

## Article 370 - A Constitutional History of J&K

In this article, UPSC aspirants will get to know what is Article 370 and Article 35A, important dates, controversies associated with Article 370 and its revocation. Article 370 and the constitutional history of Jammu & Kashmir are important for the [IAS exam](#).

### Article 370

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

(1) Notwithstanding anything in this Constitution,

(a) The provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;

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

1. **those matters in the Union List and the Concurrent List** which, in **consultation with the Government of the State**, are declared by the President to correspond to matters **specified in the Instrument of Accession** governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and
2. such other matters in the said Lists as, with the **concurrence of the Government of the State**, the President may by order specify  
Explanation For the purposes of this article, the **Government of the State means the person for the time being recognized by the President as the Maharaja of Jammu and Kashmir** acting on the advice of the Council of Ministers for the time being in office under the Maharajas Proclamation dated the fifth day of March, 1948 ;

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

(d) such of the **other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President** may by order specify: Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph 1 of sub clause (b) shall be issued except in consultation with the Government of the State: Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

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

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify: Provided that the **recommendation of the Constituent Assembly of the State referred to in clause (2)** shall be necessary before the President issues such a notification.

### What is Article 370?

- Article 370 is a constitutional provision that gave Jammu and Kashmir its special status.
- The provision was incorporated in **Part XXI** of the Constitution: Temporary, Transitional and Special Provisions.
  - As evident from the title of the Part, it was supposed to be a temporary provision and its applicability was projected to last till the formulation and adoption of the State's constitution.
- It restricts the Parliament's legislative powers with respect to the state of J&K.

#### Application of 370

- However, the **State's constituent assembly dissolved itself on 25 January 1957** without recommending either abrogation or amendment of Article 370, leaving the status of the provision on a

cliffhanger.

- The provision was **later held to have acquired permanent status by way of rulings of the Supreme Court of India** and the High Court of Jammu and Kashmir.
- This implied that to **apply a central law to the state on subjects included in the Instrument of Accession, mere "consultation"** with the state government is required.
- However, to apply a central legislation to matters other than defence, foreign affairs and communications, **"concurrence"** of the state government was mandatory.

### Jammu and Kashmir Constitution

- **Article 3-> Relationship of the State with the Union of India:-** The State of Jammu and Kashmir is and shall be an integral part of the Union of India.
- In the **Preamble** to the Constitution, not only is there no claim to sovereignty, but there is a categorical acknowledgement about the object of the J&K Constitution being "to further define the existing relationship of the state with the Union of India as its integral part thereof."

## Constitution (Application to Jammu and Kashmir) Order, 2019

1. (1) This Order may be called the Constitution (Application to Jammu and Kashmir) Order, 2019.

(2) It shall come into force at once, and shall thereupon **supersede the Constitution (Application to Jammu and Kashmir) Order, 1954** as amended from time to time.

2. All the provisions of the Constitution, as amended from time to time, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows:-

### To article 367, there shall be added the following clause, namely:-

"(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir-

(a) References to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;

(b) references to the **person for the time being** recognized by the President on the recommendation of the Legislative Assembly of the State as the **Sadar-i-Riyasat of Jammu and Kashmir**, acting on the advice of the Council of Ministers of the State for the time being in office, **shall be construed as references to the Governor of Jammu and Kashmir**;

(c) references to the **Government of the said State shall be construed as including references to the Governor of Jammu and Kashmir** acting on the advice of his Council of Ministers; and

(d) in the proviso to clause (3) of Article 370 of this Constitution, the expression **"Constituent Assembly of the State referred to in clause (2)" shall read "Legislative Assembly of the State"**.

## Has Article 370 been scrapped?

- The Presidential order signed by the President of India **has not scrapped Article 370**.
- But invoking this very article, the special status of Jammu & Kashmir has been withdrawn.
- Thus, Article 370 is very much on the statute book.
- In other words, the move by the government gives full applicability of the Indian Constitution in Jammu and Kashmir. Earlier, only a set of limited provisions such as foreign relations, communication and defence had jurisdiction over Jammu and Kashmir.

## What is the status of Article 35-A?

- Since Presidential Order of August 5 has **extended all the provisions of the Constitution to Kashmir**,

the Fundamental Rights chapter has now been extended and therefore some discriminatory provisions of Article 35-A may not be in accordance with prescribed Rules.

- Therefore the President can also declare this to be inapplicable.

## Background

- Article 35A of the Indian Constitution is an article that empowers the Jammu and Kashmir states legislature to define “permanent residents”.
- The provision mandates that no act of the state legislature coming under the ambit of Article 35A can be challenged for violating the Indian Constitution or any other law of the land.

