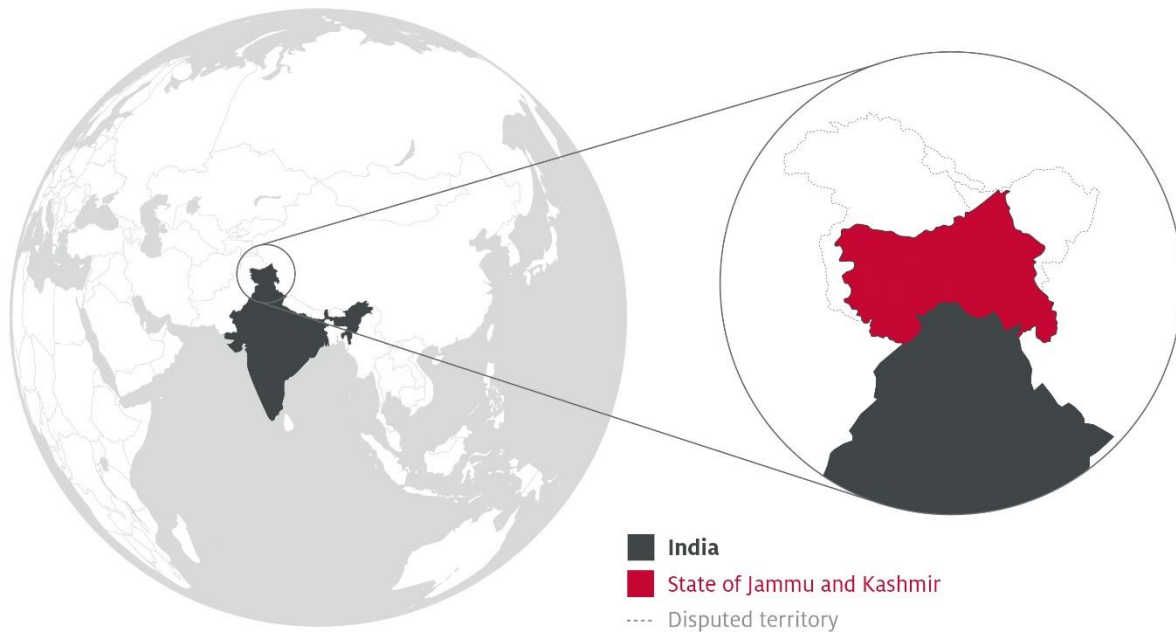




## Jammu and Kashmir

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## 1. Essential Facts and Figures

### 1.1. India

Although Hindus constitute a clear majority (80.5%) of India's population, the country is characterized by a substantial minority of Muslims (13.4%), as well as several smaller religious communities like Christians (2.3%), Sikhs (1.9%), Buddhists (0.8%) and Jains (0.4%).<sup>1</sup> Even the large Hindu population cannot be regarded as a single homogeneous unit, as it is divided along regional and linguistic lines as well as by caste affiliation. In spite of the numerical predominance of Hinduism, the authors of the Indian Constitution (IC) refrained from declaring it the official religion of the country and explicitly named secularism in the preamble as an essential characteristic of the republic. They did however consider the issue of religion, granting certain cultural and educational rights to both religious and linguistic minorities (Article 29 and 30 IC).

With regard to its linguistic demographics, India is even more diverse than in its religious affiliations. Though a consensus among linguists is lacking, some estimates contend that as many as 1,632 languages are spoken in the country (Basu 2002, 387). Most of these are broadly classified as belonging to one of two major language families: Indo-Aryan (76.9%) and Dravidian (20.8%). Although Hindi is the most widespread mother tongue, at 41.0% it is far from being in a majority position, but substantially more common than the languages which follow in the ranking: Bengali (8.1%), Telugu (7.1%), Marathi (7.0%), Tamil (5.9%) and Urdu (5.0%).

In contrast to religions, the framers of the Constitution could not maintain a completely neutral position towards languages and treat all of them equally. For the purpose of conducting governmental affairs, a decision for an official language was necessary. Following a prolonged debate, the Constituent Assembly chose Hindi (Article 343 (1) IC) by a narrow margin as the official language of an independent India, instead of Hindustani, a mixture of Hindi and Urdu which had been the national language under the British Raj. Moreover, English was defined as a co-official language for both the publication of official documents and communication between the Union and the states<sup>2</sup> for a period of 15 years. Though this was intended to be a temporary measure, English was eventually affirmed in 1965 for an indefinite time period as the official link-language, owing to the fierce opposition of some non-Hindi-majority states (Arora 2008, 207). Apart from this situation

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\* Some parts of this study have been published in Constantin and Kössler (2014, 113–56). Sections 1–4 and 10 of this case study were written by Karl Kössler, and sections 5–9 by Sergiu Constantin. The conclusions were drawn up jointly by both authors.

<sup>1</sup> Census Reports of India (2001). The results of the 2011 census concerning religious demographics are not yet available.

<sup>2</sup> For the purpose of clarity, in this chapter we use *Union* and *Center* for referring to the federal level. *State* refers to the specific federal unit of Jammu & Kashmir. Other federal units are referred to as *states* and *union territories*.

at the Union level, each state is entitled to designate its own official languages (Article 345 IC). As a result, there are currently as many as 41 official languages at the state level and 16 states grant Hindi neither sole official nor co-official status.

## 1.2. Jammu and Kashmir

Once we shift the focus from India to the State of Jammu and Kashmir (hereinafter J&K) it becomes immediately clear that this State is equally characterized by enormous diversity, but quite distinct from the rest of the country in terms of its religious and linguistic demographics. In religious terms it is one of only five states with a non-Hindu majority,<sup>3</sup> and the only one with a Muslim majority (67.0%). However, the Muslim segment of the population is not as homogeneous as it might seem at first glance. This is due to the cultural distinctiveness of the State's three historical regions (see the map below): Kashmir (5.48 million), Jammu (4.43 million) and Ladakh (0.24 million).<sup>4</sup> Of the total population living in the fertile Kashmir Valley, 97.2% are Sunni Muslims. Most of them are Kashmiri speakers and share many cultural traditions with the Hindus of the Valley, the Kashmiri Pandits. Kashmiri Muslims have little in common with the Muslims of the thinly populated Ladakh, who are predominantly followers of Shia Islam. Comprising 47.4% of the population in this region, they constitute one of its two large religious communities alongside Buddhists (45.9%). Muslims of Jammu, the most diverse of the three historical regions, make up 30.7% of the population and are again quite varied in their affiliations. They range from Gujjars and Bakkarwals, mountain pastoralists and herdsmen, to Rajputs, and even high-caste Hindu converts to Islam (Bose 2003, 9–10). Jammu's Hindu majority (65.2%) is also differentiated considerably along linguistic lines as well as caste affiliation and local identity.

Not surprisingly, this religious diversity is accompanied by linguistic diversity. Six languages are recognized in the Sixth Schedule of the Constitution of J&K as regional languages.<sup>5</sup> However, Section 145 of the J&K Constitution (J&KC) declares Urdu to be the official language of the State while providing for the continued use of English for official purposes. The status of Urdu as the official language is strongly resented by many people in Jammu and Ladakh because it is not seen as being representative of the whole State. Urdu is seldom used in these two historical regions. Only in the Kashmir Valley is it the language of education, while Kashmiri is used by most people in everyday

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<sup>3</sup> The others are Nagaland, Meghalaya and Mizoram in the North-East, with a Christian majority, and Punjab, with a Sikh majority (Bhattacharyya 2010, 28).

<sup>4</sup> The State of Jammu and Kashmir comprises three historical regions (i.e., Jammu, Kashmir and Ladakh) but only two administrative divisions, i.e., Jammu and Kashmir. Jammu is made up of Kathua, Samba, Jammu, Rajouri, Reasi, Udhampur, Ramban, Doda, Kishtwar and Poonch districts. Kashmir consists of Anantnag, Kulgam, Pulwama, Shopian, Budgam, Srinagar, Ganderbal, Bandipora, Baramulla, Kupwara, Leh and Kargil districts. The historical region of Ladakh covers the Leh and Kargil districts.

<sup>5</sup> These are Kashmiri, Dogri, Balti, Dardi, Punjabi, Pahari and Ladakhi.

life. The fact that Urdu is also the official language of Pakistan further exacerbates this linguistic irritation in Jammu and Ladakh (Marwah 2007, 17).

## 2. Autonomy in the Context of the State Structure

### 2.1. The Union of India

India is today a federal state composed of five government levels: the 29 states and seven union territories, the divisions (in some of the states), the districts, the sub-districts, and different territorial entities at the local level.<sup>6</sup> This territorial make-up was anything but foreseeable in 1946 when India's Constituent Assembly was established. Driven by the omnipresent fear of secessionism, there were serious doubts in regard to whether or not the constitution should make provision for a federal state and, if so, whether the federal structure should take into account the country's enormous diversity.

With regard to the first question, the Constituent Assembly eventually followed a middle ground approach. It decided to establish a federal state but blended it at the same time with significant unitary elements. In concrete terms, the Constitution allows for proclamations of the president of India, in the event of a national emergency,<sup>7</sup> a state emergency<sup>8</sup> and a financial emergency (Article 360 IC), which in effect transform India into a unitary state during these exceptional circumstances.<sup>9</sup> Surrendering to pressure from various parts of the country, in 1956 the Union government rather reluctantly followed the recommendation of the "States Reorganisation Committee" by starting to restructure the then existing 27 states into 14 new states along linguistic lines. It could easily do so because, unlike other federations such as the United States, the Union of India is not composed of *indestructible states*.<sup>10</sup> According to Article 3 of Indian Constitution (IC), an ordinary law is sufficient to form a new state or to alter the boundaries of an existing state. The language-based restructuring of 1956 was diametrically opposed to Nehru's initial preference for heterogeneous states, which he regarded as protection against a rise of parochial and separate identities detrimental to national unity and eventually to territorial integrity (King 1997, 138). However, the 14 states did not remain unchanged. At first, the process of creating new states and redrawing boundaries continued until

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<sup>6</sup> Moreover, the states and union territories are grouped into six overarching zones, each of which has an advisory council tasked with fostering cooperation between these neighboring subnational entities. These are the Northern, North-Eastern, North-Central, Eastern, Western and Southern Zonal Council, respectively. However, these do not have a legally recognized status as a genuine government level. The states and union territories therefore constitute the first of the five levels of government.

<sup>7</sup> Indian Constitution, Article 352 (i.e., a threat to the security of India or any part of its territory caused by war, external aggression or armed rebellion).

<sup>8</sup> Ibid., Article 356 (i.e., the breakdown of the constitutional machinery in a state).

<sup>9</sup> For details see below sections 4.1. and 6.2 of the case study.

<sup>10</sup> The US Supreme Court in *Texas v. White*, 74 US (7 Wall.) 700 (1869).

the 1970s and then gained momentum in the 1990s when the hegemony of the Indian National Congress (hereinafter INC) was replaced by a period of coalition governments including regional and state-based parties (Majeed 2010, 23–46). A clear indication of the ongoing process of territorial reorganization is the creation of the new states of Chhattisgarh, Uttaranchal and Jharkhand in 2000 and Telangana in 2014. In hindsight, the reorganization of states has altogether been quite successful in accommodating linguistic identities, though calls for the creation of new states or even for secession persist (Castellino and Domínguez Redondo 2006).

Whereas the INC-dominated Constituent Assembly had still openly refused to label India as a federation and had insisted successfully on the introduction of significant unitary features,<sup>11</sup> the court explicitly recognized in *Keshavanada Bharati v. State of Kerala* (1973) the federal character of the Constitution as one of five fundamental constitutional elements that are beyond the power of amendment.<sup>12</sup> However, in times of one-party hegemony this new status of federalism as a cornerstone of India's political system had practically been thwarted by relentless political centralism. Only during the last two decades have the changes of the party system together with economic liberalization produced a recognizable, albeit still slight tendency towards an at least politically, if not legally, more decentralized federal state (Majeed 2005, 181–83).

