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The Story of Jammu and Kashmir and Interpretation of *Article 370* of the Constitution of India

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Abstract- The paper examines and analyses the history of Jammu and Kashmir (after this J&K) and the *Article 370* of the Constitution of India in light of recent changes brought about in *Article 370* by the Government of India. The paper discusses the story of present J&K, which began in 1846 with the signing of the '*Treaty of Amritsar*' between the British Government and Maharajah Gulab Singh. The paper reflects upon the effect of Treaty and despotic rule of Dogra rulers in J&K. The paper also elaborates the political situation of J&K in the 1930s and briefly discusses the role of Sheikh Abdullah in the conception of the idea of '*Naya Kashmir*' (1944) and '*Quit Kashmir*' movement (1946). Next, the paper focuses on the Independence of Pakistan and India (August 1947). By this time almost all major Princely States except Hyderabad, J&K, Junagarh and Khanate of Kalat acceded either to Pakistan or India. Subsequently, the paper deals with the invasion of J&K by the Pashtun Tribes, which occasioned the accession of J&K to India (October 1947).

Keywords: *jammu and kashmir, instrument of accession, sheikh abdullah, article 370, presidential order, presidential declaration.*

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The Story of Jammu and Kashmir and Interpretation of Article 370 of the Constitution of India

Abhinav Gupta

Purpose of the Study: The present paper covers the detailed story of Jammu and Kashmir (after this J&K), and examines and analyses the Article 370 of the Constitution of India in light of the changes brought about in Article 370 by the Government of India through the Presidential Order of the 'Constitution (Application to J&K) Order, 2019' (after this '2019 Order') under Article 370(1)(d) on 5th August 2019 and the 'Presidential Declaration under Article 370(3) of the Constitution' which replaced the original Article 370 with a new text on 6th August 2019.

Methodology: Analytical and Descriptive methodology is adopted in the present paper. The present paper is primarily based on primary sources like UN Resolutions, Government issued documents, Treaties, Agreement, etc. and secondary data, which is majorly gathered through journals, magazines, newspapers, websites, and other related reliable sources.

Principal Findings: Article 370 of the Constitution of India provides for the constitutional relationship between India and Jammu and Kashmir, which has been modified by the 'Presidential Declaration under Article 370(3) of the Constitution'. The declaration technically repeals the Constitution of Jammu and Kashmir and deprives the permanent resident of J&K of their special status. The State of J&K has been stripped of its statehood and divided into UT of J&K and UT of Ladakh. Now, the whole of the Constitution of India applies to the UT of J&K without any exception.

Application: The present paper has significant application in the field of History, Political Science and Constitutional Law. As for finding a solution to the problem in Jammu and Kashmir, it is prudent to understand the historical evolution of the problem itself. It is also pertinent that in order to solve this problem, the provisions of the Constitution of India shall be interpreted not only in letter but also in its true spirit of participative democracy.

Novelty: The present paper deals in great detail the evolution of the dispute relating to J&K between India and Pakistan. The paper also covers the vital role played by Sheikh Abdullah, Moh. Ali Jinnah and Pandit Nehru in J&K. The paper cover historical as well as political

circumstance, which resulted in the peculiar situation in J&K as it exists today. Finally, the paper concludes with the interpretation of Article 370 of the Constitution of India and the way ahead for the UT of J&K.

Limitation: The present paper limits itself to study various Treaties, Agreement, Acts, Resolution and events, which had a direct or indirect impact on the problem in J&K only.

Abstract- The paper examines and analyses the history of Jammu and Kashmir (after this J&K) and the Article 370 of the Constitution of India in light of recent changes brought about in Article 370 by the Government of India. The paper discusses the story of present J&K, which began in 1846 with the signing of the 'Treaty of Amritsar' between the British Government and Maharajah Gulab Singh. The paper reflects upon the effect of Treaty and despotic rule of Dogra rulers in J&K. The paper also elaborates the political situation of J&K in the 1930s and briefly discusses the role of Sheikh Abdullah in the conception of the idea of 'Naya Kashmir' (1944) and 'Quit Kashmir' movement (1946). Next, the paper focuses on the Independence of Pakistan and India (August 1947). By this time almost all major Princely States except Hyderabad, J&K, Junagarh and Khanate of Kalat acceded either to Pakistan or India. Subsequently, the paper deals with the invasion of J&K by the Pashtun Tribes, which occasioned the accession of J&K to India (October 1947). After that, the paper examines the response of India to such attack and the decision to take the Kashmir issue to the United Nations (January 1948). The UN intervention resulted in the 'Karachi Agreement' (July 1949), which established 'Cease-Fire Line'. The paper also scrutinises the role of Sheikh Abdullah in internal as well as external unification of J&K with India. The paper further deliberates upon the role of Sheikh Abdullah in the drafting of Article 370 (1949) and 'Delhi Agreement' (1952). The paper critically analyses the unceremonious sacking of the Prime Minister of J&K in August 1953, although the charges against Sheikh Abdullah in Kashmir Conspiracy Case were suddenly dropped in 1964. Bakshi Ghulam Mohammad replaced the Sheikh as PM of J&K, who was a mere puppet in the hands of Central Government. The Bakshi facilitated the erosion of autonomy of J&K in favour of Central Government, starting with the ratification of Instrument of Accession by the Constituent Assembly of the State of J&K. (Drabu, 2015) The President of India issued an Order under Article 370(1)(d) in the form of the 'Constitution (Application to J&K) Order, 1954' (after this '1954 Order'), which superseded '1950 Order'. The paper deliberates upon the '1954 Order' in great detail and its implications for people of J&K, State of J&K and India. The paper then reflects the enactment and enforcement of the 'Constitution of State of J&K' and the State Assembly election in 1957. After Sheikh was released in 1964, the PM Nehru requested him to act as a bridge between India and Pakistan to find a long-lasting solution to J&K. However, these efforts

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did not yield any fruits; instead, it resulted in 2 Wars between the two countries, i.e. in 1965 and 1971. The political isolation of Sheikh ended with the '*Kashmir Accord*' in 1974, (Yousuf and Ahmed, 2018) by which Sheikh gave up the demand of plebiscite and was allowed to be elected and continued as Chief Minister of J&K, till he died in 1982. The period from 1982 to the late 1990s saw a progressive increase of insurgency in J&K, which was contained to a great extent after 2001. (Ayoob, 2019) Finally, the paper concludes with the critical evaluation of the recent Presidential Order of the '*Constitution (Application to J&K) Order, 2019* (after this '*2019 Order*') under Article 370(1)(d) on 5th August 2019 and the '*Presidential Declaration under Article 370(3) of the Constitution*' which replaced the original Article 370 with a new text on 6th August 2019.

Keywords: *jammu and kashmir, instrument of accession, sheikh abdullah, article 370, presidential order, presidential declaration.*

I. BEGINNING OF THE STORY

The story of present J&K begins on 16th March 1846, when the '*Treaty of Amritsar*', which is also called as '*Sale Deed of Kashmir*', was signed between the British Government and the Maharaja Gulab Singh of Jammu, by which the State of J&K was transferred to Maharaja Gulab Singh for a consideration of about 7.5 million rupees. (Jha, 2019) The British acknowledged the loyalty, closeness and help of Maharaja Gulab Singh to the East India Company during Anglo-Sikh War. As a result, Maharaja Gulab Singh could strike a very economical deal, which included an area of approximately 84,471 sq. Miles and a population of about 2.5 million. A British Army Officer Robert Thorp has exposed the inhuman nature of the Treaty in the following words: (Thorp, 1870)

"Towards the people of cashmere, we have committed a wanton outrage, a gross injustice, and an act of tyrannical oppression, which violates every humane and honourable sentiment, which is opposed to the whole spirit of modern civilization and is in direct opposition to every tenant of the religion we profess."