### Who Are Permanent Residents?

- The rights are given in the state Constitution of Jammu and Kashmir.
  - as a person who was a state subject on May 14, 1954
  - who had been a resident of the state for 10 years
  - has lawfully acquired immovable property in the state
- The state legislature can alter the definition of a permanent resident **by passing a law with a two-thirds majority**.
- Permanent residents are given a **Permanent Resident Certificate** which forms the basis of their rights in the state.
- It also has a provision to recognize as permanent residents, people who had migrated to Pakistan and returned, though subject to certain conditions.

### Rights and Privileges

- Special Rights and Privileges are given in the following four categories:
  - Employment under the state government/State Public Sector Jobs
  - Acquisition of immovable property in the state
  - Settlement in the state
  - Right to scholarships and such other forms of aid as the state government may provide

BEFORE	NOW
● Special powers exercised by J&K	● No special powers now
● Dual citizenship	● Single citizenship
● Separate flag for Jammu & Kashmir	● Tricolour will be the only flag
● Article 360 (Financial Emergency) not applicable	● Article 360 will be applicable
● No reservation for minorities such as Hindus and Sikhs	● Minorities will be eligible for 16% reservation
● Indian citizens from other states cannot buy land or property in J&K	● People from other states will now be able to purchase land or property in J&K
● RTI not applicable	● RTI will be applicable
● Duration of Legislative Assembly for 6 years	● Assembly duration in Union Territory of J&K will be for 5 years
● If a woman from J&K marries out of state, she would lose the citizenship of the state	● If a woman marries out of state or country, she will still retain all her rights and Indian citizenship
● Panchayats did not have any rights	● Panchayats will have the same rights as in other states
● Right to Education (RTE) was not applicable	● Children in the state will benefit from RTE

## Why was the move a necessity?

### By reorganising Kashmir's political status, Modi govt. is addressing a colonial mess

- In Africa and Asia, there are countless territorial conflicts. The **Indo-Tibetan frontier** opened up by Curzon remains a contested boundary dispute between India and China. More broadly, the buffers and protectorates constructed by the Raj to limit conflict with Russia are now zones of political contestation between India and a rising China.
- The **Durand Line drawn between India and Afghanistan in 1893**, a few years before Curzon arrived in India, remains disputed between Kabul and Islamabad. Even the Taliban, nurtured by Pakistan as an instrument to gain influence in Afghanistan, does not accept the Durand Line.
- Many other peripheries of the Raj, from **Balochistan in the west to Xinjiang and Kashmir in the north to Tibet** and the eastern Himalayan regions between India, upper Burma and China are all in turmoil of varying degrees.

### Part of the problem lies in the nature of the frontiers that the Subcontinent inherited from the Raj.

The land borders of India were not defined by a single line, but by what Curzon identified as the three-fold frontier.

- There was the “**administrative frontier**” that marked out regions that the Raj governed to the fullest extent.
- Beyond that was the “**frontier of active defence**” like the Durand Line.
- A third was the “**strategic frontier**” consisting of the outer boundaries of protectorates over which the Raj exercised a measure of control.

### Confusion over Control of Territories

- While the British Raj, Czarist Russia and Qing China found ways to live with ambiguities in remote corners of the empire, the new nationalist regimes that succeeded them have had much more difficulty.
- The Partition of the subcontinent, based on religious considerations, added an explosive dimension to an already complex inheritance.
- The successor states to the empires laid formal claims to tracts of territory that had an ambivalent status, but have struggled to realise them.

### **The colonial past has left territories that are claimed by many countries with significant challenges**

- **Pakistan** has struggled to find stability on its western borderlands — where the **Baloch** and the **Pashtun** continue to challenge its claims.
- **China** reacted furiously when Delhi in 1975 ended Sikkim's protectorate status and integrated it with India. It took nearly three decades for China to accept the new reality.
  - Beijing continues to claim the entire state of Arunachal Pradesh.
  - But the arguments with China are now mostly political. After instigating trouble in each other's territory for a period, Delhi and Beijing are now committed to managing the dispute peacefully, while expanding the broader relationship.
  - There is a frequent spike in military tensions, but there has been no shooting war.
- India has had greater success with **Bangladesh**. Early on in his first term, Prime Minister Narendra Modi seized the opportunities to settle the disputes with Dhaka on the land and maritime boundary inherited from the Partition.