As far as the scope of territorial autonomy within India is concerned, there is a fundamental distinction between the states and union territories. The fact that in the latter case administrators or lieutenant-governors are in principle appointed by the president of India,<sup>13</sup> creates two classes of subnational entities. However, these union territories are clear exceptions, representing only a tiny share (1.6%) of India's total population. Among the states, there are few examples of constitutionally entrenched special status. These merely concern certain border areas marked by – even by Indian standards – particular diversity (Arora 2008, 212): Jammu and Kashmir (Article 370, IC) along with the north-eastern states of Nagaland (Article 371A, IC) Sikkim (Article 371F, IC) and Mizoram (Article 371G, IC). Although Article 2 of the Indian fundamental law provides an explicit constitutional basis for asymmetry by empowering the Union parliament to “admit into the Union, or establish new States on such terms and conditions as it thinks fit”, it is clear that special status is granted to states only in exceptional cases. At the level of the districts, into which all states and union territories are subdivided, asymmetry is again the exception rather than the rule. Out of 655

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<sup>11</sup> Instead of *federation*, the Constituent Assembly chose *Union of States*. See Indian Constitution, Article 1.

<sup>12</sup> The other four essential elements are supremacy of the Constitution, republican and democratic form of government, secular character of the Constitution and separation of powers between the legislature, executive and judiciary (Majeed 2005, 186–87). This *basic structure doctrine* was later reinforced in *Indira Nehru Gandhi v. Raj Narain* (1975), *Minerva Mills Ltd. v. Union of India* (1980) and other decisions.

<sup>13</sup> The union territories are the Andaman and Nicobar Islands, Chandigarh, Dadra and Nagar Haveli, Daman and Diu, Lakshadweep, Pondicherry and National Capital Territory of Delhi. Among them the latter two have a special status through own institutions, i.e., popularly elected legislative assemblies and executive councils, and more, albeit still very limited, powers.

districts only 13 have a special status by being endowed with Autonomous District Councils. Ten of these are located in tribal areas of the north-eastern states of Assam, Meghalaya, Tripura and Mizoram, while the remaining ones are in West Bengal and J&K.

## **2.2. Jammu and Kashmir within the Union of India**

Within this Indian federation, which has over time undergone such significant changes, autonomy is conferred on a territorial basis to different entities at different levels of government, among them the State of J&K. The territory of this State as a point of reference for autonomy is simultaneously defined and protected by the Constitution of India. According to its First Schedule, J&K comprises the entire area of the princely state which acceded to India in 1947, i.e., also the areas that are presently not under Indian control. The demarcation of the State territory in Section 3 of the J&K Constitution (J&KC) is in line with this definition. Moreover, the territory of J&K enjoys extraordinary protection under the Indian Constitution. As outlined above, Article 3 of the fundamental law endows the Union parliament with the power to form a new state or to alter the boundaries of an existing state through ordinary law. This general rule of unilateral territorial changes does not apply to J&K. In this specific case, the consent of the State legislature is indispensable for such a change to come into effect.

At district level, there are in J&K, more specifically in Ladakh, the two Autonomous District Councils of Leh and Kargil, which were created in 1996 and 2003 respectively. The other 20 normal districts of J&K are part of either the Jammu division or the Kashmir Valley division. These two territorial entities merely serve administrative purposes and are devoid of real policy-making power. Autonomy on a territorial basis is therefore only granted at the state level to J&K and at the sub-state level to the districts of Leh and Kargil.

## **3. Establishment and Implementation of Autonomy**

### **3.1. The Road towards Autonomy**

The genesis of the still ongoing conflict in J&K can be traced back to the period of British colonial rule. In the aftermath of the First Anglo–Sikh War, the British ended Sikh rule over the predominantly Muslim province of Kashmir and incorporated it into the realm of the Hindu Dogra Maharaja of Jammu under the Treaty of Amritsar of 1846. While religious tensions were initially suppressed by the absolute rule of the Maharaja, they were bound to surface under the specific political circumstances of decolonization. Whereas British India, i.e., the territories under direct colonial rule, was simply incorporated into India or Pakistan, the rulers of the 565 princely states, which had enjoyed autonomy under British suzerainty, were provided by the outgoing colonial



power with three options: accession to India or Pakistan, or independence. The latter option existed rather in theory only, as probably none of the princely states was in a position to survive politically and economically in the face of the two giant neighboring countries. Moreover, as the British colonial empire on the subcontinent disintegrated into many small states, the fear of increasing instability became a major concern of the most important actors in the international arena. Independence was therefore also highly unlikely to find support abroad (Behera 2006, 213). As a result, the Maharaja Hari Singh faced the dilemma of having to choose *de facto* between Pakistan and India. Being a Hindu prince, he could not expect to remain in power in the Islamic Republic of Pakistan. But on the other hand, he was also highly critical of India and its INC leadership because it opposed the authoritarian rule of the princes and maintained close ties with Sheikh Abdullah, the popular Kashmiri leader and main rival of the Maharaja Hari Singh. The fact that the latter was unable to reach a decision about this situation additionally intensified the territorial claims of both India and Pakistan (Marwah 2007, 5).

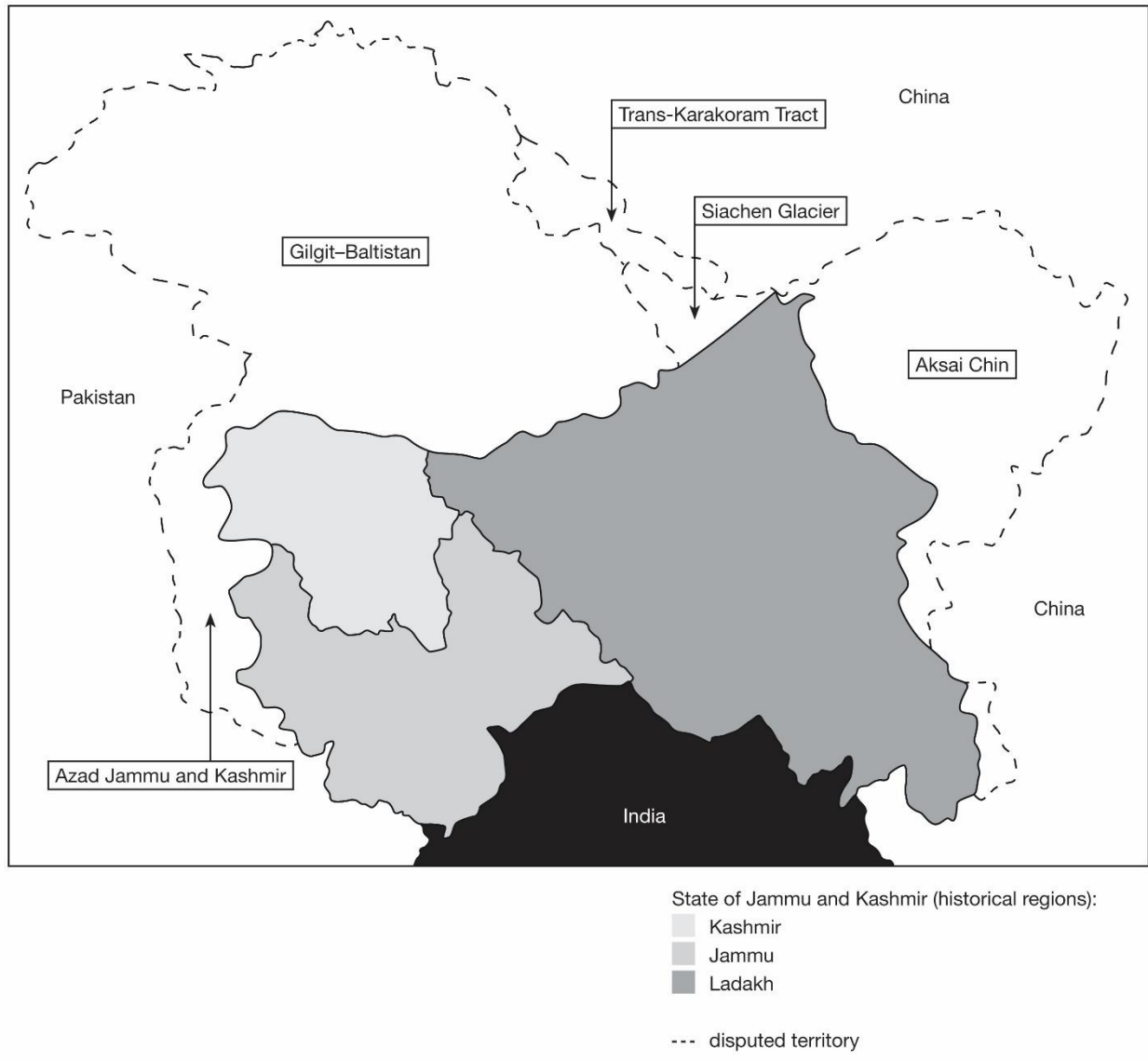
After Pakistan, perceiving itself as the kin-state of Kashmiri Muslims, had assisted armed tribesmen in conquering parts of the Maharaja's territory, the Indian government readily accepted the request of the ruler for military help. In turn, however, the Indian government made him sign the Instrument of Accession on 27 October 1947, through which the territory of the princely state was transferred to India. However, the parts under Pakistani control, i.e., the Northern Areas and the so-called Azad Kashmir, have remained beyond India's reach. They are as disputed today as the parts of the princely state territory which have come under Chinese control since the 1960s. These are Aksai Chin, an area over which India and China fought a brief war in 1962, and the Trans-Karakoram Tract, which was ceded by Pakistan to China in 1963 but is still claimed by India on the basis of the Instrument of Accession (see map 1 below).

When the Maharaja signed the Instrument of Accession, he only relinquished his jurisdiction concerning matters of external affairs, defense and communications to India under Clause 8. Even regarding these matters, J&K retained according to the judgment of the Supreme Court of India in *Rehman Shagoo v. State of Jammu and Kashmir* (1959) the power to legislate as long as State laws are not repugnant to any Union laws. Moreover, the Maharaja made explicitly clear in Clause 7 that he does not commit himself "in any way to acceptance of any future Constitution of India."

The war between India and Pakistan continued for more than a year until both parties accepted a UN-brokered ceasefire in January 1949. The agreement required Pakistan to withdraw its regular and irregular forces and India to reduce its troops to the minimum strength necessary for preserving law and order. In compliance with these conditions, the UN resolution foresaw a plebiscite to determine the future of the territory. However, the conflicting parties neither reached a common understanding

of the procedure for demilitarization nor of its extent, and the Indian government moved on to finalize the status of J&K within India.

**Map 1. Indian State of Jammu and Kashmir and disputed territories**



From May to October 1949, Nehru and his personal friend Sheikh Abdullah, the archenemy of the Maharaja and meanwhile prime minister of J&K, bilaterally negotiated Article 370 of the Indian Constitution. This article was to guarantee J&K's special status. Whereas the Constituent Assembly debated all other constitutional provisions in detail, it only rubberstamped the draft of Article 370, which resulted from this intergovernmental bargaining (Noorani 2011, 1). The fact that the Indian government negotiated the terms of membership with J&K and no other state was not a result of pure generosity and consideration of its extraordinary circumstances. It was actually forced to do so because, unlike all other states, Sheikh Abdullah's government did not allow the Constitution of India

to prescribe the State Constitution. It was allowed to do so as a result of the above-mentioned Clause 7 of the Instrument of Accession (Anand 2004, 91–93).

Article 370 of the Indian Constitution, which came into effect on 26 January 1950, is a particular provision not only from a procedural point of view but also regarding its content. It entrenched the right of J&K to draft its own Constitution. This power was intended to find its limits exclusively in the only two provisions of the Indian Constitution which were declared applicable to J&K: Article 370 itself as well as Article 1, which in conjunction with the First Schedule defines J&K as a State of India and its territory. Moreover, Article 370 restricted the legislative power of the Union parliament to those subjects already mentioned in the Instrument of Accession, i.e., defense, external affairs and communications. However, this far-reaching autonomy in both constitutional and legislative terms was limited by the right of the Indian president to extend further provisions of the Constitution of India to J&K by means of special Presidential Orders (Article 370 (2) IC).

