

# WISDOM CRUX

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## CONSTITUTIONAL POSITION OF JAMMU AND KASHMIR

[Volume 2, Issue 8] – August, 2017

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Jammu and Kashmir has dependably been the epicenter of all political contentions and has been significant reason of severity amongst India and Pakistan. It is a broadly wrangled about issue whether J&K ought to or ought not to be given such uncommon status and frequently compensates for a decent political motivation before decisions. In any case, what lays underneath so much contradictions and complexities which J&K as a state and India as nation appearances is an Article of Indian Constitution. It is a specific end goal to know why the diligent issue of socialism, fear mongering and separationist developments have been giving Indian Government some genuine inconvenience the beginning and nature of this Article is one thing which ought to be comprehended in detail. To dive into the ever-questionable **Article 370** by investigating its experience, the nature of the article, the different convictions individuals have about the article and what lies ahead after completely looking for replies before. It passes on the elements of this Article; how diverse it is regarding different states and what are the delayed consequences of having such brief article work for a considerable length of time and years after autonomy. It will likewise be crucial to examine the exceptional subtleties of administration that have sprung up because of conceding of unique statue to J&K under Article 370, thereby making it fascinating to recognize what will be the reaction this article will get in coming years from the **political gatherings** as well as even from worldwide group. Over the span of the paper the different perspectives whether Article 370 ought to be annulled or not will be too are talked about with a specific end goal to assist **legitimize** the way of this Article.

### KEYWORD:

- Article 370
- Political gatherings
- Legitimize

### INTRODUCTION

The Constitution of India<sup>1</sup> provides for uniform rule over the whole country. But certain regions of

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the country are governed by special provisions. These provisions<sup>2</sup> ensure the protection of cultural identities, customs and economic and political interests of the original inhabitants of these areas. One of them is Jammu and Kashmir, which is a constituent State of Indian Union, but its Constitutional position, and its relation with the Central Government, somewhat differ from that of other States and the same enjoys special autonomy which is enshrined in Part XXI under Article 370 of the Constitution of India, according to which, no law enacted by the Parliament of India, except for those in the field of defense, communication and foreign policy, will be extendable in Jammu and Kashmir unless it is ratified by the state legislature of Jammu **and Kashmir**. **Subsequently, jurisdiction of the Supreme Court of India over Jammu and Kashmir has been extended.**

The State was acceded to the **Dominion of India**<sup>3</sup> by Maharaja Hari Singh, who was the ruler of the State in 1947 at the time when India was itself burning in the flames of communal riots. Jammu and Kashmir is also the only Indian state that has its own flag and constitution, and Indians from other states cannot purchase land or property in the state. Designed by the then ruling National Conference, the flag of Jammu and Kashmir features a plough on a red background symbolizing labour substituted the Maharaja's state flag.

The internal position of the Jammu and Kashmir was also not far better than India. Communal disturbances and hunger for power in the sub-continent were provoking the religious feelings of community in order to fulfil their long-awaited desire to assume political supremacy. The division of the sub-continent on the basis of the religion was creating hindrances in achieving the v Kashmiri struggle is going through a very difficult phase. We have reached a stage where people of Jammu and Kashmir appear to have lost sense of direction or they are so disillusioned that they have even stopped complaining, as they have been let down time and again. Their own Kashmiri leaders have let down in first place, and whatever hope they had from Pakistan has been shattered by u turns made by various government of Pakistan. And tragedy is that some pro

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pocket Kashmiris are still praising government of Pakistan is doing all this to promote and protect interest of people of Jammu and Kashmir.

They deliberately refrained from highlighting issues, which concerned people of so called **Azad Kashmir**<sup>4</sup> and Gilgit and only spoke of miseries of the people of Indian controlled Kashmir.

Thus, indirectly supporting this myth that these areas enjoy freedom and are trouble free.

Very objective of “Independence”.