With the '*Treaty of Amritsar*', began a shrewd, corrupt and ruthless reign of Dogra Rulers in J&K, where despotic Hindu Kings ruled over a Muslim majority population. The '*Treaty of Amritsar*' contained 10 Article and was silent on how the internal administration of the State shall be carried out, as a result, it provided unrestricted rights to the Dogra rulers to administer the hapless population of J&K, who had no say in '*Treaty of Amritsar*'. The '*Treaty of Amritsar*' overlooked even elementary rights of the people of J&K. As a result, the entire State was pushed into a chaotic economic condition, which was aggravated by religious intolerance, persecution, exploitation, repression, discrimination and levy of exorbitant taxes, to recover the expenditure resulting out of the '*Treaty of Amritsar*'. The situation of people in Kashmir has been depicted by Muhammad Iqbal below: (Iqbal, 1932)

*"O breeze if thy happen to go Geneva way,
Carry a word to the nation of the world,
Their fields, their crops, their streams,
Even the peasants in the vale,
They sold, they sold all alas,
How cheap was the sale."*

Article 9 of the Treaty ensured protection to the State from any external aggression by the British Government. Such protection guaranteed by the British Government ensured the Maharaja Gulab Singh to have full internal autonomy and authority. Besides above, British Troops backed the Maharaja to suppress any resistance by the natives of J&K brutally. The feudal policies of Maharaja pushed the masses towards poverty and misery, causing the emigration of over 4,000 artisans from Kashmir to Lahore. Even the British advised Maharaja to be more considerate to his population; Otherwise, it may cause the total collapse of his administration. The misrule by Maharaja caused discontent against the Dogra rulers and led to the general impoverishment of the population.



Figure 1: The Dogra Rulers in succession

II. THE RISE OF SHEIKH ABDULLAH

The tyrannical rule of Dogra Rulers continued unabated till the middle of the 1920s when began the first wave of political awareness among the Kashmiri Muslims, which was an outcome of a ban on All-Muslim Organisations, burgeoning labour crisis and widespread exploitative practices by the Monarch. In October 1924, a group of Kashmiri Muslims presented a memorandum

to the Lord Reading to protest against the repressive rule of Maharaja. Almost at the same time, the first generation of graduates from abroad returned to J&K after having studied the idea of democracy, nationalism and liberty. These graduates wrote extensively against the discriminatory rule of the Maharaja and formed an informal group in the form of '*Fateh Kadal Reading Room Party*'. One of the most prominent graduates, who returned to J&K after having completed M.Sc. in

Chemistry from Aligarh Muslim University in 1930 was Sheikh Abdullah, who intended to take up further studies in the United Kingdom. Thus, applied for a scholarship to the State Government of J&K but was denied the scholarship. He took up a simple job of a School-Teacher but played a vital role of mobilising public opinion against the Maharaja's oppressive and discriminatory rule. (Bhattacharjee, 2008)

In 1932, Sheikh Abdullah laid the foundation stone of 'Muslim Conference', which was later rechristened as 'All India J&K National Conference' in 1939. The Sheikh Abdullah's leadership transformed the political movement against the Dogra Rule in J&K. Sheikh Abdullah was known for his political wisdom, which is evident from the programmes and campaigns of his Party to mobilise masses. The best-known example of his political prudence is 'Naya Kashmir Manifesto', which was adopted by the 'National Conference' in August 1945. This manifesto was based on social, economic and political equality for all including women. The manifesto advocated the way to achieve social, economic and political equality is by putting an end to feudal order in J&K. In the centenary year of the 'Treaty of Amritsar', Sheikh Abdullah launched the 'Quit Kashmir' movement against the Maharaja on 12th May 1946 and demanded the annulment of unlawful and inhumane 'Sale Deed of J&K'. The 'Quit Kashmir' movement was inspired by the 'Quit India' movement (1942) by Indian Nationalist against the British Rule in India. The 'Quit Kashmir' movement was condemned by the Mohammed Ali Jinnah and Muslim League, on the other hand, Jawahar Lal Nehru not only supported this movement but also reached Kashmir on 16th May 1946 without a permit to show solidarity with the movement and also fight the case against Sheikh Abdullah but Nehru was forced to return without meeting Sheikh. Sheikh along with his 3 Party men was tried at Badami Bagh cantonment on the charges of sedition and treason and was sentenced for nine years and was confined to jail till 30th September 1947, when he was prematurely released. (Nayar, 2019)

III. INDEPENDENCE AND PARTITION

After World War-II and change in the Government of Great Britain, it was announced on 20th February 1947 that India should be granted independence, not later than August 1948. Upon the failure of the 'Cabinet Mission' (1946), Lord Mountbatten proposed the '3rd June Plan' of Partitioning India into India and Pakistan, which was ultimately accepted by both Indian National Congress and Muslim League. To decide the status of Princely States, the Indian National Congress advocated the adoption of the method of Plebiscite, which was also used to determine the territories of Pakistan but the Muslim League was adamant that the decision of the Ruler of the Princely

State shall be final. Because of consensus over the Mountbatten Plan, the British Parliament passed the 'Indian Independence Act', which shall create 2 Dominions on 15th August 1947 by Section 1 (*The new Dominions*) of the Act. The most controversial provision of the Act was Section 7 (*Consequence of the setting up of the new Dominions*), which announced the lapse of suzerainty of British Empire over the Indian Princely States and also lapsed of all treaties and agreement signed between British Empire or any person having authority on the date of passing Act, which was 18th July 1947. It effectively resulted in the independence of almost 565 Princely States on 18th July 1947. The 'Indian Independence Act, 1947', did not provide any directions or suggestions to these Princely States. Thus, Lord Mountbatten tried to supplement the Act by addressing these Princely States on 25th July 1947, where he advised the Princes to accede to either of the 2 Dominions, i.e. India or Pakistan, keeping in mind the geographical continuity of their State to the Dominion and giving up only such powers which they had surrendered to British Empire like, Defence, Communication and External Affairs with no financial implication. By 14th August 1947, most of the Princely States had acceded to either of the Dominion except for Hyderabad, J&K, Junagarh and Khanate of Kalat. On 12th August 1947, the ruler of J&K, Maharaja Hari Singh proposed a 'Standstill Agreement' with both the Dominions, while he made the final decision regarding the future of his State. While Pakistan accepted the 'Standstill Agreement' on 15th August 1947, India requested the Maharaja to send a representative for discussion. Parallely, Pakistan became independent on 14th August 1947 with Mohammad Ali Jinnah as its Governor-General and India became independent on 15th August 1947 with Lord Mountbatten as Governor-General, Pandit Jawahar Lal Nehru as Prime Minister and Sardar Vallabh Bhai Patel as the Home Minister of India.

IV. CONSOLIDATION OF INDIA

The herculean task of consolidating India was taken up by the Home Minister Sardar Vallabh Bhai Patel, who was ably assisted by Mr V. P. Menon. Most of the Princely States which were geographically connected with India had acceded to India by 15th August 1947, with notable exceptions like Junagarh, J&K and Hyderabad. (Menon, 2014)

Junagarh on 15th September 1947, acceded to Pakistan when Nawab of Junagarh Muhammad Mahabat Khanji III signed *Instrument of Accession* in favour of Pakistan against the advice of Lord Mountbatten. Upon such news, the people of Junagarh revolted against the Nawab, and he was forced to flee to Pakistan along with his family and left the administration of the State in the hands of Diwan Shah Nawaz Bhutto.

Sardar Patel refused to accept the accession and offered to Pakistan to reverse the accession and hold a plebiscite in the State as Junagarh was a Hindu majority state ruled by a Muslim monarch. Besides, the State had no land border with Pakistan, and the only way to connect it with Pakistan was through the Arabian Sea. Because lack of cooperation and delay from Pakistan and reports of widespread looting, murders and rapes in the State, India was forced to assume State administration upon request from the Diwan of the State in November 1947. A plebiscite was conducted on 20th February 1948, in which 99.95% population of the State voted in favour of India. (*Pradhanmantri Series*, 2013)

Initially, the State of Hyderabad had requested to the British Government to exist as an independent Constitutional Monarch under the British Commonwealth of Nation, but the Governor-General of India Lord Mountbatten rejected it. The State of Hyderabad which was situated right in the middle of India having no sea link or land border with Pakistan proposed a *Standstill Agreement* with India for one year on 29th November 1947. As the *Standstill Agreement* was nearing its end, Hyderabad was pushed to take a call on its accession to India. However, the Nizam intended to exist as an independent state, so the political organisation *Majlis-e-Itehad-ul-Muslimeen* (MIM) recruited Razakars, who started targeting those sections of the society which favoured accession to India. Observing the situation in Hyderabad, India advised the Nizam to check communal violence in the state. On 21st August 1948, the Nizam of Hyderabad approached UN Security Council (after this UNSC) under Article 35(3) of the *UN Charter*, claiming such a situation had arisen which may affect international peace and security. When Nizam did not control the persecution of innocent minorities in Hyderabad, India was left with no choice but to execute 'Operation Polo' on 13th September 1948. The Hyderabad army surrendered on 18th September 1948, and the Nizam acceded to India. By a conservative estimate, it is assumed that these Razakars killed at least 20,000-40,000 people (*Sunder Lal Committee* (1949)). On 22nd September 1948, the Nizam of Hyderabad also withdrew his complaint from the UNSC. (*Thomson*, 2013)