In exercise of the authority conferred upon him by Article 370, the president of India already issued an Order in 1950 on the day the Constitution of India was adopted.<sup>14</sup> Its First Schedule left all matters not explicitly enumerated to the State, while the Second Schedule extended parts of the Indian Constitution with several exceptions and modifications to J&K (Anand 2004, 101–08). The special status based on Article 370 and this CO of 1950 was then further cemented bilaterally between Nehru and Sheikh Abdullah in the Delhi Agreement of 24 July 1952. Without following the procedure prescribed in Article 370 the accord did not have any legal force. Its purpose from Nehru's perspective was rather to increase the Sheikh's political commitment to J&K's position as a State within India. The Sheikh, however, still sought a final solution based on an agreement between India and Pakistan (Chadda 2006, 7; Noorani 2011, 9–10).

### 3.2. The Erosion of Autonomy

Problems soon emerged when it came time to implement the autonomy arrangement. As internal minorities, both Hindus from Jammu and Buddhists from Ladakh fiercely opposed Article 370 because they feared that special status would facilitate the domination of the Kashmir Valley Muslims. Moreover, the international context had meanwhile become increasingly unfavorable for the autonomy of J&K, as Pakistan's rapprochement to the West alienated the Indian government. The British and, after the Korean War, the United States began to court India's rival for geopolitical reasons. From a Western point of view, close relations with Pakistan should make the country a cornerstone of the *cordon sanitaire* against Communist influence on the oil-rich and strategically vital

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<sup>14</sup> Constitution (Application to Jammu and Kashmir) Order no. 10 of 26 January 1950 (hereinafter CO of 1950). It was abrogated and replaced by Constitution (Application to Jammu and Kashmir) Order no. 48 of 14 May 1954 (hereinafter CO of 1954).

Middle East and at the same time marginalize Nehru and his policies of nonalignment (Behera 2006,, 209–16; Chadda 2006, 7).

These unfortunate developments in J&K and in the international arena resulted in deteriorating relations at all levels. The increasing tensions between the governments of India and J&K eventually culminated on 8 August 1953 with Sheikh Abdullah, who had started to explore the independence option, being dismissed as prime minister on the charge of having lost the confidence of his cabinet. Instead of being given the opportunity to prove his majority in the parliament, Sheikh Abdullah was put under house arrest and later imprisoned on conspiracy charges. Apart from short interruptions he remained in jail until 1972.

The following two decades, between the mid-1950s and mid-1970s, marked the period when J&K's autonomy was most extensively curtailed. This was enabled by fraudulent State elections, in which the INC, led by a nominee of the Union government, won repeatedly with significant majorities (Bose 2003, 62–68; Noorani 2011, 13). For the latter, having an obedient government in J&K instead of the *politically unreliable* Sheikh Abdullah solved the crucial problem of being required to obtain the mandatory concurrence for Presidential Orders. According to the clear wording of Article 370 (2)<sup>15</sup> the government of J&K would possess the authority to give concurrence, which it actually accorded to the above-mentioned fundamental CO of 1950, only initially. The State government would then have lost this power to the Constituent Assembly of J&K upon the establishment of this institution on 31 October 1951. After the dissolution of the Constituent Assembly on 17 November 1956 the unusual practice of amending constitutional provisions by simple orders of the Indian president was supposed to end altogether (Noorani 2011, 5–8; Anand 2004, 98). While the important CO of 1954 was still constitutional as a result of the concurrence given by the J&K Constituent Assembly, orders after 1956 would therefore be unconstitutional notwithstanding concurrence of the respective State government.

However, the Indian government claimed that the authority to issue Presidential Orders would last for an indefinite time and could be exercised repeatedly as long as it had the concurrence of the J&K government. In collusion with Union-friendly State governments, which rubberstamped all proposals from New Delhi, 28 Presidential Orders were issued until the mid-1970s (Bose 2003, 62–88). Nehru publicly admitted in 1963 that Article 370

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<sup>15</sup> "If the concurrence of the Government of the State [...] 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."

has been eroded, if I may use the word, and many things have been done in the last few years which have made the relationship of Kashmir with the Union of India very close. [...] We feel that this process of gradual erosion of Article 370 is going on. [...] We should allow it to go on.<sup>16</sup>

Not surprisingly, these internal developments also had negative repercussions on Indo–Pakistani relations. Tensions eventually escalated in 1965 and led to the Second Kashmir War. A rapprochement of the two neighboring countries was then initiated by the Simla Agreement of 1972, in which both settled on the ceasefire line as a permanent Line of Control and on a bilateral effort towards a final solution. This shifting context in relations between the two countries had additional repercussions on the internal situation – but this time positive ones. In the face of decreasing tensions with its neighbor, India was ready to release Sheikh Abdullah, who now refrained from seeking independence, from prison in 1972 and even accepted him as chief minister of J&K three years later in the so-called Indira–Sheikh Accord.

What followed in the late 1970s and 1980s however was increasing religious polarization that proved to be another stumbling block for the implementation of autonomy. During these years, the INC started openly appealing to Hindu sentiments in order to prevent its own imminent decline. This opportunistic and short-sighted strategy was harmful to the secular character of India’s democracy in general and utterly devastating for the political climate in multi-religious states such as J&K (Shakir 1988, 163). Religious polarization together with a culture of political interference by the Union government, corruption and unemployment gradually increased frustration in J&K. This tendency finally culminated in the fraudulent State elections of 1987, which triggered a massive popular revolt (Schofield 2000, 233–35).

The ensuing armed confrontation with the Indian security forces led to a complete breakdown of democratic politics between 1987 and 2002. The beginning of this period was marked by a clear trend towards a *Kashmirization* of the conflict (Bose 2003, 2). Until then the emphasis had been on the fight between two neighboring countries over sovereignty in a contested area, but now a genuinely popular revolt of Kashmiris against the Union of India emerged. Nevertheless, Pakistan’s role remained important, as it clashed again with India over the Kashmir conflict in the Kargil War of 1999 and began to serve more and more as a base for Jihadis to infiltrate J&K. This transformed an initially home-grown uprising into a partly externally driven campaign. While militants in the late 1980s had still adhered to the traditional *Kashmiriyat* culture, which can be traced back to the 16<sup>th</sup> century and is characterized by religious pluralism and a strong affiliation with their mountainous homeland, Islamic extremists and their agenda of an Islamic Kashmir united with Pakistan gained increasing support. This

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<sup>16</sup> Nehru on 27 November 1963, while addressing the Indian parliament, quoted in Noorani (2011, 2).

development entailed the forced migration of a great number of Kashmiri Pandits, the indigenous Hindu population of the Kashmir Valley, to Jammu or to other parts of India (Chadda 2006, 8; Marwah 2007, 17).

Although the violence has continued to this day, some developments in the last decade may be regarded as encouraging. The year 2002 marked the return to democratic elections in J&K. In the following year, India and Pakistan restored diplomatic ties and resumed regular talks which identified at least some points of convergence. Bilateral discussions have focused since then on a Four-Point formula: reducing the relevance of the Line of Control, demilitarization, autonomy, and a joined management mechanism with members nominated from both sides (Noorani 2011, 26).

In hindsight, the more than six decades that have passed since the entrenchment of autonomy are characterized by a deliberate and substantial curtailing of autonomy. Although this was most intensive until the mid-1970s, Presidential Orders have continued to restrict the constitutional and legislative autonomy of J&K. In sum, the 47 Orders prior to 1994 extended to the State 260 out of 395 articles of the Indian Constitution (Ibid., 13–14).<sup>17</sup> Thus it seems fair to say that “the special status conferred by the Constitution, for all practical purposes, no longer exists because it has been so eroded by the central government” (Stepan, Linz and Yadav 2011, 112).

## **4. Legal Basis of Autonomy**

### **4.1. Two Constitutions as Main Legal Sources**

As already outlined in the previous section, the basis of autonomy is formed by the Constitution of India, as far as it is applicable to J&K, and the Constitution of J&K. The latter is not repugnant to the Indian Constitution but complementary and must therefore be read in conjunction with it. Due to its position as a princely state, not ruled directly by the British, J&K had a Constitution as early as in colonial times.

The scope of the first democratic Constitution of J&K, adopted by the Constituent Assembly in 1956, is already clearly indicated in its Preamble. By exercising its constitution-making power and in explicit recognition of the Instrument of Accession, the people of the State of J&K seek “to further define the existing relationship of the State with the Union of India as an integral part thereof”. Section 3 then reaffirms that the State “is and shall be an integral part of the Union of India”, while Section 5 defines the residuary power of J&K for all matters, which the Constitution of India does not explicitly reserve

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<sup>17</sup> The texts of all 47 Presidential Orders from 1954 to 1994 are printed in Noorani (2011, 336–87). In the meantime, a 48<sup>th</sup> Order was issued.

to the Union parliament. One of the earliest and most important decisions of the Constituent Assembly regarding its own State institutions was to abolish hereditary rule.

However, the relevance of the State Constitution as legal basis of J&K's autonomy is weakened by several central intervention powers. One such restriction of constitutional autonomy concerns the extension of Article 356 of the Indian Constitution, which allows temporary centralization of power in case of state emergency. While the declaration of financial emergency under Article 360 is not at all applicable with regard to J&K and the declaration of national emergency under Article 352 is so only with concurrence, Article 356 was introduced in J&K by a Presidential Order of 1964.<sup>18</sup> As a result two types of proclamations are made in case of a "breakdown of the constitutional machinery" in the State: *Governor's Rule* under Section 92 of the J&K Constitution and, in addition, *President's Rule* under Article 356 of the Indian Constitution as in all other states (Basu 1996, 256).

#### 4.2. Constitutional Amendment

As to the amendment of the main legal documents, which enshrine the autonomy of J&K, we must differentiate again between the Union level and the State level. In Article 370 (3), the Indian Constitution makes clear that Article 370 can be abrogated or amended by a Presidential Order. However, such an act requires again the cooperation of the J&K Constituent Assembly, more specifically, its recommendation of such an order.

With regard to its amendment, the J&K Constitution takes a differentiated approach according to the matter in question. Certain provisions, in concrete terms, Section 3 concerning accession to India, Section 5 regarding the extent of Union competences, Section 147 containing the amendment procedure as well as provisions of the Indian Constitution applicable to J&K, are declared unalterable. All other sections are relatively flexible insofar as majorities of two-thirds of the total membership are sufficient in both houses of the J&K parliament. After this parliamentary decision-making, the J&K Constitution only required the assent of the governor. However, with regard to the amendment of certain provisions pertaining to the governor, the election commission and the upper house of the J&K parliament, a Presidential Order of 1975<sup>19</sup> made it obligatory to obtain the assent of the president of India (Noorani 2011, 19–20). Thus, an order again restricted J&K's constitutional autonomy, even in respect to regulating its own amendment procedures.

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<sup>18</sup> Constitution (Application to Jammu and Kashmir) Third Amendment Order no. 71 of 21 November 1964.

<sup>19</sup> Constitution (Application to Jammu and Kashmir) Second Amendment Order no. 101 of 23 July 1975.