### **HISTORICAL BACKGROUND**

There are some Constitutional changes that took place in the **State of Jammu and Kashmir**<sup>5</sup>. The letter dated October 27, 1947, the Governor-General, the Maharaja of Jammu and Kashmir, Hari Singh, offered to accede the Dominion of India. On March 5, 1948, the Maharaja issued a proclamation forming a responsible government of the **Council of Ministers**<sup>6</sup> headed by the Prime Minister which was to take steps to constitute a National Assembly bases on adult franchise to frame a Constitution for the State. On November 25, 1949, Yuvraj Khan Singh, to whom the power was entrusted by the Maharaja, issued a proclamation directing that the Constitution of India to be adopted by the Constituent Assembly of the State insofar as it was applicable in Jammu and Kashmir in order to govern the relationship of the State and the contemplated Union of India. The Constitution of India was adopted on November 26, 1949, and on the same day some of it provisions came into force and the remaining provisions came into force on January 26, 1950. In October 1947, the accession was made by the ruler in favor of India in consideration of certain commitments made by Pt. Jawaharlal Nehru (the then Prime Minister of India). It was in the pursuance of those commitments that Article 370 was incorporated in the Constitution of India. Article 370 of the Constitution of India dealt with the relationship of the State of Jammu and Kashmir with the Union of India. On January 26, 1950 the Constitution which was applicable to Jammu and Kashmir Order, 1950, was made by the

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President. On April 20, 1951, the Maharaja issued a proclamation in pursuance of which the Constituent Assembly of the State submitted the interim report recommended that —

- The form of the future Constitution of Jammu and Kashmir shall be wholly democratic;
- The institution of hereditary ruler ship shall be terminated;
- The office of the Head of the State shall be elective.

### **RECOMMENDATIONS ADOPTED BY THE CONSTITUENT ASSEMBLY**

The **Constituent Assembly**<sup>7</sup> of the State by a resolution adopted these recommendations. The relevant part of the resolution is as follows:

(1)

- (i) that the Head of the State shall be the person recognized by the President of the Union on the recommendations of the Legislative Assembly of the State;
- (ii) he shall hold office during the pleasure of the **President**<sup>8</sup>;
- (iii) he may, by writing under his hand addressed to the President resign his office;
- (iv) subject to the foregoing provisions, the Head of the State shall hold office for a term of five years from the date he enters upon his office;

Provided that he shall, notwithstanding the expiration of his term, continue to hold office until his successors enters upon his office;

(2) that the recommendations of the Legislative Assembly of the State in respect of the recognition of the Head of the State specified in sub-para (1) of paragraph 1, shall be made by elections.

(3) that the Head of the State shall be designated as the Sadar-i-Riyasat .

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On May14, 1954, in exercise of the power conferred by **Article 370** <sup>9</sup> (1) of the Constitution of India, the president, with the concurrence of the government of the State, made the Constitution of (Application to Jammu and Kashmir) Order, 1954. It superseded the earlier Order of 1950, and extended the application of various provisions of the Constitution of India to the State. One such provision was Article 368 but a proviso was added to the effect that “no State of Jammu and Kashmir unless applied by order of the President under clause (1) of Article370”. On November 17, 1956, the Jammu and Kashmir Constitution was adopted. Some sections of the Constitution came into force on January 26, 1957.

The State of Jammu and Kashmir is a part of Indian Territory and is included in the List of States in the First Schedule of the Constitution.