The State of J&K was the only State which was bordering both India and Pakistan. Maharaja Hari Singh ruled J&K, and like Hyderabad, J&K also intended to exist independently, as Switzerland of West, because Pakistan was an Islamic Nation and he knew that existence of a Hindu ruler in a Muslim Nation should be difficult. India was a tough choice due to existence of Democracy in India, as he may not have similar authority in India. Maharaja having royal connect with Lord Mountbatten had discussed this scheme with him as a friend in July 1947. However, Lord Mountbatten advised Maharaja that the independent existence of J&K

sandwiched between 2 opposing nations will be a difficult proposition. Thus, Maharaja had bought some time for himself by signing the *Standstill Agreement* with Pakistan and proposed the same to India. Nevertheless, Pakistan had some other plans, as it started breaching the *Standstill Agreement* by steadily and increasingly strangulating the essential supplies like food, petrol and salt to J&K. In September 1947, Maharaja had twice offered to accede to India on the condition that India respected the reservation of Maharaja against Sheikh Abdullah, but Pandit Nehru refused the accession both the time. Pandit Nehru insisted that Sheikh Abdullah shall not only be released but also head the popular government in J&K. The pressure from Pandit Nehru forced Maharaja to release Sheikh Abdullah and his party men on 30th September 1947. While observing the unfolding of events and the mood of Maharaja, Pakistan decided to take an alternative route, where the Governor-General of Pakistan ordered Akbar Khan to train Pashtun Tribal Muslims to enter and conquer whole of J&K forcefully. These Pashtun Tribal Muslims, who were trained, along with Pakistani Army officials in civil dress, armed with modern weaponry and supported by Pakistan State for supplies (including petrol and food) motored into J&K on 21st October 1947. (Akbar Khan, 1992) These 10,000+ strong-armed men, who invaded J&K with the motive of over-throwing Maharaja, called themselves 'Azad Kashmir Army'. Once they entered J&K, there was no potency in Maharaja Army to defend the State against the 10,000+ strong-armed forces marching towards Srinagar. When the Muslim soldiers in the Maharaja's Army joined the invaders in Uri on 23rd October 1947, then it the Maharaja had just three options. First, to try to fight back the invaders with under-equipped and low on morale Army, which will end in defeat. Second, to watch these armed personnel to take-over the State of J&K. The third and final option was to request India for help, which Maharaja did but Lord Mountbatten being the Governor-General of India was adamant that India cannot help or protect J&K till the State accedes to India, as it may cause a full-fledged war which shall be detrimental for a new-born nation like India. Thus, on the eve of 26th October 1947, when Srinagar was staring at massacre the next day. Maharaja voluntarily signed the *Instrument of Accession* on 26th October 1947, which was unconditionally accepted late in the night of 26th October 1947 by Lord Mountbatten. (*Nayak*, 2019)

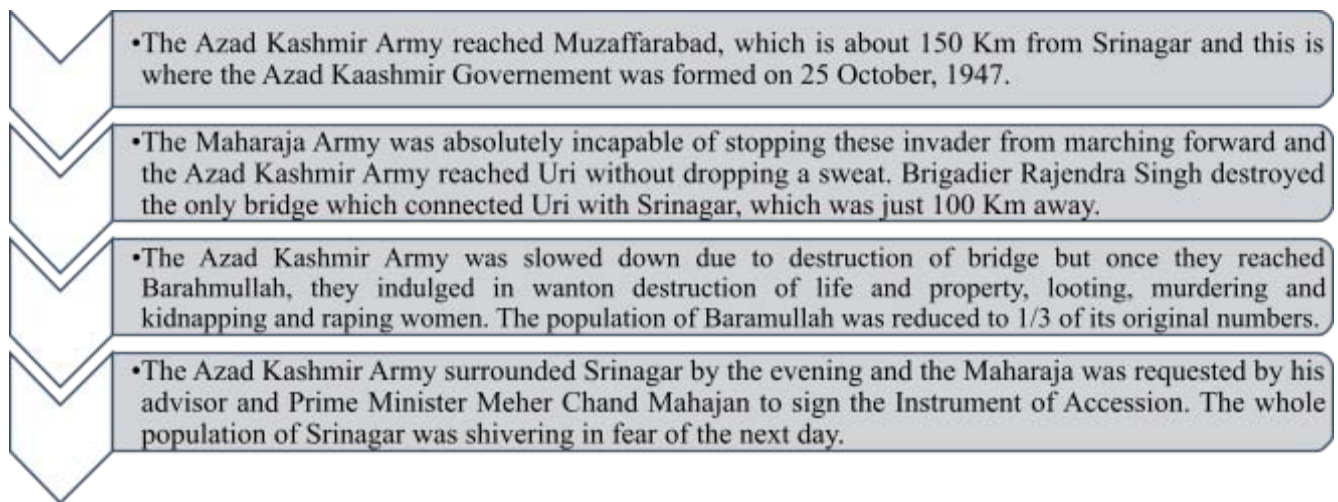


Figure 2: The flow of events day by day leading to the signing of Instrument of Accession by Maharaja

V. KASHMIR ISSUE

Once Lord Mountbatten accepted the Instrument of Accession, the Indian Army flew early in the morning to Srinagar to fight the invaders. (Schofield, 2002) Sheikh Abdullah, along with his party-men not only welcomed the Indian Army at the Srinagar Airport but also helped them. Thus, the first Indo-Pak war began on 27th October 1947 and extended up to 31st December 1948. Upon the accession of J&K to India by Maharaja, the Governor-General of Pakistan Jinnah ordered his General to attack J&K. However, the General refused because same British General Auckinlake headed both the Armies of India and Pakistan and he had been informed about the accession of J&K to India. (*Pradhanmantri Series*, 2013)

Mohammad Ali Jinnah did not accept this accession as he claimed that the accession was forced upon J&K by India. Thus, Jinnah invited Lord Mountbatten and Pandit Nehru to Lahore to discuss and settle the matter amicably. However, Sardar Patel was resolute that if Jinnah wants to talk, he shall come to India. On 1st November 1947, Lord Mountbatten went to Lahore, where Jinnah refused to accept the accession of J&K to India and claimed that J&K was a Muslim majority State and quoted the example of Junagarh and condemned the use of power by India in J&K. Replying to Jinnah, Lord Mountbatten clarified that no force was used by India in J&K to secure the accession instead the Maharaja and the people of J&K requested India to accept the accession of J&K to India in the wake of the extraordinary situation created because of invasion and use of brute force by the Pashtun tribe from Pakistan. Besides this, Lord Mountbatten advised Jinnah to withdraw forces from J&K and play a constructive part in conducting a plebiscite in peaceful conditions. (Akbar, 2017)

At the same time in Kashmir, the Maharaja announced on 30th October 1947, Sheikh Abdullah shall

head the emergency administration, till the war with invaders is continuing. On 22nd December 1947, India warned Pakistan to block any help provided to invaders in J&K. Otherwise, it shall be forced to take pre-emptive steps. On 1st January 1948, India submitted a Complaint to UN Security Council, which placed the J&K issue before the UN with an intention that UN shall acknowledge the invasion of Pakistan on J&K, to force Pakistani forces to vacate J&K and to find a final and lasting solution to the question of accession of J&K to India. At the UNSC, USA & UK took a stance unfavourable to India; this saddened Pandit Nehru. Thus, India sent a delegate to the UNSC, headed by Gopalaswami Ayyangar in February 1948. On 5th February 1948, Sheikh Abdullah addressed the UNSC and firmly supported the Government of India's stance as stated in the Complaint filed against Pakistan on 1st January 1948. He went beyond that and explained the circumstances of accession and the request from Maharaja and people of J&K to accept the accession. Not only this, but he also explained that there was no need on the part of Prime Minister Nehru to assure the people of J&K that upon normalisation of the situation, a plebiscite shall be conducted to determine the will of people of J&K, which PM Nehru did when he visited Srinagar upon the request of Sheikh Abdullah on 13th November 1947. (Noorani, 1999) After Sheikh Abdullah's address in UNSC, the signing of *Instrument of Accession* by Maharaja was never questioned by the UN.