## 5. Autonomous Institutions

Under the Indian Constitution the doctrine of separation of powers has not been explicitly stated as it has in the fundamental laws of other countries.<sup>20</sup> The same is true in the case of the J&K Constitution. It states that the executive and legislative power of the State extends to all matters except those with respect to which the Indian parliament has power to make laws for the State under the provisions of the Indian Constitution. Furthermore, the J&K Constitution requires the State to “take steps to separate the judiciary from the executive in the public services”. Initially, the State was governed by a *Sadr-e-Riyasat* (president) elected by the legislative body and a *Wazir-e-Azam* (prime minister). However, the use of these Urdu language terms that underlined the distinctiveness of the State was abolished in 1965 through an amendment of the J&K Constitution.<sup>21</sup> Not only were the two offices now renamed to governor and chief minister, respectively, but the head of state was to be appointed by the Indian president.<sup>22</sup>

Currently, Section 46 of the J&K Constitution stipulates that the State legislature consists of the governor and a bicameral legislative body composed of a lower house called the Legislative Assembly (hereinafter LA) and an upper house called the Legislative Council (hereinafter LC). As most of the governor’s functions are linked to the executive branch, there are certain overlaps between the legislative and the executive. In conclusion, the J&K Constitution does not provide for a formal and complete separation of the three branches but aims to achieve the desired goals of the doctrine of separation of powers by establishing a system of checks and balances.

### 5.1. The Governor

The governor of J&K is the head of the State; he/she exercises the executive power directly or through offices subordinated to him/her and is appointed by the president of India for a mandate of five years. Any Indian citizen who is at least 30 years old can be appointed in this position. The Indian president can replace the governor whenever he/she sees fit (Section 26 (1), (2), Section 27 and Section 28 (1), (3) J&KC) and “may make such provisions as he thinks fit for the discharge of functions of the governor

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<sup>20</sup> However, the Supreme Court of India upheld the principle of separation of powers. In the case *Asif Hameed v. State of Jammu & Kashmir* (1989, 9) the court underlined that “[I]f legislature, executive and judiciary have to function within their own spheres demarcated under the Constitution. No organ can usurp the functions assigned to another.”

<sup>21</sup> Constitution of Jammu and Kashmir (Sixth Amendment) Act of 10 April 1965.

<sup>22</sup> The Supreme Court held in the case *Mohammad Maqbool Damnoo v. State of Jammu and Kashmir* (1972) that there is no difference between an elected *Sadr-e-Riyasat* and an appointed governor, as the change “does not bring about any alteration either in the framework or the fundamentals of the Jammu and Kashmir Constitution.” In 1996, the J&K government set up a State Autonomy Committee with the mandate to examine and recommend measures for the restoration of J&K autonomy and the development of a better relationship between the State and the Union. The State Autonomy Committee (2000, 94) argues that the 1965 amendment “brings about fundamental changes in the core foundation of the Constitution of the State” and that through this radical change “the basic character of the Constitution was infringed”.



in any contingency not provided for” (Section 33 J&KC) in the Constitution. One may argue that such clauses weaken the position of the governor and that their effect may be a *de facto* disempowerment of the J&K top political official. The governor appoints the chief minister and, following his/her advice, the other ministers and the deputy ministers from amongst the members of either house of the legislative body.<sup>23</sup> The chief minister of J&K is the head of the government which is officially called the Council of Ministers. Most of the executive powers are vested within the government which has the obligation to communicate to the governor all its decisions relating to the administration of State affairs. The government is collectively responsible to the LA (Section 37 (1) J&KC).

Beside the executive competences, the J&K Constitution also grants the governor legislative powers. He/she is part of the legislature without being a member of the legislative body. The governor summons sessions of the LA and the LC, as well as prorogues them (Section 53 J&KC). He/she can dissolve the LA and has the right to appoint several members of the two houses of the parliament. Furthermore, during the recess of legislature, the governor has the power to promulgate ordinances with the same force and effects of a law. These ordinances may be revoked at any time by him/her but they cease to operate at the expiration of six weeks from the re-assembly of the parliament, or if before the expiration of that period a resolution disapproving it is passed by the LA and agreed to by the LC (Section 91 (2) J&KC). The governor has a limited veto right in the sense that he/she may withhold the assent to a law approved by the two houses of the parliament, sending it back with suggestions for review. However, if the law is passed again by the legislative body without the requested amendments, the governor is compelled to accept it (Section 78 J&KC). Laws or amendments dealing with financial issues (e.g., taxes, financial obligations of the State, Consolidated Fund of the State) can be introduced only in the LA following the recommendation of the governor (Section 84 J&KC). A specific feature of the J&K Constitution is the Governor’s Rule in the case of failure of constitutional machinery in the State.<sup>24</sup> Through a proclamation, the governor may assume all or any of the functions of the government of the State, and all or any of the powers vested in or exercisable by any authority in the State. Moreover, the governor may make incidental and consequential provisions that are necessary for giving effect to the proclamation, including provisions for suspending in whole or in part the operation of any provision of the J&K Constitution relating to anybody or authority in the State. However, the governor cannot assume any of the powers vested in

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<sup>23</sup> Sections 36 and 38. Section 37 (2) J&KC specifies that a minister who for a period of six consecutive months is not a member of either house of the legislative body shall upon the expiry of that period cease to be a minister.

<sup>24</sup> It is worth noting that Article 356 of the Indian Constitution relating to suspension of constitutional machinery was extended to the State in 1964. Therefore, in case of failure of the constitutional machinery as set up by the Constitution of J&K, the *President’s Rule* under Article 356 of the Indian Constitution may be applied in J&K as in the case of other states of the Union.

or exercisable by the High Court of the State or suspend in whole or in part the operation of any provision of the J&K Constitution relating to the High Court (Section 92 J&KC).

In the judicial sphere, the governor has the right to grant pardons, reprieves, respites or remissions of punishment, and to suspend, remit or commute the sentence of any person convicted of any offence against any law relating to a matter to which the executive power of the State extends. Furthermore, the governor appoints the district judges in the State and the administrative staff of the judicial service, in consultation with the High Court and the Public Service Commission (Sections 109 and 110 J&KC).

## 5.2. The Legislature

The LA has a mandate of six years unless it is sooner dissolved by the governor (Section 53 (2) (b) J&KC). If a proclamation of emergency issued under Article 352 of the Indian Constitution is in operation, the six-year period may be extended by the State legislature by law for a period not exceeding one year at a time and not extending in any case beyond a period of six months after the proclamation of emergency has ceased to operate (Section 52 (1) J&KC). The LA is composed of 111 members (hereinafter MLA) chosen by direct election. The voting system used is first-past-the-post with single-member constituencies. It is worth noting that the fundamental law of J&K contains a special provision that aims to ensure the representation of women in the lower house. If the governor of J&K is of the opinion that women are underrepresented in the legislative body, he/she may nominate two women as MLA (Section 47 (1) J&KC). However, one may argue that in practice the positive effects of this form of affirmative action are rather limited because, firstly, its enforcement depends on the will of the governor and, secondly, the two additional female MLA cannot really influence the decision-making process. Of note is also the fact that 24 out of the 111 seats are reserved for the representatives from Pakistan-controlled Kashmir. These seats remain officially vacant “until the area of the State under the occupation of Pakistan ceases to be, so occupied and the people residing in that area elect their representatives” (Section 48 (1) J&KC). This region is excluded in delimiting the territorial constituencies and the 24 seats are not taken into account for reckoning the total membership of the LA (Section 48 (1) J&KC). In conclusion, the lower house has 87 elected members (plus 2 nominated members). The present delimitation of the LA constituencies was done in 1995 in pursuance of Article 4 (d) of the Jammu and Kashmir Representation of the People Act of 1957 and seven seats were reserved for the Scheduled Castes<sup>25</sup> in the State (Ahuja 2000, 48). Out of

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<sup>25</sup> According to Article 366 (24) of the Indian Constitution, *Scheduled Castes* means the castes, races or tribes or part of, or groups within, castes, races, or tribes which are for the purposes of the Constitution of India deemed to be Scheduled Castes in relation to the states under the provisions of Article 341 of the Indian Constitution. Article 341 stipulates that the Indian president may specify in a public notification, with respect to any state or union territory, the castes, races or

the existing 87 LA constituencies, 46 are in Kashmir, 37 are in Jammu and four are in Ladakh. The J&K Constitution provides that the number, extent and boundaries of the territorial constituencies for the LA shall be readjusted upon the completion of each census (Section 47 (3) J&KC) and Articles 3 and 4 of the Jammu and Kashmir Representation of the People Act stipulate the procedure to be followed for the delimitation of the LA constituencies. In 2002 however, both the Jammu and Kashmir Representation of the People Act and the J&K Constitution were amended and the delimitation of the constituencies was postponed until the official data of the first census taken after the year 2026 is published.<sup>26</sup>

The criticism of the 2002 amendment comes mostly from Jammu-based politicians and academics who argue that a new delimitation of LA constituencies on the basis of laid down criteria (e.g., geographical compactness, nature of the terrain, facilities of communication<sup>27</sup>) would increase the numbers of seats allocated to this region. According to this line of reasoning, the 2002 amendment reflects the will of Kashmiri Muslim leadership to retain control over State politics (Om 2010). A detailed report on the political, social and economic situation in J&K commissioned by the Indian Ministry of Home Affairs<sup>28</sup> points out that people in Jammu and Ladakh strongly believe that the politicians from Kashmir Valley “have given them a raw deal largely due to an iniquitous delimitation of constituencies” (Padgaonkar et al. 2011, 35) and highlights the strong sentiment in both regions that New Delhi has neglected their grievances because of their pro-India stance.

Section 49 (1) of the J&K Constitution stipulates that the number of seats for the Scheduled Castes shall bear the same proportion to the total number of seats in the LA as the population of the Scheduled Castes bears to the population of the State, as ascertained at the last official census. However, according to the 2002 amendment of J&K Constitution, until the official data of the first

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tribes which, for the purposes of Constitution, shall be deemed to be Scheduled Castes in relation to that state or union territory. Subsequently, the parliament may by law include in or exclude from the list of Scheduled Castes specified in such notification any caste, race or tribe.

<sup>26</sup> The Jammu and Kashmir National Panthers Party (JKNPP), a recognized political party in the State, has challenged the amendment of the Jammu and Kashmir Representation of the People Act before the High Court of J&K. However, the court held that the readjustment of the territorial constituencies after each census was neither a mandate of the fundamental law, nor the essence of democracy and rejected the complaint. The Supreme Court of India dismissed the JKNPP’s appeal. The court held that a demand for a “uniform value of one’s voting right through the process of delimitation, disregarding the statutory and constitutional dispensation based on historical reasons is not a justiciable right” (*J&K National Panthers Party v. Union of India* 2011: para. 24).

<sup>27</sup> Jammu and Kashmir Representation of the People Act of 1957 (as subsequently amended), Article 4 (2) (a).

<sup>28</sup> In summer 2010 mass protests erupted in J&K, and the violent confrontations between protesters and security forces claimed the lives of more than 100 people. The Indian government announced a set of measures designed to defuse tension in the State, and in October 2010 appointed a Group of Interlocutors with the mandate to hold wide-ranging consultations at all levels of J&K society. They were to identify the political contours of a solution and the roadmap towards it. During 2011, the Group of Interlocutors held consultations in all 22 districts of J&K, met the leadership of both large and small, national and regional political parties and received over 700 delegations of community representatives (e.g., clerics, traders and workers’ associations, women’s groups, media and welfare organizations). The Report of the Group of Interlocutors (i.e., D. Padgaonkar, R. Kumar, and M. M. Ansari) was submitted to the Indian authorities in October 2011 and was made public in May 2012. As of June 2014, the report is still pending with the State government (Wani 2014).

census taken after the year 2026 are published the reference should be the data of the 1981 census. Section 49 (2) of J&K Constitution establishes the principle that this affirmative action is a temporary measure.

The LC is a permanent chamber, as only a fraction of its membership is changed periodically. The members of LC (hereinafter MLCs) enjoy a tenure of six years but one-third of them retire after every second year.<sup>29</sup> The LC consists of 36 MLCs chosen according to a complex scheme laid down in Section 50 of J&K Constitution: 14 MLCs are elected in the Jammu administrative division,<sup>30</sup> 14 MLCs are elected in the Kashmir administrative division (including two from Ladakh)<sup>31</sup> and eight MLCs are nominated by the governor.