### **HOW SPECIAL POSITION OF JAMMU AND KASHMIR IS DIFFERENT FROM OTHER STATES?**

The position of this State differs from other States in the following respects: -

#### **GIST OF SPECIAL PROVISIONS**

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<b>LEGAL POWER OF THE PARLIAMENT.</b>	The legislative authority dealing of the Union Parliament in respect of this State is limited to those matters in the Union List and Concurrent List which are declared by the President, in consultation with the government of the State, to conform the term of the Instrument of Accession. <a href="#">[9]</a>
<b>SEPARATE CONSTITUTION.</b>	The only State in India i.e. Jammu and Kashmir has a separate Constitution which was

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	adopted on November 17, 1956 and came into force on 26 <sup>th</sup> January, 1957.
<b>PROVISIONS RELATED TO EMERGENCY.[10]</b>	<p>The power does not vest with the Union to declare Financial Emergency[11]in the state. The Union can declare emergency in the state only in case of War or External Aggression. No proclamation of emergency made on the grounds of internal disturbance or imminent danger thereof shall have effect in relation to the state unless the following situations arises: - it is made at the request or with the concurrence of the government of the state; or</p> <p>where it has not been so made, it is applied subsequently by the President to that state at the request or with the concurrence of the government of that state[12].</p>
<b>FUNDAMENTALS DIRECTIVE PRINCIPLES OF STATE POLICY[14] AND DUTIES[15].</b>	<p><b>RIGHTS[13], FUNDAMENTAL</b></p> <p>Article 19 (1) (f)[16] and Article 31(2)[17]of the Constitution are still applicable to Jammu and Kashmir.</p> <p>Supplementary to above, Directive Principles of State Policy and Fundamental Duties are also not applicable to Jammu and Kashmir.</p>

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<b>HIGH COURT OF JAMMU AND KASHMIR.</b>	<p>The High Court of J&amp;K has very limited powers as compared to other High Courts within India.</p> <p>It can't declare any law unconstitutional. Unlike High Courts in other states, under Article 226[18] of the Constitution, it can't issue writs[19] except for enforcement of Fundamental Rights.</p>
<b>OFFICIAL LANGUAGES.[20]</b>	<p>The official language for communication between one state and another; or between a state and the Union;</p> <p>The official language of the Union;</p>



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	The language of the proceedings in the Supreme Court;  Urdu is the official language of Jammu. and Kashmir but use of English is permitted for official purposes unless the state legislature provides otherwise.
<b>PREVENTIVE DETENTION LAWS.[21]</b>	The power of legislation regarding preventive detention laws vests in the State Legislature alone and not in the Parliament.
<b>OTHER PROVISIONS OF THE CONSTITUTION OF INDIA.</b>	The other provisions of the Constitution of India shall apply to Jammu and Kashmir as the President may by order specify.

### **POWER OF THE PRESIDENT UNDER ARTICLE 370**

Article 370 clearly states that due to the special position given to State of Jammu and Kashmir, the President is given the power to apply the provisions of the Constitution to that State subject to such exceptions and modifications as the President may by order specify. The President has power to say by order that certain provisions of the Constitution will be excepted from application to the State of Jammu and Kashmir and on such order, being made those provisions would not apply to that State. Besides this power of making exceptions, the President is also given power to apply the provisions of the Constitution with such modifications as he thinks fit. The meaning of the word ‘**modification**’<sup>10</sup> used in Article 370 (1) must be given the widest effect, including making racial modifications.

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### **HOW CAN WE AMEND ARTICLE 370 WHEN THE CONSTITUENT ASSEMBLY OF JAMMU AND KASHMIR NO LONGER EXISTS?**

According to the provision enshrined under Article 370 (3) of the Constitution of India, consent of the Constituent Assembly of the State and State Legislature are required to amend Article 370.

This issue has been raised at par. Various constitutional experts and jurists are silent on this aspect. Some of them say it can be amended by an amendment Act under Article 368 of the Constitution of India and the amendment extended under Article 370 (1), but the proper answer is yet to come.

In reality, this is the actual status of Article 370 which is still a very debatable and mooted question and remains unanswered. By constitutional amendment. The parliament may amend the article 370 to remove that requirement. Or, the parliament may simply remove the article 370 altogether thereby removing the special status of the state. The constituent assembly of J&K still exists. It is not called 'Legislative Assembly' as in other states.

