10. Take all appropriate measures to regard Jammu and Kashmir as a bridge between South and Central Asia.

Table 36.1 *The Constitution of Jammu and Kashmir at a Glance*

<i>Parts</i>	<i>Subject Matter</i>	<i>Sections Covered¹¹</i>
I	Preliminary	1-2
II	The State	3-5
III	Permanent Residents	6-10
IV	Directive Principles of State Policy	11-25
V	The Executive	26-45
VI	The State Legislature	46-92
VII	The High Court	93-113
VIII	Finance, Property and Contracts	114-123

IX	The Public Services	124-137
X	Elections	138-142
XI	Miscellaneous Provisions	143-146
XII	Amendment of the Constitution	147
XIII	Transitional Provisions	148-158

Table 36.2 *Schedules of the J & K Constitution at a Glance*

<i>Numbers</i>	<i>Subject Matter</i>
First Schedule	Method of Election to the Office of Sadar-i-Riyasat (Omitted)
Second Schedule	Emoluments, Allowances and Privileges of the Governor
Third Schedule	Salaries and allowances of the Speaker and Deputy Speaker of the Legislative Assembly and the Chairman and the Deputy Chairman of the Legislative Council
Fourth Schedule	Salaries, allowances and other conditions of service of the Judges of the High Court
Fifth Schedule	Forms of Oaths or Affirmations
Sixth Schedule	Regional Languages
Seventh Schedule	Provisions as to disqualification on ground of defection

NOTES AND REFERENCES

1. These include Maharashtra, Gujarat, Nagaland, Assam, Manipur, Andhra Pradesh, Telangana, Sikkim, Mizoram, Arunachal Pradesh, Goa and Karnataka.
2. It was accepted by the Governor General of India, Lord Mountbatten, on

27 October, 1947.

3. D D Basu, *Commentary on the Constitution of India*, Prentice-Hall, Vol. v, 5th edition, 1970, p. 512.
4. This order was amended in 1963, 1964, 1965, 1966, 1972, 1974 and 1986.
5. The Concurrent List was not applicable to the state till 1963. The State List is not applicable to the state even today.
6. Unlike in other states, a proclamation of emergency can be made in J&K on the ground of internal disturbance also. An emergency declared on the ground of war or external aggression is directly (i.e., without the concurrence of the state government, as in the case of other states) applicable to J&K.
7. M P Jain, *Indian Constitutional Law*, Wadhwa, Fourth Edition, 1987, p. 435.
8. Originally, the strength of J&K Assembly was 100 and this was increased to 111 in 1987.
9. The other two members of the Group were academician Radha Kumar and former Information Commissioner M.M. Ansari.
10. This Agreement, along with the Instrument of Accession and Article 370 of the Constitution, has been adopted by the Indian Parliament and the Constituent Assembly of Jammu and Kashmir.
11. For the subject-matter of each section of the Constitution of Jammu and Kashmir, see Appendix–XIV.