### **Conclusion**

- But unlike Dhaka and Beijing, Rawalpindi is not really prepared for a peaceful resolution. Repeated efforts by Indira Gandhi (1972), Atal Bihari Vajpayee (1999), and Manmohan Singh (2005-07) ended in failure. The inherent difficulty of negotiation has been compounded by **Pakistan's use of terrorism and Kashmir's ambiguous political status within the Indian Union**.
- In confronting Pakistan's terrorism and reorganising the political status of Kashmir, the Modi government has set a new policy template.
- The key to its success lies in finding early political reconciliation within Kashmir and persuading the Pakistan army that its interests are better served by stable, peaceful and legitimate frontier with India.

## **Criticisms**

### **Due process**

- The process of revocation of Article 370, which ties the state with India, needed the approval of J&K's Constituent Assembly. In the absence of such an assembly, it can be removed with the concurrence of the state legislative assembly. But the assembly does not exist at the moment either, and the notification suggests that **it was the Governor's concurrence that was obtained to render the provisions irrelevant**. This is clearly not sufficient.
- The process has been pushed through **without consultations with Kashmir's political leaders**, who have been under detention.
- Further, the **reorganisation of states requires the consent of the state assembly concerned**.
- In this case, J&K has been bifurcated, and statehood diluted to UT status, without any deliberations in the assembly.

### **Article 3 of the Constitution**

- It says that before parliament can consider a bill that diminishes the area of a state or changes its name, the bill must be "referred by the President to the Legislature of that State for expressing its views thereon".
- This is an essential safeguard of India's federal system and has clearly not been followed in this case.
- In Parliament, the Home Minister invoked that since the J&K assembly was dissolved and the state is under Central rule, **it is parliament that gets to exercise the prerogatives of the assembly**.

- This move will strain India's social fabric not only in its impact on Jammu and Kashmir but also in the portents it holds for federalism, parliamentary democracy and diversity.
- The Centre's abrupt move disenfranchised people on a matter that directly affects their life and sentiments.

### **Kashmiris seek greater democracy**

- Like all Indian citizens, Kashmiris seek greater democracy.
- Elements keen to destabilize India would seek to **build a narrative that Delhi is taking away powers from the local level**. It is important that the process of turning the state into a UT does not lead to alienation.

### **Deepen communal and religious lines**

- While Ladakhi Buddhists, for instance, are now celebrating the fulfilment of their long-pending demand for Union Territory status, the **voices of Kargilis who are still under a strict curfew** are yet to be heard.
- They may not support this decision because 'a Union Territory without a legislature' not only negates the idea of decentralisation of power to the grassroots (the undergirding principle of the autonomous hill council) but could well lead to a shifting of the loci of power to Leh, resulting in losing whatever gains they have assiduously made over the years.

## Instrument of Accession

- In Kashmir's Instrument of Accession in **Clause 5**, Raja Hari Singh, ruler of J&K, explicitly mentioned that the terms of "my Instrument of Accession cannot be varied by any amendment of the Act or of Indian Independence Act unless such amendment is accepted by me by an Instrument supplementary to this Instrument".
- **Clause 7** said "nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future constitution".
- Originally it was India's stated policy that wherever there was a **dispute on accession, it should be settled in accordance with the wishes of the people rather than a unilateral decision of the ruler of the princely state**.
  - In India's acceptance of the IoA, Lord Mountbatten stated that "it is my Government's wish that as soon as law and order have been restored in Kashmir and her soil is cleared of the invader, the question of the State's accession be settled by a reference to the people".

### **Elections in Jammu and Kashmir were delayed**

- The three independent observers appointed by the **Election Commission** — to assess the readiness for assembly elections in Jammu & Kashmir — are learnt to have conveyed to the poll panel that the situation is conducive for elections immediately after Lok Sabha polls.

### **Why Jammu and Kashmir is special?**

- **Former MP Karan Singh, son of Maharaja Hari Singh, wrote in An Examined Life:** "The right wing seems to resent that J&K carries a special status. That has always surprised me. We are a great country, we should be large-hearted. J&K came to India under complex and difficult circumstances. Now after all these years to ask why it holds a special position is baffling. It will always be special because it was born out of a special historical event and subsequent political developments. In England they have all sorts of governing systems..., we should feel so lucky that J&K, a Muslim-majority state became a part of India despite the religion-led Partition. Cherish that; relish that; honour that."
- In November 1963, in a debate in Parliament, when Hari Vishnu Kamath argued that Kashmir was "not fully" integrated, **Nehru asserted** that it was, indeed, "fully integrated" with India. He said: "The House will remember that we have some **restrictions with respect to NEFA and other places; outsiders cannot buy land. This is also in some other districts, the hill districts of Assam**. This is to protect them."