It should be noted that the article 370 clearly mentions that the provisions are only temporary. Also, the June 2000 resolution from the constituent assembly of JK asking for an amendment to article 370 where the word 'temporary' is to be replaced by 'special' was rejected by the cabinet. Out of the 562 princely states in India, Kashmir was among those that the British did not rule directly. The British government transferred the state forever to Maharaja Gulab Singh under the Treaty of Amritsar, and fixed a nominal annual payment to protect his territories from external enemies. A key development in the history of Jammu and Kashmir in the twentieth

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century is the crystallization of the popular opposition to the Maharaja's rule through the Jammu and Kashmir National Conference, led by Sheikh Abdullah. With India's independence, Maharaja Hari Singh, the ruler of Kashmir in 1947, had three options: to remain independent, merge with India, or merge with Pakistan. Pressing the Maharaja, who initially wanted to remain independent, to accede to India, Prime Minister Jawaharlal Nehru, in one of his letters said, "It is of the most vital importance that Kashmir should remain in the Indian Union. But however, much we may want this, it cannot be done ultimately except through the goodwill of the mass of the population. Even if military forces held Kashmir for a while, a later consequence might be a strong reaction against this. Essentially, therefore, this is a problem of psychological approach to the mass of the people and of making they feel being in the Indian Union will benefit them. If the average Muslim feels that he has no safe or secure place in the Union, then obviously he will look elsewhere. Our basic policy must keep this in view, or else, we fail."

At the point when Hari Singh announced Jammu and Kashmir autonomous in 1947, Pakistan quickly propelled a guerrilla war to free the district, which had a dominant part of Muslims, from Hindu run the show. The Maharaja, understanding his powerlessness to ensure his domain, asked for the Indian government for offer assistance. The Indian government demanded that Kashmir acquiesce to India before it would send its armed force. The Maharaja consented to the same and the Indian government and the Maharaja marked the increase settlement ("the Instrument") on October 26, 1947. Imperatively, Clause 5 of the Instrument said that it couldn't be adjusted without the state's assent. Condition 7 particularly ensured the state's entitlement to sanction the utilization of any future constitution of India in its region. It read: "Nothing in this Instrument should be esteemed to submit me in any capacity to acknowledgment of any future Constitution of India or chain my circumspection to go into game plans with the Government of India under any such future Constitution." The Instrument did not bring about the merger of Kashmir – represented by its own Constitution of 1939 – into India and just made a transitory settlement

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under which India's legislature would care for the subjects of safeguard, outside undertakings, and correspondence while Kashmir would have its own constitution, banner, and Prime Minister. In a communicate on November 2, 1947, Nehru talked about the impermanent way of the Instrument.

### JUDICIAL APPROACH

Now, let us see the vital role played by the Judiciary in the light of the following decided cases which are related to Article 370 of the Constitution of India.

In the case of Sampat Prakash vs. State of J&K :

The main issue which was raised by the petitioner was based on the fact that Article 35 (c) of Jammu and Kashmir Constitution as initially introduced by the Constitution (Application to Jammu and Kashmir) Order, 1954, had given protection any law relating to preventive detention in Jammu and Kashmir against invalidity on the ground of infringement of any one of the fundamental rights guaranteed by Part III of the Constitution for a period of five years only.

Subsequently this period was extended to ten years and later to fifteen years by the Presidential Orders dated 1959 and 1964. These extensions were challenged by the petitioner on the ground that the orders making such modifications could not be validly passed by the President under Article 370 (1). Article 370 could only have been intended to remain effective until the Constitution of the State was framed and thereafter it must be held to become ineffective that any modification made by the President subsequent to the enforcement of the Constitution would be without the authority of law.