Only the *permanent residents* of the State as defined in the J&K Constitution can sit in the legislative body.<sup>32</sup> For each territorial constituency there is one general electoral roll for the election to either house of the legislative body, and no person shall be ineligible for inclusion in any such roll on grounds such as religion, race, caste, sex.<sup>33</sup> No MLA and MLC shall be liable to any proceeding in any court in respect of anything said or any vote given by him in the legislature.

The complex composition of J&K parliament aims to ensure a balanced representation at two levels: firstly, between the two main territorial-administrative units and, secondly, between the urban and rural populations of the State. It is worth noting that several LC seats are reserved for representatives from some of the most remote and undeveloped areas of the State.<sup>34</sup> However, the present arrangement has been criticized on various grounds.<sup>35</sup> As early as in the 1980s, the Wazir Commission<sup>36</sup> recommended that based on topography, geographical compactness, development

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<sup>29</sup> Section 52 (1) of the Constitution of J&K, and Article 156 (1) of the of the Jammu and Kashmir Representation of the People Act.

<sup>30</sup> 11 out of these 14 MLCs from the Jammu administrative division are elected by the MLAs from amongst residents of Jammu who are not members of the LA. At least one of these 11 MLCs shall be a resident of Doda district and at least one of them shall be a resident of Poonch district. Further, one MLC is elected by the members of municipal council, town area committees and notified area committees in Jammu and two MLCs are elected by the members of local self-government bodies in Jammu.

<sup>31</sup> Eleven out of these 14 MLCs from the Kashmir administrative division are elected by the MLAs from amongst residents of Kashmir who are not members of the LA. At least one of these 11 LMCs shall be a resident of sub-district Leh (Ladakh) and at least one shall be a resident of sub-district Kargil. Further, one MLC is elected by the members of municipal council, town area committees and notified area committees in the Kashmir province; two MLCs are elected by the members of local self-government bodies in Kashmir.

<sup>32</sup> Constitution of J&K, Section 51 (a) and Section 140, Jammu and Kashmir Representation of the People Act, Article 12 (1) (b) and Article 23 (2).

<sup>33</sup> Jammu and Kashmir Representation of the People Act, Article 11 and Constitution of J&K, Section 139.

<sup>34</sup> While Kargil and Leh are the least populated districts of the State, Doda and Poonch are in the top three of the most backward districts of J&K and are receiving financial support from the Backward Regions Grant Fund. This is a programme launched in 2007 by the Indian government with the aim to redress regional imbalances in the country's development. For details, see <http://panchayat.nic.in/brgf/> (accessed January 15, 2016).

<sup>35</sup> For example, one may argue that Kashmir Valley is over-represented in the legislature when compared with Jammu and Ladakh and that present delimitation favors the urban elites. From this point of view, it is necessary a new delimitation which would allocate more seats to the remote and underdeveloped areas of the State and ensure a better representation of the so-called *minorities within minorities*.

<sup>36</sup> The Wazir Commission was established in November 1981 with the aim to study *inter alia* the rationalization of territorial-administrative units. The Commission submitted its report in January 1984.

level, means of communication and population distribution, Jammu should have more districts (thus more MLAs) than Kashmir. One may reasonably assume that the non-implementation of such a solution has led to an increasing dissatisfaction in Jammu towards the arguably Kashmir-centric leadership of the State.

### 5.3. The Judiciary

The High Court of J&K consists of a Chief Justice and several judges who hold office until the age of 62. They are appointed by the Indian president after consultation with the Chief Justice of India, the governor of J&K, and the Chief Justice of the High Court in the case of appointment of a judge other than the Chief Justice (Section 93 and 95 J&KC). The High Court is composed of permanent and additional judges.<sup>37</sup> The High Court sits in Srinagar (the summer capital) from May to October. From November to April, it shifts to Jammu (the winter capital). However, court sections of both the Jammu and Srinagar branches of the High Court function throughout the year. As the main judicial authority of the State, it exercises the control over all lower-level courts in J&K and it has the power to transfer cases to itself from subordinate courts concerning the interpretation of the J&K Constitution or the Indian Constitution (Sections 103–105 J&KC).

The Indian Constitution establishes a single integrated judicial system. The Supreme Court of India is the highest court in the hierarchy of Indian judiciary and has original, appellate and advisory jurisdiction.<sup>38</sup> Nowadays, the provisions of the Indian Constitution regarding the jurisdiction of the Supreme Court are applicable to J&K as well, with several exceptions and modifications.<sup>39</sup> It is worth noting that, initially, the CO of 1950 granted the Supreme Court only appellate jurisdiction in relation to the State but the CO of 1954 (with the subsequent amendments) extended the jurisdiction of the Supreme Court.

Larson (2001) rightly points out that India is a secular state in a religious society and its legal system therefore faces a double challenge: on one hand, to ensure an equal treatment for all citizens and, on the other hand, to be responsive to the various religious communities. The Indian case shows very well the tension between legal universalism and legal pluralism. While the former treats the individuals as basic units of the society with uniform rights and obligations, the latter focuses on groups as the basic units, the building blocks of the society and state (Rudolph and Rudolph 2001, 36–37). Article 25 of the Indian Constitution guarantees the freedom of conscience and free profession,

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<sup>37</sup> According to Section 100-A of the Constitution of J&K, additional judges are appointed by the Indian president for a period of maximum two years, in case of temporary increase in the business of the High Court or arrears of work therein.

<sup>38</sup> For details, see <http://www.supremecourtindia.nic.in/jurisdiction.htm> (accessed January 15, 2016).

<sup>39</sup> For example, Articles 134A, 135, 139, 139A of the Indian Constitution are not applicable to J&K. For details, see Appendix II of the Indian Constitution, “Re-statement with reference to the present text of the Constitution, of the exceptions and modifications subject to which the Constitution applies to the State of Jammu and Kashmir”.

practice and propagation of religion, and according to Article 44, “[t]he State shall endeavour to secure for the citizens a uniform civil code throughout the territory of India.” The issue of adopting a uniform code has been always highly sensitive, and this goal has not been achieved so far. Thus, legal pluralism remains one of the features of Indian juridical system. Hindus, Muslims, Buddhists, Sikhs, Christians and other communities continue to use different systems of *personal law* regarding marriage, divorce, wills, inheritance, succession, etc. However, the personal law is interpreted and applied by the secular courts. Sharia courts have no constitutional or legal authority but their judgments may have a strong impact in J&K, the only Muslim-majority Indian State.<sup>40</sup>

## 6. Autonomous Powers

It is particularly remarkable how complex and confusing the present legal arrangements between the Union and J&K are. One may reasonably argue that the numerous constitutional amendments created a kind of juridical labyrinth. For Lavakare (2005, 31–32) “it is not readily known as to exactly how many Acts of Parliament are not applicable to Jammu & Kashmir State and which are the really important among those.” It is difficult to say what the total number of modifications of the Indian constitutional provisions in their application to J&K is.<sup>41</sup> Stepan, Linz and Yadav (2011, 112) rightly argue that in the last half of century, J&K “became a *specially disempowered state* that was practically run by the central government”.<sup>42</sup> The following analysis on the legislative and executive competences of the State is illustrative in this regard.

### 6.1. Distribution of Legislative Powers

According to Section 5 of the J&K Constitution, the legislative and executive powers of the State extend to all matters except those with respect to which the Indian parliament has power to make laws for the State under the provisions of the Indian Constitution. The distribution of legislative and executive powers between the Union and the states is illustrative for the specificity of the Indian

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<sup>40</sup> A striking example seems to show that the J&K authorities may cave to pressure from such unofficial courts. In October 2011, a self-styled sharia court led by the J&K Grand Mufti summoned an Anglican priest from Srinagar to answer to charges of blasphemy. Less than a month later, the priest was arrested by the local police and charged under Articles 153A and 295A of the J&K Penal Code. While Article 153A pertains to “promoting enmity between different groups [...] and doing acts prejudicial to maintenance of harmony”, Article 295A has to do with “deliberate and malicious acts, intended to outrage religious feelings of any class by insulting its religion or religious beliefs”. The priest was released on bail at the beginning of December 2011 but the All India Christian Council accused the police of arresting him in order to forestall an anti-government rising by Muslim extremists. In January 2012, the same self-styled sharia court ordered the expulsion of the Anglican priest and several other Christian missionaries who, allegedly, had lured Kashmiri Muslims to convert to Christianity (Ramachandran 2012). In February 2012, the J&K High Court issued an order that halted the legal proceedings against the Anglican priest. However, apparently, he (and the other Christian missionaries) were compelled to leave Kashmir due to security concerns.

<sup>41</sup> Appendix II of the Indian Constitution contains a “Re-statement with reference to the present text of the Constitution, of the exceptions and modifications subject to which the Constitution applies to the State of Jammu and Kashmir” but this long list contains only exceptions and modifications “which have a practical significance”.

<sup>42</sup> Emphasis in the original.

federal system with its strong unitary bias. Article 246 of the Indian Constitution provides for a division of legislative powers in three lists, based on principles of exclusivity and concurrency:

- The Union List originally contained 97 items. There are currently 100 matters on this list in respect to which the Indian parliament has exclusive power to make laws.<sup>43</sup> Currently, the Union List includes *inter alia* defense, deployment of security forces in any state and powers, jurisdiction, privileges and liabilities of the members of such forces, foreign affairs, transports, banking and insurance, public service, national elections, Supreme Court and high courts of the states, taxes and duties.
- The State List originally contained 66 items. There are currently 61 matters on this list, all of which are exclusive legislative powers of the states.<sup>44</sup>
- The Concurrent List originally contained 47 items. This list currently has 52 matters which are powers vested in the Union as well as the states.<sup>45</sup>

As Singh and Saxena (2011, 171) point out, more than half a century after the adoption of the Indian Constitution, the State List has lost several subjects to the Union and Concurrent Lists. As a matter of fact, “[b]etween 1950–2001, a total of 27 changes have been brought about by constitutional amendments: 9 in the Union List, 11 in the State List, and 7 in the Concurrent List.” It is particularly remarkable that 94 of the original 97 entries in the Union List were made applicable to J&K by 1994 (Noorani 2011, 13–14). Moreover, the State Autonomy Committee (2000, 8) argues that “26 entries in the Concurrent List have also been applied [to J&K], 6 more with modifications.” This argument deserves particular consideration, and a short discussion of the constitutional developments in a historical perspective is helpful for a better understanding of the J&K autonomy erosion process.

Let us remember that when the Indian Constitution came into force, Article 370 laid down the principle that J&K has competence over all issues except defense, foreign affairs and communications. If other constitutional provisions and other Union powers were to be made applicable in J&K, the prior concurrence of the State government and the approval of the State’s Constituent Assembly were required.<sup>46</sup> The State Autonomy Committee (2000, 30) argues that according to the wording of Article 370, the J&K government’s authority to give the concurrence lasted only as long as the State’s Constituent Assembly was convened. It was an interim power and as soon as the J&K Constituent Assembly met, the State government could not give its own concurrence. Moreover, the State

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<sup>43</sup> Article 246 (1) IC and Seventh Schedule.

<sup>44</sup> Indian Constitution, Article 246 (3) and Seventh Schedule. Currently, the State List includes *inter alia* police and public order, local government, cultural institutions, public health, agriculture and land, state elections, state taxes and duties, jurisdiction and powers of all courts except the Supreme Court, with respect to any of the matters in this List.

<sup>45</sup> *Ibid.*, Article 246 (2) and Seventh Schedule. Currently, the Concurrent List includes *inter alia* criminal law and criminal and civil procedure, marriage and divorce, wills and successions, transfer of property except agricultural land, bankruptcy and insolvency, economic and social planning, employment and trade unions, education, and printed media.