VI. CONSTITUTIONAL RELATION OF J&K WITH INDIA

On 5th March 1948, Sheikh Abdullah was appointed 2nd Prime Minister of J&K after the accession of J&K to India, and he succeeded Mehr Chand Mahajan. On 15th and 16th May 1949, Sheikh Abdullah concluded '*Delhi Understanding*', after meeting Pandit

Nehru and Sardar Patel to carve out the relationship of J&K with India, where it was agreed that Constituent Assembly of J&K should draft a Constitution for the State of J&K and J&K shall accede to India subjects like Defence, Communication and External Affairs and any other matter as the Constituent Assembly of J&K decides. (Verghese, 2007) After '*Delhi Understanding*', four representatives from J&K joined as members Constituent Assembly of India for drafting of Constitution of India on 16th June 1949. (Noorani, 2000) Maharaja Hari Singh was abruptly forced to abdicate the throne in favour of his son Yuvraj Karan Singh on 20th June 1949. (Guha, 2007) In Constituent Assembly of India when Sheikh Abdullah consulted Dr B. R. Ambedkar for the drafting of a provision suitable to J&K, he refused to draft it and said, "*Mr Abdullah, you want India should defend Kashmir, India should develop Kashmir and Kashmiris should have equal rights as citizens of India, but you do not want India and any citizen of India to have any rights in Kashmir. I am the Law Minister of India. I cannot betray the interest of my country.*" Then such task of drafting provision in the Constitution of India suitable to J&K was assigned to Gopalaswami Ayyangar, who was also a member of the Drafting Committee. On 17th October 1949, Gopalaswami Ayyangar proposed Article 306-A w.r.t. Special status of J&K before Constituent Assembly, while presenting this Article and explaining the reason for it, he argued that- "*In the case of other Indian States, the Instrument of Accession will be a thing of the past in the new Constitution; the States have been integrated with the Federal Republic in such a manner that they do not have to accede or execute a document of accession for becoming units of the Republic and, in the case of practically all States other than J&K, their constitutions have also have been embodied in the Constitution for the whole of India. It would not be so in the case of Kashmir as the State is not yet ripe for this kind of integration due to the special conditions prevailing in Kashmir.*" Adding to this, he further elaborated that- "*In the first place there has been a war going on within the limits of J&K State - part of the State is still in the hands of the enemies, and in the second place, the Government of India, have committed themselves to the people of Kashmir in certain respects. They have committed themselves to the position that an opportunity will be given to the people of the State to decide for themselves the nature of their Constitution.*" (Nayyar, 2014) From the above reading of explanation given by Gopalaswami Ayyangar to Constituent Assembly, it could be easily inferred that the Article was temporary.

On 25th November 1949, the regent of J&K Yuvraj Karan Singh proclaimed application of Indian Constitution to J&K. On 26th November 1949, the Constituent Assembly passed the Constitution of India

containing the temporary and transient provision w.r.t. J&K under Article 370 (Part-XXI). On 26th January 1950, the Constitution of India came into force. On 31st October 1951, the democratically elected Constituent Assembly of J&K met for the first time and enacted the Constitution of J&K on 17th November 1956, which came into force on 26th January 1957.

The Constitutional arrangement between India and J&K was finalised between the Government of India and J&K by the '*Delhi Agreement*' on 24th July 1952, which approved by the Parliament of India on 7th August 1952 and by the Constituent Assembly of J&K on 21st August 1952. The political parties in J&K like Praja Parishad, Bharatiya Jan Sangh and Hindu Mahasabha launched a movement against '*Delhi Agreement*', and they wanted a total merger of J&K like any other Princely State. (Soz, 2018) They protested by raising catchy slogans like '*Ek Desh mein Do Vidhan, Do Pradhan, Do Nishan...nahi chalenge, nahi chalenge*' (*Two Constitutions, two heads of State, two flags...these in one State we shall not allow, not allow*). (Guha, 2007) The evolution of Constitutional relation between India and J&K is briefed in Figure 3. (Kapur, 2019)

These agitations against '*Delhi Agreement*', planted seeds of apprehension about India after Pandit Nehru in the mind of Sheikh Abdullah. It is believed that this led to a change of stance by Sheikh Abdullah and his meeting with Mr Adlai Stevenson, the US Presidential candidate and Chinese Prime Minister Zhou Enlai was considered being an effort to negotiate independence for J&K or a shift towards Pakistan. Sheikh's speeches in April and July 1953, reflected such emotions by him. (Nayyar, 2014) This culminated in the sacking of Sheikh Abdullah Government on 8th August 1953, on the ground of loss of support from his Cabinet, even without allowing him to prove his majority on the floor of the house. On 9th August 1953, Sheikh Abdullah was arrested on the charges of '*inciting communal disharmony; fostering hostile feelings towards India and treasonable correspondence with foreign powers*', more commonly known as '*Kashmir Conspiracy Case*'. (Aslam, 2018) Sheikh Abdullah was confined to a farmhouse in Kodaikanal for more than a decade, till 8th April 1964, when the State Government suddenly dropped all charges against him. (Noorani, 2008)