Looking at these arguments from the past, the people, the local political parties in Jammu and Kashmir and the

political parties in India should have been taken into confidence for bringing about an end to a legislation that was indeed the bridge between India and the state of Jammu and Kashmir.

### Challenges

- The first and most obvious result could be a **worsening of the law and order situation** in the Kashmir Valley.
  - The recent pre-emptive deployment of additional forces into Jammu and Kashmir enables the state government to deal appropriately with any situation.
  - If large-scale protests do erupt, how they are handled will be extremely important.
- Pakistan will undoubtedly step up its **support to terror activities in Kashmir**.
  - Pakistan can be expected to fish actively in the troubled waters of Kashmir. Buoyed by the recent statements of United States President Donald Trump on mediation, Pakistan will attempt to internationalize the issue of Kashmir.
  - However, there are limits to Pakistan's response. Hobbled by international pressure and a dire financial situation, Pakistan needs to keep its actions calibrated to ensure that the situation does not escalate to a conventional conflict.
  - The Indian Army's deployment along the Line of Control in Jammu and Kashmir is extremely robust, and will not allow large-scale infiltration.
- It is also essential to not look at tackling the situation purely through a security approach. If the government's action aims to find a **resolution to the Kashmir conflict, it has to take the local population into confidence**.
- It must also be understood that **narratives are more than verbal messages**; they also need visible actions to show the sincerity of the political leadership in finding a just solution.
  - The decision of the government must not be painted in terms of victory or defeat, but as a win-win for everyone.
  - The **advisory to various state governments to ensure the safety and security of the residents of Jammu and Kashmir** is a step in the right direction.

It must now be followed up by a genuine outreach to the people of the state.

## Union Territory Status

- There were seven union territories (UTs) specified under **Part II of the First Schedule to the Constitution of India**, viz. Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu, Lakshadweep, National Capital Territory of Delhi and Puducherry.
- Except for the National Capital Territory of Delhi and Puducherry, UTs did not have their own legislature until now.
- Now, the **state of Jammu and Kashmir has also been added along with Delhi and Puducherry to be a UT with a legislature**.

### Article 240 of the Indian Constitution

- According to Article 240, the President of India has the power to make regulations for UTs not having their own legislature.

### Is it right to give a state Union Territory status? Yes

- A delegation headed by **Chewang Rigzin, President, Ladakh Buddhist Association** approached the then Prime Minister of India Pandit Jawahar Lal Nehru and submitted a memorandum in New Delhi on 4th May 1949 which concludes as under:- "Ladakh is not prepared to go to Pakistan whatever the result of the plebiscite may be".
  - **Frederic Drew, who served as Governor of Ladakh in the 19th Century** had rightly observed that "the territories of J&K have no other bond of cohesion than the fact of Maharaja's rule, no simple name for it exists".
  - Ladakhis since then have consistently been demanding a separate region from the Jammu and Kashmir State and asking for the status of Union Territory for the area.

- Jammu and Kashmir is strategically important for India.
  - With the United States seeking a quick exit from, and willing to let the Inter-Services Intelligence-sponsored Taliban control Afghanistan (and China deeply embedded in the power play), the **heartland of Central Asia has rarely been as adverse to Indian interests since 1989**, when the Soviet Union withdrew from Afghanistan. Kashmir could, in these circumstances, become even more vulnerable to external elements than it was in the 1990s.
  - The situation emerging in the western neighbourhood and the possible re-ascendance of the Taliban in Afghanistan call for greater attention and care to be taken in what will remain as J&K after bifurcation. Making it a Union Territory with a legislature makes a lot of strategic sense.
  - In the interest of security, this is a good move. Once all the security measures are met, we can give statehood as it happened with Goa and Arunachal Pradesh in the past.
- It will insulate Ladakh from the happenings in the other two regions and provide for greater development of the region.
- Ladakh remained critical for India's national security. Imagine, without Ladakh, China's People's Liberation Army would be sitting on the southern foothills of the Himalayas. It has been self-harming to have ignored Ladakh thus far.
  - Ladakh's unique geographical location should offer India a huge counter-offensive potential in terms of leveraging connectivity to the Eurasian region and China.
- 'My Frozen Turbulence in Kashmir' (1986)
  - It is a book penned by Ex-Governor of J&K Jagmohan during 1984-1990.
  - "Article 370 is nothing but a breeding ground for the parasites at the heart of the paradise. It skins the poor. It deceives them with its mirage. It lines the pockets of the 'power elites'".