<sup>46</sup> *Ibid.*, Article 370 (1) (b) (ii) and (2).

government would not have the right to give its concurrence for the extension of constitutional provisions and Union powers applicable in J&K after the Constituent Assembly finished its work and was dissolved. Such an interpretation of Article 370 calls into question the legality of the subsequent progressive reduction of the autonomous powers of the State through Presidential Orders. The J&K Constituent Assembly was dissolved in 1957 but successive State governments gave their assent for a series of constitutional amendments that curbed the autonomy with the blessing of the Supreme Court of India.<sup>47</sup>

Initially, the constitutional relationship between the State and the Union was shaped by the CO of 1950 that enumerated in its First Schedule the matters included in the Union List with regard to which the Union could make laws for the State.<sup>48</sup> Moreover, the CO of 1950 specified in its Second Schedule what other constitutional provisions shall apply in relation to J&K subject to several exceptions and modifications.<sup>49</sup> The CO of 1950 was abrogated by the CO of 1954 which has remained one of the basic relevant pieces of legislation for the Union–State relations. It marked the beginning of the encroachment of State legislative powers by widening those of the Union. As a matter of fact, the CO of 1954 gave the Indian parliament the power to make laws for J&K in regard to nearly all matters in the Union List (with some exceptions and modifications) and significantly extended the number of Indian Constitution’s provisions which are applicable to J&K (again with several exceptions and modifications).<sup>50</sup>

The Union parliament enjoys legislative competence over matters which are not enumerated in the Concurrent and State Lists. These are residuary powers that stem from Article 248 of the Indian Constitution.<sup>51</sup> However, the J&K Constitution lays down the principle that the legislative power of the State extends to all matters except those with respect to which the Union parliament has power to make laws for the State (Section 5 J&KC).

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<sup>47</sup> It is worth noting, however, that in the case *Prem Nath Kaul v. State of Jammu and Kashmir* (1959) the Supreme Court held that “Constitution-makers attached great importance to the final decision of the Constituent Assembly, and the continuance of the exercise of powers conferred on the parliament and the president by the relevant temporary provision of Article 370 (1) is made conditional on the final approval by the said Constituent Assembly in the said matters.” Yet, the Supreme Court held the opposite view in the case *Sampat Prakash v. State of Jammu and Kashmir* (1968). The judges decided that Presidential Orders can be issued under Article 370 despite the fact that the Constituent Assembly was dissolved. Peer and Rahman (2012, 73) rightly point out that it is “rather perplexing, to note that although the only case which came before the Supreme Court till then in relation to Article 370 was *Prem Nath Kaul*, the Court did not even consider or refer to it while deciding on *Sampat Prakash*”. The Supreme Court also overlooked *Prem Nath Kaul* as a legal precedent in the case *Mohammad Maqbool Damnoo v. State of Jammu and Kashmir* (1972) in which it upheld the replacement of the elected *Sadr-e-Riyasat* by an appointed governor. For the court, the essential feature of Article 370 is the necessity of the concurrence of the State government, not the Constituent Assembly (Noorani, 2000).

<sup>48</sup> For example, armed forces, atomic energy, diplomatic, consular and trade representation, naturalization and aliens, railways, airways, shipping, post and telegraph, elections to parliament.

<sup>49</sup> For example, the provisions of Part XVII of the Indian Constitution on official language shall apply in relation to J&K “only in so far as they relate to the official language of the Union and to proceedings in the Supreme Court.”

<sup>50</sup> For example, Part II (Citizenship), Part III (Fundamental Rights), Articles from Part V (The Union), Part XI (Relations between the Union and the States).

<sup>51</sup> For example, according to Article 248 (2) of the Indian Constitution, the Union has the power to make any law imposing a tax not mentioned in either of those Lists.



Article 248 of the Indian Constitution was made applicable to J&K<sup>52</sup> in a modified version, guaranteeing the power of Indian parliament to make laws dealing with the prevention of terrorism and the activities directed against the sovereignty and territorial integrity of India, as well as regarding several types of taxes. It is worth noting that the legislative powers of the Union can be extended to subjects enumerated in the State List under special situations: e.g., national interest (Article 249 IC), proclamation of emergency (Article 250 IC), agreement between two or more states (Article 252 IC), implementation of international treaties (Article 253 IC), failure of constitutional machinery in a state (Article 356 IC). These provisions of the Indian Constitution were not applicable to the State under the CO of 1950. However, the subsequent application of (modified versions of) Articles 248 and 249 of the Indian Constitution to J&K brought the residuary powers into a grey area and constitutional law experts have differing opinions in this regard. Whereas for Anand (2004, 133) the residuary powers still belong to the J&K legislature, Noorani (2011, 20) argues that the Union has acquired residuary powers because the Indian parliament can legislate on matters “not mentioned in the Union List and Concurrent List” as laid down in a Presidential Order of 1986<sup>53</sup> which made applicable a modified version of Article 249 to J&K. A decade earlier, the State Autonomy Committee (2000, 69) followed the same line of reasoning when it pointed out that the application of a modified version of Article 250 to J&K which gives the Union parliament the right to make laws for the State in respect of “matters not enumerated in the Union List” may cover “areas which are part of residuary power of legislation or strictly powers of legislature of the State”.

Article 254 of the Indian Constitution which is currently applicable to J&K lays down the mechanism for resolution of conflict between State-made law and Union-made law. In such cases, the Union legislature prevails over the State legislature, in principle. If any provision of a law made by the State legislature (i.e., Law A) is repugnant to any provision of a law made by the Indian parliament (i.e., Law B) in its field of competence, before or after the adoption of Law A, then Law B prevails, and Law A shall be void to the extent of the repugnancy. The same principle applies in case of any provision of a law made by the State legislature being repugnant to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List (Article 254 (1) IC). An exception to the above rule occurs under the following necessary conditions: (i) the State law deals with matters enumerated in the Concurrent List, and it contains provisions inconsistent with an earlier law made by the Indian parliament or an existing law with respect to that matter; (ii) the State law has been reserved for the consent of the president and received his or her assent. In such cases, the State law prevails. However,

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<sup>52</sup> A modified version of Article 248 of the Indian Constitution was made applicable to J&K through Constitution (Application to Jammu and Kashmir) Amendment Order no. 85 of 17 February 1969 and Constitution (Application to Jammu and Kashmir) Second Amendment Order no. 93 of 6 May 1972.

<sup>53</sup> Constitution (Application to Jammu and Kashmir) Amendment Order no. 129 of 30 July 1986.

the Indian parliament can override such State law through subsequent legislation (Article 254 (2) IC). In several cases, the Supreme Court of India has examined issues related to this *doctrine of repugnancy* which is meant to resolve disputes arising from the inconsistency between laws made by states and the Union.<sup>54</sup>

## 6.2. Distribution of Executive Powers

According to Article 73 of the Indian Constitution, the executive power of the Union covers all matters with respect to which the Indian parliament can make laws. The Indian government has the power to enter into any treaty or agreement, but Article 253 of the Indian Constitution requires that the Union parliament passes a law for giving effect to such treaty or agreement. Article 253 applies to J&K as modified by CO of 1954 (with subsequent amendments) under the condition that no decision affecting the disposition of the State shall be made by the Indian government without the consent of the State government. Moreover, no proclamation of emergency made by the president under Article 352 of the Indian Constitution on the ground of internal disturbance shall have effect in J&K, without the concurrence of the State government. The Union has no power to make a proclamation of financial emergency with respect to the J&K under Article 360 of Indian Constitution. However, the executive power of the Union extends to giving J&K directions which the Indian government deems necessary to avoid a situation in which the exercise of the State's executive power may impede or prejudice the exercise of the executive power of the Union. The instructions given by the Union to the State may also regard measures concerning the construction or maintenance of any means of communication, and measures to be taken for the protection of the railways within the State (Article 257 IC). Article 312 of the Constitution regarding All India Services<sup>55</sup> is applicable to J&K.

The executive power of J&K shall be so exercised as to ensure compliance with the laws made by the Indian parliament (and any existing laws which apply in the State), and not to impede or prejudice the exercise of the executive power of the Union. In the exercise of its executive power J&K shall facilitate

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<sup>54</sup> For example, in the case *State of Jammu and Kashmir v. M. S. Farooqi and Others* (1972) the Supreme Court dealt with a matter of inconsistency between a State-made law (i.e. Jammu and Kashmir Government Servants' Prevention of Corruption Commission Act) and a Union-made law (i.e. All India Services Act). The respondent was a member of the Indian Police Service. The Commission set up under the Jammu and Kashmir Government Servants Prevention of Corruption Act started an investigation into a complaint received against the respondent. He challenged the jurisdiction of the Commission, and the J&K High Court allowed the petition, holding that the members of an All India Service, serving in J&K, are governed by the All India Services Act (and the rules made thereunder) thus the State-made law was not applicable to them. The Supreme Court dismissed the appeal of the State following the same line of reasoning: the State law is repugnant to the provisions of the Union law and hence, under Article 254 of Indian Constitution which is applicable to J&K, the State law must give way to the Union law. For a detailed discussion on the conflict between State-made law and Union-made law, see also the case *M. Karunanidhi v. Union of India* (1979).

<sup>55</sup> The All India Services Act of 1951 provides that the Indian government may make rules for regulating the recruitment and the conditions of service of persons appointed to the All India Services. The All India Services include the Indian Administrative Service, the Indian Police Service and the Indian Forest Service.

the Union's discharge of its duties and responsibilities under the Constitution in relation to the State.<sup>56</sup> The Indian president may entrust either conditionally or unconditionally to the State government or to its officers functions in relation to any matter to which the executive power of the Union extends. This procedure requires the consent of the J&K government. In such case, the Indian government will pay to the State any extra costs of administration incurred by the State in connection with the exercise of those powers. The other way around, the governor of the State may, with the consent of the Indian government, entrust either conditionally or unconditionally to that government or to its officers functions in relation to any matter to which the executive power of the State extends (Articles 258 (1), (3) and 258A IC).

## 7. Financial Arrangements

Part XII of the Indian Constitution dealing with financial issues is applicable to J&K with few exception and modifications, and the Comptroller and Auditor-General of India has jurisdiction over the State.<sup>57</sup> However, the Union has no power to make a proclamation of financial emergency with respect to the J&K under Article 360 of Indian Constitution. The exclusion of J&K from the application of Article 360 means that the Indian president cannot give directions to that State to observe certain fiscal requirements deemed necessary when its financial stability is threatened. Whereas "this arrangement has been made in the view of the special circumstances of the State", it may be argued that "the situation seems unreasonable [and] hardly justifiable" because J&K "shares in the revenues of the Union and gets grants-in-aid" (Anand 2004, 154).

The financial arrangements between the Union and J&K are based on three main principles laid down by the Indian Constitution. Firstly, no tax shall be levied or collected except by authority of law (Article 265 IC and Section 114 J&KC). Secondly, the property of the Union is exempted from State taxation, and the property and the income of the State is exempted from Union taxation (Articles 285 and 289 IC). Thirdly, the taxation power of the State is limited in several specific cases. No State law shall impose or authorize the imposition of a tax on the sale or purchase of goods where such sale or purchase takes place outside the State or in the course of the import or export of the goods into or out of the territory of India. The aim is to avoid multiple taxation. A State law that imposes or authorizes the imposition of a tax on the sale or purchase of goods declared by Union law to be of special importance in inter-state trade or commerce is subject to restrictions and conditions stipulated

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<sup>56</sup> Article 256 (1) and (2) IC. Paragraph 2 was introduced by CO of 1954 (with subsequent amendments) and is applicable only in relation to J&K: in particular, if so required by the Union, J&K shall acquire or requisition property on behalf and at the expense of the Union, or if the property belongs to the State, transfer it to the Union on such terms as may be agreed or as may be determined by an arbitrator appointed by the Chief Justice of India.

<sup>57</sup> Their jurisdiction was extended to the State by Constitution (Application to Jammu and Kashmir) Second Amendment Order 1958, which made Entry 76 of Union List under the Indian Constitution applicable to J&K.

by the Union law (Article 286 (1) and (3) IC). Furthermore, no State law shall impose or authorize the imposition of a tax on the consumption or sale of electricity consumed by the Indian government, or sold to it for consumption (Article 287 IC). This also applies to taxes in respect to any water or electricity stored, generated, consumed, distributed or sold by any authority established by Union Law for regulating or developing any inter-state river or river-valley (Article 288 IC).