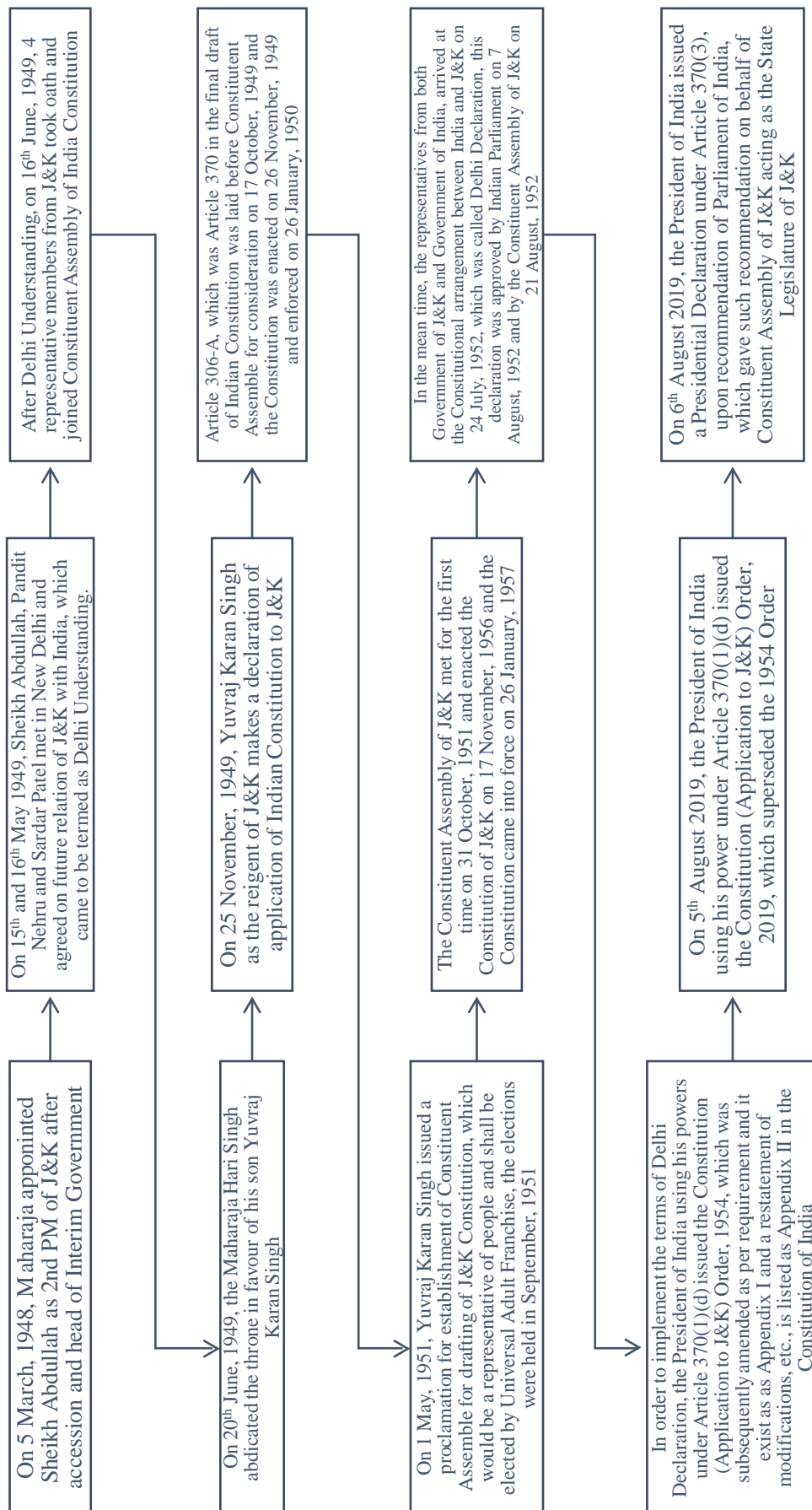


Figure 3: Evolution of Constitutional Relations between India and J&K

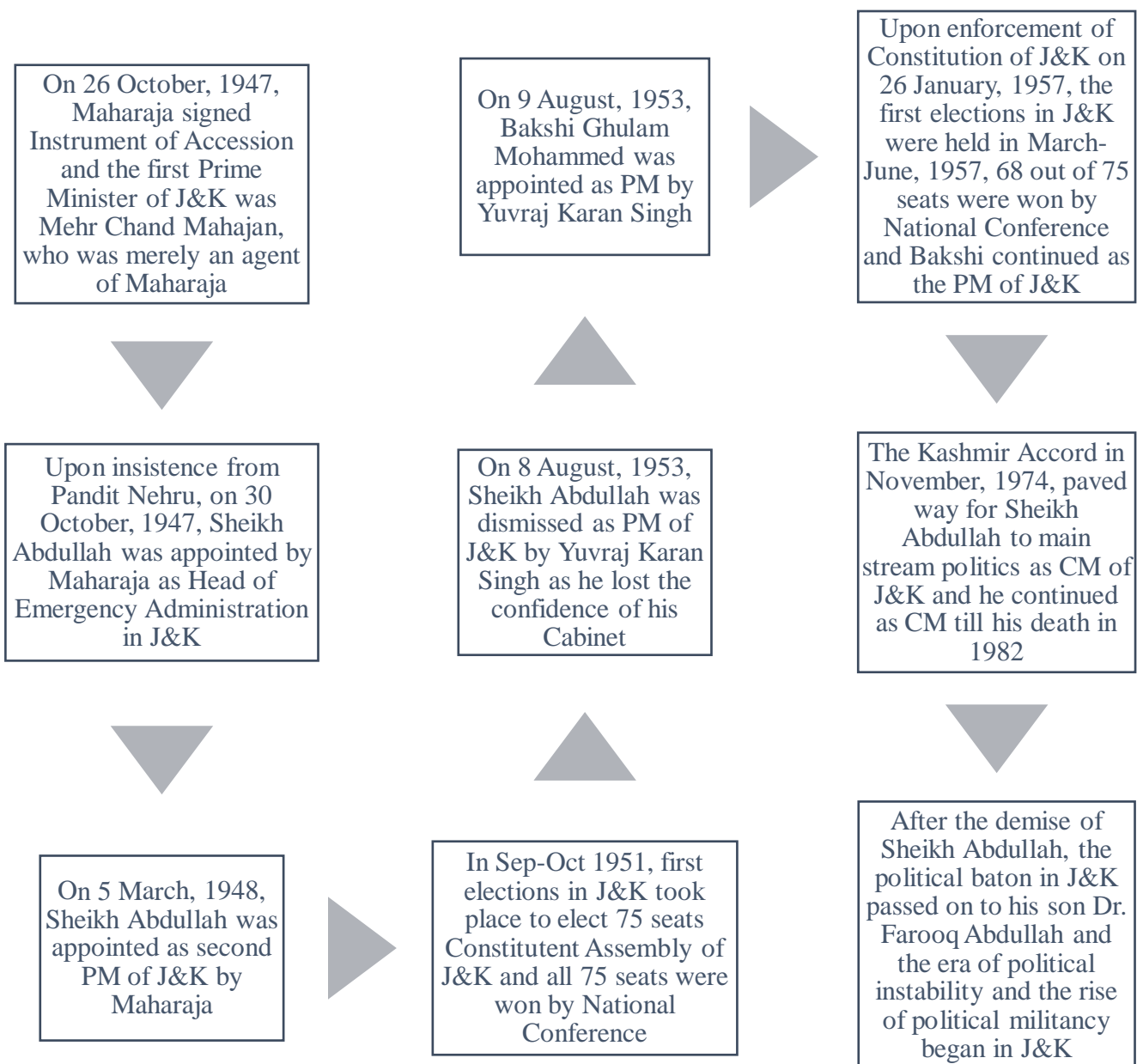


Figure 4: Political Situation in J&K since accession to India in 1947

After Sheikh Abdullah was removed as Prime Minister of J&K, Bakshi Ghulam Mohammad, who acted as an agent of Central Government replaced him. On 15th February 1954, the Constituent Assembly of J&K ratified the accession of J&K to India. On 14th May 1954, the President of India passed the '1954 Order', exercising his powers under Article 370(1)(d), which majorly was based on the principles laid down in the 'Delhi Agreement'. The '1954 Order' also included the controversial Article 35-A, which provided for special privileges to the permanent resident of J&K. (Rajagopal, 2017) After enforcement of the Constitution of J&K on 26th January 1957, the first elections for the Legislative Assembly for the State of J&K took place in March-June

1957. After the successful conclusion of the elections in J&K, the Home Minister of India Govind Ballabh Pant, upon his visit to J&K exclaimed that- "*The State of J&K is now fully a part of India. This leaves no possibility of a plebiscite in J&K.*" (Singh, 2018) The political situation in J&K has been briefly elaborated in Figure 4. (Ahmad, 2000)

VII. UN INTERVENTION IN J&K

India's filed a complaint to UNSC against the tribal invasion in J&K, who were trained, helped and supported from the Pakistani soil on 1st January 1948, under Article 35 of Chapter-VI of UN Charter. UNSC made many efforts to stabilise the situation in J&K and

bring to peace the disputing parties. UNSC also affirmed that the final resolution of the matter of J&K should be based upon the will of the people of J&K. By *UNSC Resolution 39*, a *UN Commission for India and Pakistan* (UNCIP) was established, which mediated between India and Pakistan to find a mutually acceptable and long-lasting solution. The *UNSC Resolution 47* is considered to be one of the most important declarations by UNSC, and it laid down principles on which restoration of peace and order shall be secured in J&K and also the precondition which is required to be fulfilled by both countries for final determination of status of J&K by conduction plebiscite in J&K under the auspices of UN Representative, i.e. Plebiscite Administrator. This *Resolution 47* was supplemented by the Resolution passed by UNCIP on 13th August 1948, which had three parts. The *Part-I* dealt with the *Cease-Fire Order*, which required both the

parties to immediately order their forces to cease fire and to avoid any statement or actions that may aggravate the situation. In the *Part-II (Truce Agreement)*, for the first time, the UN acknowledged the presence of Pakistani troops in J&K, which was a material change from the previous situation. *Section-A* of *Part-II* required Pakistan to withdraw all tribal men and other Pakistani Nationals from J&K. Upon accomplishment of this, under *Section-B* of *Part-II*, the UNCIP shall inform Government of India about such withdraw and then India shall also call back additional troops from J&K and maintain a minimum number of armed personnel as required to preserve law and order in J&K. The *Part-III (Plebiscite)* of Resolution, declared that upon achievement of above explained two parts, the future status of J&K should be determined by the will of people of J&K through a plebiscite.