The above argument was rejected by the Supreme Court and held Article 370 should be held to be continuing in force because the situation had existed when this article was incorporated in the

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Constitution had materially altered, and the purpose of introducing this article was to empower the President to exercise his discretion in applying Indian Constitution and a reference was also made that **Article 368 of the Constitution**<sup>11</sup> in its application to State of J&K under which an amendment to the Constitution under Article 368 is of no consequence in the State of J&K unless applied by the President under Article 370 (1).

In the case of Mohd.Damnoo v. State of J&K

The petitioner challenged the validity of his detention under the J&K Preventive Detention (Amendment) Act, 1967, on the ground that the Act is invalid as it has not been assented to by the Sadar-i-Riyasat of the State. On November 16, 1952, the President had made an order substituting another Explanation for the existing one in clause (1) of Article 370, as “For the purpose of this article, the Government of the State means the person for this time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of J&K, acting on the advice of Council of Ministers of the State for the time being in office.”

According to the counsel on behalf of the petitioner, neither the State Assembly nor the President were competent to impair the functioning of the Sadar-i-Riyasat of the State unless the Constitution of India was amended under Article 368 and 370 (3) or a fresh Constituent Assembly was convened to amend the Explanation.

The above argument was not accepted by the Supreme Court and the Court explained the following feature of Article 370 (1) (b) and (d) is the necessity of the concurrence of the State Government. Article 370 (1) merely recognized a constitutional position in the State. It was contended Article 370 (1) (b) and (d) places no limitation on the framing or amendment of the Constitution of J&K. basically, it was pointed out that the change in the designation and the mode of the appointment of the Head of the State, the constitutional position in the State remains

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basically the same and the Governor is the successor to the Sadri-i-Roast and can validly exercise his powers as **Head of the State**<sup>12</sup>.

### CONCLUSION

Now, it is crystal clear that the State of J&K has a different Constitution because Kashmir is not a part of India. It is a disputed territory, rather a foreign nation. Legally speaking, as per International Law and UN Charter, any differences between two nations are decided under the UN Charter. Kashmir was always an independent nation, never a part of India in the history too and i.e. the only reason it always leads to a tussle between Pakistan and India. Specifically, related to recognition of Kashmir.

The question of plebiscite doesn't arise till Pakistan doesn't withdraw its forces from POK (Pakistan Occupied Kashmir). India has taken a stand that after lapse of so much time, the circumstances within state have changed. Under the changed circumstances, the plebiscite can't be held and hence, the demand for it is completely unjustified. The view is accepted by most of the nations of the world like USA, UK, France, etc.

With the passage of time, The Constitution (Application to Jammu and Kashmir) Order, 1954 was promulgated by the President of India in consultation with the Government of J&K, regulating the constitutional status of the State; and apart from it several Central laws got extended to the J&K State and even the nomenclature of Sadr-i-Roast and Prime Minister were changed to Governor and Chief Minister on March 30, 1965.

The State of Jammu and Kashmir which is a constituent unit of the Union of India, shall, in its relation with the Union, continue to be governed by Article 370 of the Constitution of India.

Despite of continuous efforts by various political parties, Article 370 of the Indian Constitution could neither be made permanent nor abolished, so it continues to be as such in the Indian

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Constitution with J&K having its own Constitution and State flag and resulting into non-application and non-extension of Central laws without approval of the **State Legislature**<sup>13</sup>.

### References

<sup>1</sup> *Constitution is a living document, an instrument which makes the government system work. Its flexibility lies in its amendments. In this edition, the text of the Constitution of India has been brought up-to-date by incorporating therein all amendments made by Parliament up to and including the Constitution (One Hundredth Amendment) Act, 2015 which contains details of acquired and transferred territories between the Governments of India and Bangladesh and the same has been included in Annexure. The Constitution applies to the State of Jammu and Kashmir with certain exceptions and modifications as provided in article 370 and the Constitution (Application to Jammu and Kashmir) Order, 1954. This Order has been included*

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in Appendix I for facility of reference. Appendix II contains a re-statement of the exceptions and modifications.