The distribution of income from taxation between the Center and J&K follows a general rule whereby the Union and the states retain the proceeds from taxes levied on matters that fall under their respective competences. However, the Indian Constitution lays down some exceptions that also apply to J&K: (i) duties levied by the Union but collected and appropriated by the states,<sup>58</sup> (ii) taxes levied and collected by the Union but assigned to the states<sup>59</sup> and (iii) taxes levied and collected by the Union and distributed between the Union and the states.<sup>60</sup>

It is worth noting that J&K is one of the *special category states* which enjoy preferential treatment from the Union, as its economic performance is negatively affected by “remoteness and poor connectivity, [...] inhospitable terrain, vulnerability to natural disasters, a weak resource base, poor infrastructure, shallow markets and most importantly a law and order situation threatened by militancy” (PHD Research Bureau 2011, 18). These particular conditions “have resulted in low economic activity, low employment and low-income generation” (Ibid.). Consequently, the State is not able to generate sufficient revenue from its own resources and depends on financial support from the Union to meet even its routine administrative expenditures (Marwah 2007, 11). J&K has four sources of revenue (Planning Commission 2003, 354): (i) the tax revenue,<sup>61</sup> (ii) the non-tax revenue,<sup>62</sup> (iii) the grant-in-aid from the Union government,<sup>63</sup> and (iv) the State’s share of Union taxes and duties. The J&K government has its own Finance Department, headed by a Minister of Finance. This institution

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<sup>58</sup> Indian Constitution, Article 268. These are stamp duties and duties of excise on medicinal and toilet preparations.

<sup>59</sup> Ibid., Article 269. These are taxes on the sale or purchase of goods and taxes on the consignment of goods.

<sup>60</sup> Ibid., Article 270. These are taxes on income other than agricultural income. The Finance Commission of India makes recommendation to the Indian president regarding the percentage of the net proceeds of income taxes that shall be assigned to the states, the share of each state within the divisible pool and the percentage of the net proceeds of income taxes that shall be retained by the Union. For details, see Thirteenth Finance Commission (2009).

<sup>61</sup> The tax revenue is the most important for the budgeting exercise and includes in order of higher revenue collections sales tax, excise, tax on goods, tax on vehicles, stamp duty, electricity duty, tax on passengers and land revenue. Besides, miscellaneous taxes in the shape of tax on professions, trade, selling and employment, entertainment duty and advertisement, road tax and tourist tax are charged.

<sup>62</sup> The non-tax revenue is largely dependent on collection of fees from the consumers on account of supply of goods and services like electric energy, drinking water, irrigation facilities, exploitation of forest wealth, charges of health services, mining, etc.

<sup>63</sup> According to Article 275 of Indian Constitution, the Union parliament has the authority to offer every year such financial support to the states that are in need of assistance and different sums may be fixed for different states. Moreover, the Union may give to the State government pass-through grants that shall reach local bodies (e.g., *Panchayati Raj* institutions) for carrying out development and welfare schemes. Also, the State government devolves financial resources as grants-in-aid to *Panchayats* following the recommendation of the State Finance Commission. In 2011, J&K established a State Finance Commission for *Panchayats* and Municipalities which aims to review and improve the financial position of these local bodies.

prepares a State budget which must be approved by the State legislature. It comprises three parts: (i) the Consolidated Fund, (ii) the Public Account and (iii) the Contingency Fund.<sup>64</sup>

The J&K government offers a set of incentives to those interested in investing in the State. Illustrative examples in this regard are the exemption in excise duty for ten years, an income tax holiday of five years, as well as various subsidies provided with the aim to facilitate industrialization (PHD Research Bureau 2011, 16). However, few will dispute the claim that the financial situation of J&K is directly linked to security issues and that the consolidation of peace and order is an absolute prerequisite for further economic development.

## 8. Intergovernmental Relations

Singh and Misra (2012) rightly argue that the role of the Union and the states as envisaged in the Indian Constitution more than 60 years ago is challenged by new socio-political-economic realities. The results of the 2009 Indian general elections confirm the trend towards the *regionalization of politics* (Jaffrelot and Verniers 2009) meaning the increasing fragmentation of the political scene and the upsurge of regional parties. Moreover, “with the advent of coalition politics, the Centre–State relationship started coming under considerable strain as different political parties assumed power at the Centre and in different States” (Singh and Misra 2012, 4).

Indeed, Hardgrave and Kochanek (2008, 150–51) point out that “[u]ntil 1967 the bargaining process of Center–States relations took place primarily within the framework of the dominant Congress Party”, but its gradual loss of hegemony gave more and more weight to negotiations within official bodies like the National Development Council which dealt with all issues involving economic planning and the Conference of Chief Ministers which “handled non-planning political issues requiring national uniformity, coordination, and Center–State cooperation”.

In 2007, the Indian government set up a Commission on Center–State Relations known as the *Punchhi Commission*.<sup>65</sup> The mandate of this body was multifaceted: to review the working of the existing arrangements between the Union and the states, various pronouncements of the courts in regard to powers, functions and responsibilities in all spheres including legislative relations, administrative relations, the role of governors, emergency provisions, financial relations, economic and social

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<sup>64</sup> For details see the information published on the website of the Financial Department of J&K’s government at <http://jakfinance.nic.in/budget.html> (accessed January 15, 2016).

<sup>65</sup> Back in 1983, the Indian government established the so-called *Sarkaria Commission* with the mandate to examine and review the working of the existing arrangements between the Union and the states in regard to powers, functions and responsibilities in all spheres, recommending such changes or other measures as may be appropriate. The report of Sarkaria Commission published in 1988 contains 247 recommendations. The appointment of another panel to deal with these issues 20 years after the Sarkaria Commission submitted its report suggests that most of the problems highlighted in 1988 have remained unsolved.

planning, *Panchayati Raj* institutions,<sup>66</sup> sharing of resources, and to recommend such changes or other measures as may be appropriate. The report of the Punchhi Commission made public in 2010 contains 282 recommendations. The two major constitutional amendments proposed are related to the parliament and internal security (Singh and Saxena 2011, 192). The commission recommends equal representation for the states in the upper house in order to bring about a federal balance in favor of smaller states, which are disadvantaged in both chambers of the parliament as seats are allotted in proportion to the size of each state's population. As regards internal security, the commission recommended the establishment of an over-arching structure at the center level called the National Counter-Terrorism Centre (NCTC). This body was to coordinate all intelligence and investigation agencies and other organizations and departments dealing with security issues. In 2012, the intention of the Union government to establish the NCTC in pursuance of the report of the Punchhi Commission was met with opposition by several states arguing that law and order is essentially a State List subject and that the concept of NCTC goes against the federal spirit of the Indian Constitution (Singh and Misra 2012, 7). The chief minister of J&K has opposed the mandate of the NCTC to carry out independent operations with the option to inform the state governments after the operation has been launched and concluded. In his view the NCTC may gather and analyze information unilaterally, but it should perform only joint operations with the state police (Tandon 2012).

The main issues regarding the Union–J&K relations are discussed within the complex scheme of consultation and participation mechanisms which includes the National Development Council, the Planning Commission of India, and the Inter-State Council. The J&K chief minister is a member of both the Inter-State Council and National Development Council, and periodical consultations are taking place between the J&K government and the Planning Commission. According to Marwah (2007, 12–13), “de facto cooperative arrangements” are agreed to by the Union and the State “in relation to the exercise of some competencies, especially with regard to security and financial matters.” As regarding the political representation of J&K at the Union level, the State has four seats allocated in the *Rajya Sabha* (Council of States) and six seats in the *Lok Sabha* (House of the People). Whereas the members

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<sup>66</sup> According to Articles 243 and 243B of the Indian Constitution, the *Panchayats* are institutions of self-government at the village, intermediate and district level. This system of governance is called *Panchayati Raj*. The legislature of a state regulates by law the procedure for the election of the members of the *Panchayats* and their competences. The devolution of powers shall enable these bodies to play a major role in the preparation and implementation of plans for economic development and social justice. The *Panchayats* are financed by centrally-sponsored schemes and by the state governments on the recommendation of the State Finance Commissions. The legislature of a state may authorize a *Panchayat* to levy, collect and appropriate taxes, duties, tolls and fees. The *Panchayats* must have a certain number of reserved seats for Scheduled Castes and Scheduled Tribes, as well as for women.

of *Rajya Sabha* are elected by the State legislature,<sup>67</sup> the members *Lok Sabha* are directly elected in the State on the basis of universal suffrage.<sup>68</sup>

## 9. Inter-group Relations within the Autonomous Entity

### 9.1. Relations between Religious, Ethnic and Linguistic Communities

The progressive erosion of the asymmetric autonomy arrangement laid down by the Indian Constitution led to the deterioration of the political, social and economic situation in J&K. The political discontent in the Kashmir Valley increased constantly from the early 1980s, and the allegedly rigged 1987 LA elections “reinforced the prevalent feeling that Kashmiris would never get a fair deal through democratic means” (Chowdhary and Rao 2003, 195). This event set the stage for the subsequent mass anti-India protests, militancy and insurgency. In 1989, the demand for autonomy was replaced by the calls for *azadi* (freedom) of secessionist/irredentist forces supported by a large part of the Muslim population of the Kashmir Valley (Tremblay 2009: 934). Almost the entire Hindu minority population in the Kashmir Valley (i.e., the Kashmiri Pandits) fled the region after the outbreak of violence. During the early 1990s,

[b]oth guerrilla leaders and ordinary Kashmiris associated their own cause with the string of remarkable political turnabout in the Baltics, Germany, and Afghanistan (i.e., the Soviet withdrawal). There was a sense that somehow Kashmir must be next to taste freedom. (Desmond 1995, 7).

However, after 1996 the Muslims from Kashmir Valley pursued their short-term economic objectives by participating in State governance through elections “while continuing to express long-term demands for *azadi* outside the institutional framework” (Tremblay 2009, 925). This brings us to the question of political and economic aspirations of the other communities living in J&K. As Behera (2006, 104) rightly underlines, each of them “is struggling to nurture its sociocultural identity, find avenues

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<sup>67</sup> The *Rajya Sabha* is the upper house of the Indian parliament. It is a permanent body with not more than 250 members. It is not subject to dissolution, but one-third of its members retire every two years. The term of office of a member of the *Rajya Sabha* is six years from the date of election (or nomination). Members of the *Rajya Sabha* are not elected by the people directly but indirectly by the LAs of the various states. Every state is allocated a certain number of members in the *Rajya Sabha*. The representatives of a state in the *Rajya Sabha* are elected by the MLAs of that state in accordance with the system of proportional representation by means of the single transferable vote. For details, see <http://rajasabha.nic.in> (accessed January 15, 2016).

<sup>68</sup> The *Lok Sabha* is the lower house of the Indian parliament. It consists of a maximum of 552 members. Not more than 530 members are chosen by direct election from territorial constituencies in the states. The elections take place every five years and are based on the first-past-the-post electoral system. The total elective membership is distributed among the states in such a way that the ratio between the number of seats allotted to each state and the population of the state is, so far as practicable, the same for all states. In addition, the union territories are represented in the *Lok Sabha* by not more than 20 members, and not more than two members of the Anglo-Indian community may be nominated by the President in the *Lok Sabha*. For details, see <http://loksabha.nic.in> (accessed January 15, 2016).

of social and economic development, and create its own political space". In the Kashmir Valley the main demands are linked to the political sphere ranging from *azadi* (with either a secessionist or an irredentist aim) to a real autonomy and self-rule as originally conceived, based on the special status enshrined in Article 370 of the Indian Constitution. Kashmiri elites have rejected the interventions from the Center that curtailed the autonomy of the State, but "in fighting against those integrative pressures, Kashmiris replicated unitary power structures and thus alienated the people from Jammu and Ladakh" (Ibid., 105). Indeed, in these two regions, the perceived dominance of Kashmiri Muslims in the political life of the State and the inter-regional disparities induced a sense of resentment against the policies of both the Union and the State. In the Hindu-dominated areas of Jammu, nationalist organizations request the abolition of Article 370 of the Indian Constitution, which guarantees the special status of the State (Chowdhary 2009). At least a part of the Hindu population of Jammu would be in favor of establishing a separate state but the five Muslim-majority districts of Jammu oppose such an idea. The demand for union territory status for Ladakh is near unanimous in the Buddhist-dominated area of Leh. This aspiration is cross-cutting not only party but also community lines because it is supported even by the small local Muslim population. As the State allocates budgetary financial resources for infrastructure development on the basis of population size, it is clear that a territorially large but sparsely populated region like Ladakh is disadvantaged. However, the Shia Muslim-dominated district in Kargil does not want union territory status for Ladakh, as those in Buddhist-dominated Leh do. These small Muslims communities argue that granting such a status to Ladakh or establishing a separate State in Jammu will force them, much against their grain, to cast their lot with the Kashmir Valley. Should that happen, the minorities in these districts, too, fear that they will face another partition trauma (Padgaonkar et al. 2011, 35–36).