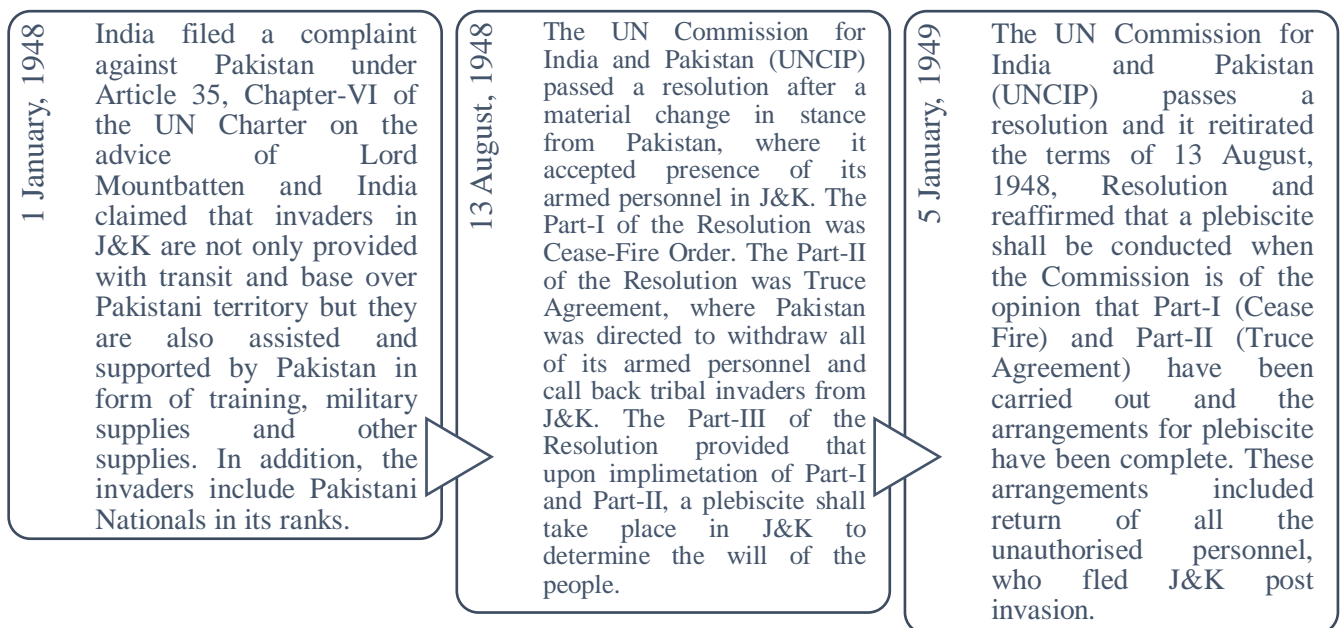


Figure 5: India's Complaint to UNSC and UNCIP Resolutions

The Government of India and Pakistan accepted the *Part-I* of 13th August 1948, Resolution and declared a cease-fire to take effect from 1st January 1949. The UNCIP passed another Resolution on 5th January 1949, which reiterated the Resolution passed on 13th August and affirmed that the question of accession of J&K should be determined through a democratic method of free and impartial plebiscite, which shall be held upon fulfilment of *Part-I & II* of the 13th August Resolution. The 5th January Resolution also laid down the guidelines and principles on which the plebiscite shall take place in J&K under the watch of Plebiscite Administrator. On 27th July 1949, the '*Karachi Agreement*' was signed between India and Pakistan that finalised and established '*Cease-Fire Line*' in J&K upon satisfaction of *Part-I* of the 13th August 1948, UNCIP

Resolution, which was later converted into '*Line of Control*' in 1972 by '*Shimla Agreement*'. (Mustafa, 2019) However, as Pakistan never fulfilled the *Part-II (Truce Agreement)* of the 13th August 1948, UNCIP Resolution because the disputing parties could not agree on a '*demilitarisation plan*' as was required under '*UNSC Resolution 80*'. Thus, *Part-III* of the 13th August 1948, UNCIP Resolution which related to Plebiscite in J&K could never take place under the supervision of Plebiscite Administrator. Now, conducting Plebiscite is almost become impractical because of change in demography on the part J&K administered by Pakistan, which was one of the requirements in UNCIP Resolution on 5th January 1949. This change in demography remained unaffected in the parts administered by India due to special Constitutional protections provided to

permanent residents of J&K under *Article 35-A* introduced by the '*1954 Order*', which was recently repealed by the '*2019 Order*'. Hence, demand by Pakistan on international fora, again and again, to conduct a plebiscite in J&K is with no cause and could be considered to be taking advantage of their own mistake. A brief timeline of UNSC resolutions passed in the India-Pakistan Question w.r.t. to the complaint of India, the dispute relating to the accession of J&K to India and final solution to the dispute is reflected in *Figure 6*.



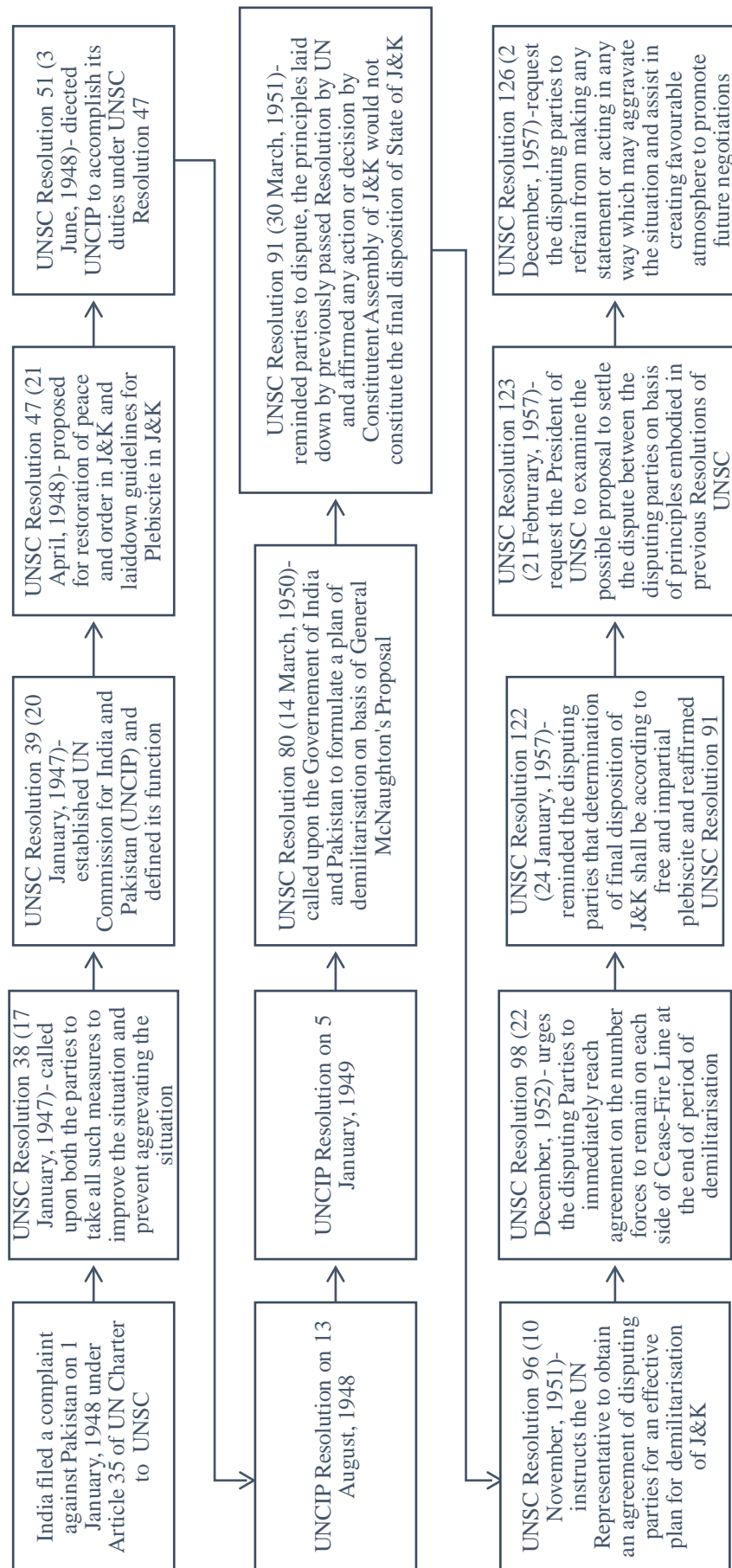


Figure 6: India's Complaint to UNSC and UNSC Resolutions

VIII. BACKGROUND OF *ARTICLE 370*

As discussed above, while addressing the Constituent Assembly about *Article 370* of the Constitution of India, Gopalaswami Ayyangar explained the extraordinary situations which exit in J&K and required special provision for J&K. (Thapliyal, 2019) In addition to that, internationalisation of J&K was another factor which weighed in dealing J&K differently from other Princely States. Adding to it, the repetitive promises made for the plebiscite in J&K had complicated the whole situation. On 27th October 1947, Lord Mountbatten wrote a personal letter to Maharaja Hari Singh, where he expressed that his Government wished to settle the question of accession of J&K to India by a reference to the people of J&K upon restoration of Law and Order and to expel invaders from the soil of J&K. (Chandhoke, 2014)

Similarly, on 2nd November 1947, Pandit Nehru in his All India Radio address to the nation explained the reasons for accepting the accession of J&K to India and also declaring that the people of J&K shall determine the fate of J&K. (Roy, 2010) Pandit Nehru reiterated this promise of conducting a plebiscite in J&K in Srinagar on 13th November 1947, when he visited J&K upon an invitation from Sheikh Abdullah. (Soz, 2018) Pandit Nehru while reassuring the people of J&K that future of J&K shall be determined by the people of J&K and India shall accept the outcome of plebiscite even if it was against India. Such a promise by Pandit Nehru is the reflection of the confidence that he had in J&K w.r.t. accession to India, as he knew that Jammu and Ladakh region which was Hindu and Buddhist majority region would vote in favour of India and the Muslim majority region, i.e. Kashmir shall vote in favour of India due to unimpeachable influence that Sheikh Abdullah has in Kashmir and Sheikh's inclination towards India. Thus, Pandit Nehru restated the promise of plebiscite in J&K on All India Radio on 23rd December 1949. (Nayyar, 2014) In addition to above, several UNSC Resolutions including *UNSC Resolution 47*, *UNCIP Resolution on 13th August 1948 and 5th January 1949*, insisted on the final determination of the status of J&K shall take place through the democratic method of free and impartial plebiscite.