### Conclusion

- Geographically and metaphorically, Jammu and Kashmir is the crown of secular India — a Muslim majority region in a Hindu majority country. Its people and leaders had chosen secular India over Islamic Pakistan, a fact that Islamists never reconciled with.
- The new doctrine will have to persuade the majority of the people of Jammu and Kashmir that greater integration with India will provide them with more opportunities, provide more freedom and space, and strengthen their rights much more than the alternatives proposed by other mainstream parties or separatists.
- Going forward, India should take the people of J&K into confidence, bring development which includes all sections of society and restore statehood as per its initial promise.

## Jammu and Kashmir Reorganisation Act, 2019

- It is an act by the Indian Parliament where the State of Jammu and Kashmir was **bifurcated into two union territories** — Jammu & Kashmir and Ladakh.
  - The Union Territory of Jammu and Kashmir will have a legislative assembly,
  - Whereas the Union Territory of Ladakh will not have a legislative assembly and will be administered by the Lieutenant Governor alone.
- The **Union Territory of Ladakh will include the districts Leh and Kargil** which will, in effect, cease to be part of the existing state of Jammu and Kashmir.
- The remaining territories will remain with Jammu and Kashmir after the bifurcation.
- Representation in the House of People: Out of the six Lok Sabha seats in the state of Jammu and Kashmir, five will remain with the Union Territory of Jammu and Kashmir and one will go to the Union Territory of Ladakh.
- The Election Commission may conduct Lok Sabha elections for both the Union Territories as per the allocation of seats specified in the Delimitation of Parliamentary Constituencies Order, 1976 as amended by this act.

### The Union Territory of Jammu and Kashmir

- The Jammu and Kashmir Legislative Assembly **will have a tenure of five years** unless it's dissolved



earlier by the L-G.

- **Provisions contained under Article 239a of the constitution that are applicable to Puducherry** shall be applicable here as well.
  - This allows the Union Territory of Jammu and Kashmir to function as a legislative assembly under an administrator appointed under the said Article. In this case, it will be the LG.
- **The delimitation of constituencies following the bifurcation may be determined by the Election Commission.**
  - The constituencies will be re-organised through a de-limitation exercise under the 2002 Act of Parliament.
  - For the purpose of delimitation, the 2011 census figures will be taken as the benchmark.
- The number of seats in the Legislative Assembly of Jammu and Kashmir shall be **increased from 107 to 114.**
  - The state assembly currently has 111 seats, of which 46 are in the Valley, 37 in Jammu and the remaining **four are in the Ladakh division.**
  - Of these, 24 seats would be deemed to be vacant till the time Pakistan-Occupied Kashmir comes under the jurisdiction of the Indian state.
- With this, the **existing legislative council in Jammu and Kashmir stands abolished.** “Every member thereof ceases to be such member and all bills pending in the Legislative Council shall lapse.”
- **Four sitting members of the council of states (Rajya Sabha)** representing the existing state of Jammu and Kashmir shall be deemed to have been elected to **fill the seats allocated to the Union Territory of Jammu and Kashmir.** Their term of office remaining unaltered.
- The **High Court** of the existing state of Jammu and Kashmir will be the common High Court of the two Union Territories.
- The new Assembly shall have **reservations** for Scheduled Caste and Tribes as in other parts of the state.

## Legislative powers of the Union Territory of Jammu and Kashmir

- The Legislative Assembly may make laws for the whole or any part of the Union Territory of Jammu and Kashmir with respect to any of the matters enumerated in the state list **except on subjects “public order” and “police”** which will remain in the domain of the Centre vis-a-vis the LG.
- In case of inconsistencies between laws made by Parliament and laws made by the Legislative Assembly, earlier law shall prevail and law made by the Legislative Assembly shall be void.

### Role and powers of the Lieutenant Governor

- The Governor of the existing State of Jammu and Kashmir shall be the Lieutenant Governor for the Union territory of Jammu and Kashmir, and the Union Territory of Ladakh for such period as may be determined by the President.
- Appointment of L-G in Ladakh: The **President shall appoint the L-G under article 239.**
  - The L-G will be assisted by advisors appointed by the Centre since the Union Territory will not have a Legislative Assembly.
- In the case of Union Territory of Jammu and Kashmir, the **L-G shall “act in his discretion” on issues which fall outside the purview of powers conferred on the Legislative Assembly,** in which he is required to exercise any judicial functions, and/or matters related to All India services and the Anti-Corruption Bureau.