<sup>2</sup>the action of providing or supplying something for use

<sup>3</sup>At the outset, a distinction must be made between a British "dominion" and British "Dominions". The use of a capital "D" when referring to the 'British Dominions' was required by the United Kingdom government in order to avoid confusion with the wider term "His Majesty's dominions" which referred to the British Empire as a whole

<sup>4</sup>trouble started brewing in Pakistan-administered Kashmir called Azad Kashmir (AJK). The ruling party in Islamabad, the Pakistan Muslim League-Nawaz (PML-N), and the Pakistan People's Party (PPP) ruling in Azad Kashmir clashed at Nakial, in Kotri district, the hometown of the AJK prime minister. A PPP convention became a procession and challengingly passed through a PML-N stronghold, also venue of a convention. It began with foul language, leading to rock-throwing which soon escalated to firearms, resulting in one dead and seven injured.

<sup>5</sup>The Constitution of Jammu and Kashmir is the legal document which establishes the framework of government at state level in Indian state of Jammu and Kashmir. The present constitution was adopted on 17 November 1956, and came into effect on January 26, 1957. As of 2002, 29 amendments have been affected to the Constitution.

<sup>6</sup>"Council of Ministers" is the name given to the supreme executive organ in some governments. The term is usually equivalent to the word "cabinet"

<sup>7</sup>The Constituent Assembly, consisting of indirectly elected representatives, was established to draft a constitution for India (including the now-separate countries of Pakistan and Bangladesh). It existed for almost three years, the first parliament of India after independence in



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1947. The Assembly was not elected on the basis of universal adult suffrage, and Muslims and Sikhs received special representation as minorities. The Muslim League boycotted the Assembly after failing to prevent its creation. Although a large part of the Constituent Assembly was drawn from the Congress Party in a one-party environment, the Congress Party included a wide diversity of opinions—from conservative industrialists and radical Marxists to Hindu revivalists—all of whom participated in the process.

<sup>8</sup>The President of India is the head of the executive, legislature and judiciary of the country. Article 52 of the Constitution of India says that there should be a President of India. Article 53 says that all the executive powers of the Union shall be exercised by him either directly or through officer's subordinate to him.

<sup>9</sup>In exercise of the powers conferred by clause (1) of article 370 of the Constitution, the President, with the concurrence of the Government of the State of Jammu and Kashmir made The Constitution (Application to Jammu and Kashmir) Order, 1950 which came into force on 26 January 1950 and was later superseded by the Constitution (Application to Jammu and Kashmir) Order, 1954 which came into force on 14 May 1954.

In addition, 47 Presidential orders have been issued between 11 February 1956 and 19 February 1994 making various other provisions of the Constitution of India applicable to Jammu and Kashmir. All these orders were issued with the 'concurrence of the Government of the State'.<sup>[11]</sup> The effect of these orders has been to extend 94 of the 97 subjects in the Union List (the powers of the Central Government) to the State of Jammu and Kashmir, and 260 of the 395 Articles of the Constitution of India.<sup>[12]</sup> This process has been termed the 'erosion' of the Article 370.

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<sup>10</sup>*the action of modifying something*

<sup>11</sup>*Amending the Constitution of India is the process of making changes to the nation's fundamental law or supreme law. The procedure of amendment in the constitutions laid down in Part XX (Article 368) of the Constitution of India.*

<sup>12</sup>*There is a Governor for each state who is appointed by the President. Governor is the Head of the State and the executive power of the State is vested in him. The Council of Ministers with the Chief Minister as its head advises the Governor in the discharge of the executive functions*

<sup>13</sup>*The Vidhan Parishad (or Legislative Council) is the upper house in those states of India that have a bicameral legislature. As of 2014, seven (out of twenty-nine) states have a Legislative Council: Andhra Pradesh, Bihar, Jammu and Kashmir, Karnataka, Maharashtra, Telangana, and Uttar Pradesh*

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