The issue of accession of J&K to India, geographical position of J&K sandwiched between India and Pakistan, administrative problems in J&K, the internationalisation of J&K at UNSC, statements by various personalities and continuance of War between India and Pakistan till 31st December 1948, forced Constituent Assembly to consider Special position for J&K in the Constitution of India, which was approved by Constituent Assembly unanimously. However at the same time, it was also ensured that *Article 370* was temporary and transient provision by putting it under

Part-XXI of the Constitution of India, i.e. '*Temporary, Transient and Special*' Provisions (the term '*Special*' was introduced in 1962 by 13th Constituent Amendment Act, 1962). Moreover, the short title of *Article 370* also reads as '*Temporary provisions with respect to the State of J&K*'. Furthermore, the provision *Article 370* was drafted in such a fashion, so that, the President of India along with Government of J&K was empowered to determine the Constitutional relation between India and J&K, and no intervention or approval of Legislature was required. As a result, *Article 370* was aimed to be transitory provision until the situation in J&K did not normalise, and J&K could not be treated like any other State in India. A concise interpretation of *Article 370* is indicated in *Figure 7*. Thus, the intention of the Constituent Assembly w.r.t *Article 370* was to provide for a make-shift arrangement for J&K in Constitution of India. (Koul, 2015)

After '*Delhi Understanding*' in May 1949, it was agreed between the leaders of India and J&K that a separate Constituent Assembly for J&K should be established for the drafting of the Constitution of J&K for the dual purpose of the abolition of monarchy in J&K and also to represent the will of the people of J&K. Based on '*Delhi Understanding*' the *General Council of National Conference* passed a resolution on 27th October 1950 for the establishment of the Constituent Assembly of J&K and the Yuvraj Karan Singh proclaimed that end on 1st May 1951 for election of Constituent Assembly of J&K based on Universal Adult Suffrage. The elections for the Constituent Assembly of J&K was held in September-October 1951, and the first session of Constituent Assembly of J&K was held on 31st October 1951, and the Constitution of J&K was enacted on 17th November 1956. Thus, unlike any other Princely State, J&K was allowed a separate Constitution for itself due to the peculiar position as existed in the State. However, the UNSC by its *Resolution 91* clarified that any action that may be taken by the Constituent Assembly of J&K to determine the future and affiliation of the whole of J&K would not be considered as the final disposition of matter of J&K according to the principles of UNSC Resolutions.

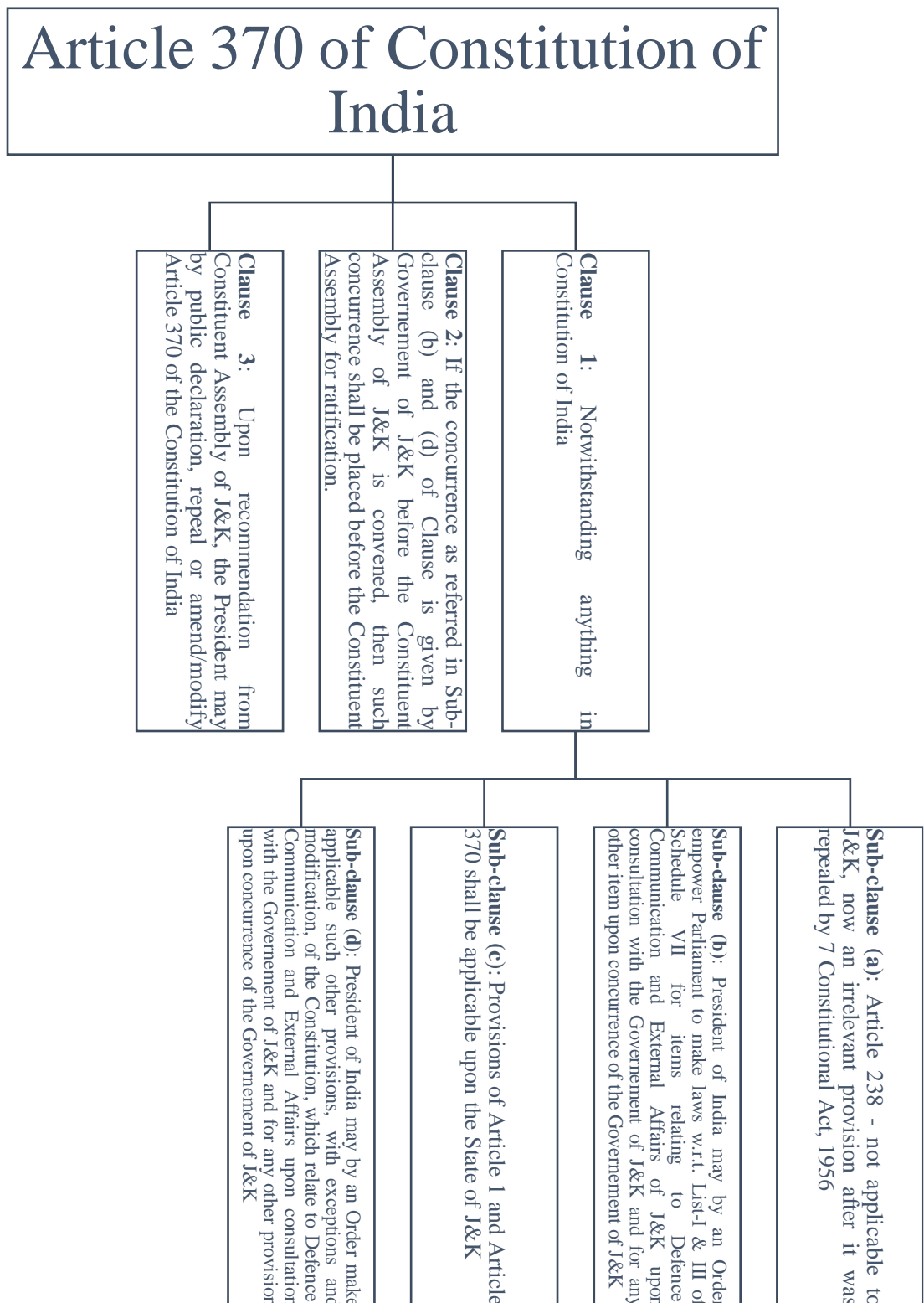


Figure 7: Diagrammatic interpretation of Article 370 of the Constitution of India

Although Sheikh Abdullah was removed from the helm of affairs in J&K in August 1953, the Government of India honoured the '*Delhi Agreement*' and the UNCIP Resolution of 5th January 1949. Thus, issued the '*1954 Order*', by which the controversial *Article 35-A* was inserted to maintain the demography of J&K as it existed in October 1947 and to facilitate effective plebiscite in J&K under the supervision of UN. *Article 35-A* provided for certain special privileges for permanent residents of J&K, and in fact, only these permanent residents could vote in elections held for State Legislative Assembly of J&K. This *Article 35-A* has been repealed by the '*2019 Order*'.

IX. RECENT CHANGES TO *ARTICLE 370*

The '*2019 Order*' which was issued by the President of India on 5th August 2019 and the *Presidential Declaration under Article 370(3) of the Constitution, 2019* which was issued on 6th August 2019 has completely changed the Constitutional relationship between India and J&K and now J&K is at par with any other territory of India with no exception. Constitutional experts have a diverging opinion on the recent change to *Article 370*, many claimed that the changes made are not only unconstitutional but is equivalent to fraud on the Constitution of India. In contrast, many others claimed it to be not only constitutionally valid but also in the best interest of India and J&K. Thus, it is imperative to understand how the whole constitutional process unfolded to understand the constitutional validity of the technical repeal of *Article 370* and the Constitution of J&K.



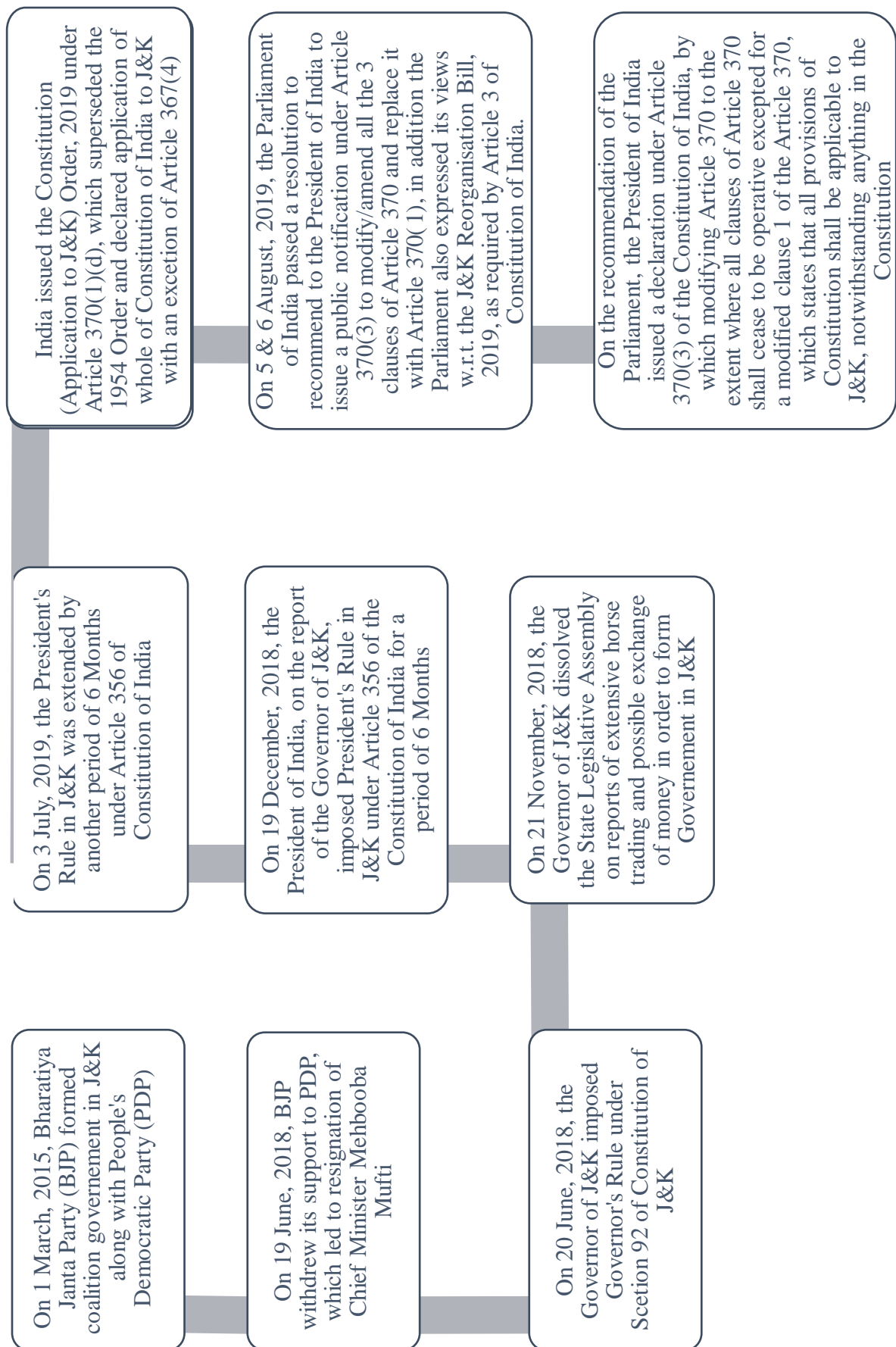


Figure 8: Events in J&K since March 2015 (Sharma, 2018)

On 5th August 2019, the President of India issued the '2019 Order' under *Article 370(1)(d)* of the Indian Constitution, which required him either consultation or concurrence with the Government of J&K if any provision of Constitution of India other than *Article 1* or *Article 370* is to be made applicable to J&K. Now, according to *Article 367(4)(b)* under the '1954 Order', the Government of J&K shall be construed as the Governor of J&K acting on the advice of his Council of Ministers. Interestingly, on 5th August 2019, as the President's Rule is continuing in the State of J&K since 19th December 2018, the President has assumed to himself all functions of the Government of State of J&K and all powers vested and exercisable by the Governor of J&K under *Article 356(1)(a)* of Indian Constitution. Thus, the President could issue the '2019 Order' by either consulting or concurring himself as he is not only performing the function of Council of Ministers but also exercising the powers of the Governor of the State of J&K under *Article 356(1)(a)* of Constitution of India read with *Article 367(4)(b)* of the '1954 Order'. By the '2019 Order', the whole of Constitution of India became applicable to J&K with an exception in the form of the new *Article 367(4)*, which is nothing but an interpretative clause. The most striking point of '2019 Order' was *Article 367(4)(d)*, which read the term 'Constituent Assembly of J&K' as provided under *Article 370(3)* as the 'Legislative Assembly of the State of J&K', which is constitutionally valid as, like Indian Parliament, the Legislature of the State of J&K exercises Constituent powers under *Section 147* of the Constitution of J&K, which provides for the power and procedure for amendment of the Constitution of J&K.

On 6th August 2019, the President issued a Declaration under *Article 370(3)* of the Constitution of India to amend/modify the *Article 370*, which required a recommendation from the Constituent Assembly of J&K, which is now to be read as Legislature of the State of J&K courtesy *Article 367(4)(d)* of the '2019 Order'. Now as the President's Rule is applicable in the State of J&K, therefore, the power of the Legislature of the State of J&K shall be exercisable by the Parliament under *Article 356(1)(b)* of the Indian Constitution. This, in turn, means that the Parliament is empowered to perform the function of the Constituent Assembly of J&K under *Article 367(4)(d)* of the '2019 Order' read with *Article 356(1)(b)* of Constitution of India. Hence, a Resolution for the recommendation of modification of *Article 370* was passed by the Parliament on 5th and 6th August 2019 and immediately upon that such recommendation which was deemed to be a recommendation from the Constituent Assembly of J&K, the President issued the public notification declaring the modification of *Article 370* and technically annulling *Article 35-A* and the whole of Constitution of J&K. The resolution passed by the Parliament on behalf of the Legislature of the State of

J&K, which in turn was on behalf of the Constituent Assembly of the State shall be constitutionally valid because of *Article 357(2)* which provides that Legislative powers exercised by the Parliament due to President's Rule in a State would not cease to operate after the revocation of President's Rule but continue to be in force unless repealed, amended or altered by the competent Legislature.

Hence, as it stands today, the '2019 Order' has superseded the '1954 Order', and the whole of Constitution of India applies to the State of J&K with no exceptions or modifications. Besides, *Article 370* has been modified to remove all three clauses and replace it with just one clause which reinforces the '2019 Order' and lays the foundation stone for complete Constitutional integration of J&K into India.

X. CONCLUSION

The recent changes to *Article 370* of Constitution of India came to be a surprise for many Constitutional Observers, where they exclaimed that if modifying *Article 370* was so easy, why did we wait so long to make these necessary change and other observers of the issue of J&K in India claimed that since the Constituent Assembly was relieved of their duties way back in 1957, therefore, the temporary provision of J&K had become permanent. The unceremonious repeal of the '1954 Order' and effective annulling of Constitution of J&K was a fraud on the Constitution of India and breach of *Basic Structure* of Indian Constitution as Federalism is part of the *Basic Structure*. Although Federalism is part of the *Basic Structure*, the Supreme Court in *State of West Bengal vs Union of India-1963*, SC has held that Indian Constitution is not truly federal because the States are not coordinate with the Union like USA and are not Sovereign. Thus, in the national interest, the federal feature of the Constitution of India may be compromised for a greater good.

Along with the Resolution for recommendation to the President for modification of *Article 370*, the Parliament also passed the *J&K Reorganisation Act, 2019*. As discussed above, the States in India are not sovereign like the United States. However, in India, the Parliament is empowered to make law under *Article 3* of the Constitution to diminish a State into a Union Territory. Thus, the *J&K Reorganisation Act, 2019*, divided the State of J&K into 2 Union Territories (after this UT), in the form of UT of J&K with Legislature at par with UT of Puducherry and UT of Ladakh at par with UT of Chandigarh. (Mohanty, 2019) Both of the UT is to come into existence on 31st October 2019, to mark the birth anniversary of Sardar Patel. Both the UT of J&K and Ladakh shall include the territories held and administered by Pakistan and China, respectively. The Election Commission of India has indicated that the earliest elections for 107 seat Legislature in J&K shall

take place in summer of 2021 after the delimitation exercise is completed in J&K. (Tripathi, 2019)

The argument given by the Home Minister of India on the floor of Lok Sabha is that over 70 years of *Article 370* brought nothing to State except militancy, leave alone prosperity. Thus, repeal of *Article 370* shall bring a new dawn for the people of J&K, and it shall bring about development and more employment opportunities in the State. In short-run, repeal of *Article 370* requires some caution and imposition of restriction in J&K due to fears of violent protests abated by our neighbour, but in the long run, it shall result into an actual integration of J&K into India and bring prosperity and development for people of J&K.

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