Indeed, at the sub-regional level, some communities have their own set of grievances rooted in fears about discrimination by another community. This leads to increasing communal polarization which has a negative impact within the three regions as well as between them. "The Muslim and Hindu majority districts of Jammu, for example, are steadily drawing apart rather than coming together; similarly, the Muslim and Buddhist districts of Ladakh are becoming increasingly distant, even acrimonious" (Ibid., 20).

The polarization of the society along communal lines reached a peak in 2008 during the Amarnath Shrine controversy.<sup>69</sup> The LA elections scheduled in November 2008 were held without major

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<sup>69</sup> Thousands of Hindu pilgrims travel every summer to the Amarnath caves located in the Kashmir Valley to pay homage to Lord Shiva. The overall organization of the mass pilgrimage and the management of the shrine are entrusted to the Shri Amarnath Shrine Board (SASB). In 2008, the State government agreed to transfer 99 acres of forest land to the SASB for the construction of housing facilities for the worshipers. This decision triggered a strong negative response in the Kashmir Valley. Chowdhary (2009) points out that the widespread opposition was based on the fear of demographic change engineered by the government with the intention of altering the Muslim-majority character of the State. Due to



incidents. Based on the election results, Chowdhary (2009) argues that the initial *regional chauvinism* triggered by the Amarnath land transfer controversy turned into a communal conflict which has carved new political constituencies based on religion. The fact of the matter surely is that inter-community relations may be deeply affected by apparently insignificant events, and that the political divide may easily shift from the regional level to the communal level.

## 9.2. Security and Human Rights Situation

The Indian military and paramilitary troops deployed in J&K are estimated at around 700,000. This means that J&K is one of the most militarized areas on the planet. International non-governmental organizations like Amnesty International and Human Rights Watch have long maintained that Indian security forces are operating with impunity in the State and called for impartial investigations of alleged human rights violations. In December 2012, two non-governmental organizations based in J&K released a report which documents 214 cases of human rights violations committed by army and paramilitary personnel, J&K police members and *government backed militants/associates* (Imroz et al. 2012, 7). The report denounces an “institutional culture of moral, political and juridical impunity” and accuses both the Union and the State authorities for failing to act even when official documents “indicted the armed forces and the police by providing reasonable, strong and convincing evidence on the role of the alleged perpetrators in specific crimes” (Ibid., 7–8).

Under the Armed Forces (Jammu and Kashmir) Special Powers Act (AFSPA) no. 21 of 1990, the military personnel deployed in a “disturbed area” may *inter alia* shoot “any person who is acting in contravention of any law”, search and arrest without warrant any person who has committed an offence or against whom “a reasonable suspicion exists that he has committed or is about to commit” an offence.<sup>70</sup> Moreover, the military forces enjoy a special immunity as no prosecution, suit or other legal proceeding can be instituted, except with the previous sanction of the Union government, against any person in respect to anything done or purported to be done in exercise of the powers conferred by the AFSPA.<sup>71</sup> Not even a single request for sanction for prosecution under the AFSPA has been granted in the 22 years since the law entered into force (Imroz et al. 2012, 231). This absolute impunity for the army personnel is reflected by the high number of so-called *fake encounters* meaning

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the progressive deterioration of the security situation in the Kashmir Valley, the State government stepped back and revoked the land transfer. However, this led to the prompt mobilization of the Hindu nationalists in Jammu who considered the revocation a capitulation by the authorities to the Muslim separatists and a direct attack on the religious sentiments of their community. Law and order was re-established in Jammu after the State government and Hindu nationalists groups reached a compromise according to which the SASB is allowed to use the forest land during the Amarnath pilgrimage, but the government retains ownership of the land. In the Kashmir Valley, the agreement was perceived as a capitulation rather than a compromise, triggering a new round of unrest in the region. For a detailed account of the Amarnath Shrine controversy, see Tremblay (2009, 938–45).

<sup>70</sup> Armed Forces (Jammu and Kashmir) Special Powers Act no. 21 of 1990, Section 4.

<sup>71</sup> Ibid., Section 7.

extrajudicial killings of civilians or suspect insurgents. In the military reports, the victims appear as aggressors who shot at the security forces and were then killed in self-defense. In March 2012, the UN Special Rapporteur on extrajudicial, summary or arbitrary executions urged India to repeal the AFSPA because “[i]t clearly violates International Law. A number of UN treaty bodies have pronounced it to be in violation of International Law as well” (India Today 2012).

## 10. Membership, “Quasi-citizenship” and Special Rights

In a landmark decision, the Constitution Bench of Supreme Court of India stressed in *ShriRaghunatharao Ganpatrao vs Union of India* (1993, para. 108) that in view of the country’s enormous diversity “India has one common citizenship and every citizen should feel that he is Indian first irrespective of other basis.” Nevertheless, the State of J&K grants a privileged status to its *permanent residents*. These are according to Section 6 of the J&K Constitution citizens of India who on 14 May 1954 were *state subjects* of Class I or Class II<sup>72</sup> or had until that day lawfully acquired immovable property in the State as well as ordinary residence in it for not less than 10 years. In spite of this constitutional definition, the State legislature has the power to enlarge or restrict the category of people regarded as *permanent residents* (Section 8 J&K). However, any law which defines or alters the definition of *permanent residents* or confers, regulates or modifies special rights or privileges requires the approval of two-thirds of the total membership of each house of the legislature.

The above-mentioned term *state subject* indicates the historical and pre-democratic origin of privileges for the local population. As early as in the late 1920s the people of the princely state of Kashmir and Jammu had campaigned for their protection against marginalization and exploitation by people from richer neighboring areas, above all the Punjab. In response to growing pressure, the Maharaja Hari Singh granted certain privileges to his *state subjects* through notifications promulgated in 1927 and 1932 (Anand 2004, 187). These legal acts remained in force even for some time after decolonization, as the CO of 1950 did not make Part II of the Indian Constitution dealing with citizenship applicable to J&K. However, the CO of 1954 did exactly that, thereby turning *state subjects* of J&K into citizens of India. In exchange however, these people, now called in a less ambiguous manner *permanent residents*, were endowed with special rights.

Article 35A was inserted into the Constitution of India for this purpose<sup>73</sup>, declaring that existing and future laws in J&K, which define *permanent residents* and confer special rights upon them regarding

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<sup>72</sup> Class I comprises persons born and residing within the state before 1846 as well as persons who settled there before 1942 and have ever since been permanent residents. Class II refers to persons other than those belonging to Class I who settled within the State before 1969 and have since permanently resided and acquired immovable property therein.

<sup>73</sup> See Appendix II of the Indian Constitution: “Re-statement, with reference to the present text of the Constitution, of the exceptions and modifications subject to which the Constitution applies to the State of Jammu and Kashmir”.

employment under the State government, scholarships and other aid provided by the State government, acquisition of immovable property and settlement in J&K shall be valid. Thus, it was explicitly clarified that the privileged status of *permanent residents* is in line with the Constitution of India in spite of its fundamental rights guarantees for all Indian citizens, such as the right to non-discrimination on grounds of birthplace (Article 15 (1) IC), to equality of employment opportunity (Article 16 (1) IC), to property (Article 19 (1) (f) IC) and to settle in any part of India (Article 19 (1) (e) IC). J&K has made use of this empowerment both in special legislation and in its Constitution itself. The latter restricts to *permanent residents*, for example, the right to work and to certain social benefits (Section 19 (a) and (d) J&K), to free education up to the university level (Section 20 (a) J&K), qualification for membership in the legislature (Section 51 (a) J&K), disqualification for it (Section 69 (1) (d) J&K) and the right to vote in elections to the lower house of the J&K parliament (Section 140 J&K).

A particularly delicate question concerned the legal consequences of marriages between daughters of *permanent residents* and non-residents. The relevant Note III of the Notification of 1927 has been interpreted before and after the J&K Constitution came into force in such a way that women would in this case lose their privileged status. At first even the High Court of J&K upheld this interpretation in *Prakash v. Mst. Shahni* (1965), in which it did not see any discrimination on the ground of sex. Only after the issue had been addressed in a number of writ petitions, did the High Court of J&K change its position and rule in the case *State of Jammu and Kashmir v. Dr Susheela Sawhney* (2002) that a woman would not lose her status as *permanent resident* in the event of such a marriage. The lower house of the J&K parliament reacted to this decision by passing the Jammu and Kashmir Permanent Residents Disqualification Bill in an attempt to restore the *status quo ante* (Ashai 2010). Following fierce debates between politicians and the strong resistance of human rights activists, the so-called *Disqualification Bill* failed to be approved by the upper house of the State legislative body. Its session on this initiative was adjourned for an indefinite time without the bill being put to vote. In 2012, the current government of J&K confirmed that it does not intend to reintroduce the bill in the parliament.

## 11. General Assessment and Outlook

A precondition for a positive impact of the autonomy arrangement would be that all parties involved recognize the complexity of the conflict. In reality however, there prevails a common misperception to portray the conflict in this state in a simplified manner as originating only from the fact that a predominantly Muslim population had its destiny determined by a Hindu ruler in 1947 and as being fought since then bilaterally between India as state of residence and Pakistan as kin-state of this Muslim community. In reality, political claims vary greatly and Pakistan as an Islamic Republic by

official definition is only perceived as kin-state by parts of J&K's population, with great variation in opinion among even the Muslim population. There are sharp divisions between those who demand accession to Pakistan, others who call for independence, and a third group which claims genuine autonomy within India. Most likely, the non-Muslim population in Jammu, Ladakh and the Kashmiri Pandits, are overwhelmingly in the latter group. Among the Muslim population there are some who demand real autonomy within India, while others favor accession to Pakistan. Still others, above all in the Valley, the center of the above-mentioned specific Kashmiri culture, seek independence (Bose 2003, 10–11; Behera 2006, 2). The failure to recognize the complexity of the conflict, stemming from diverse identities, loyalties and political claims, has so far inhibited a satisfying long-term solution. This is epitomized by Article 370 of the Indian Constitution of 1950, according to which the status of J&K is regulated by several *temporary provisions*.

Compared to other autonomy arrangements currently in place, there are probably not many which are characterized by such a tremendous gap between the law in the books and law in action as in the case of J&K. The initial arrangement had endowed this state with far-reaching autonomy in both constitutional and legislative terms. It was entitled to draft its own Constitution and merely relinquished a few explicitly listed legislative competences. However, in the course of six decades, the autonomy of J&K has been gradually and deliberately eroded through Presidential Orders with explicit approval of the Supreme Court of India.

Why has such an erosion process taken place? Apart from contextual factors, the intrinsic weaknesses of the autonomy arrangement are also relevant. The most important reason why the self-governance system has proved ineffective is its failure to properly address J&K's cultural diversity by enshrining autonomy at different levels of government in a more complex and nuanced arrangement. The exceptional procedure of how Article 370 was formulated, that is through negotiations between Nehru and Sheikh Abdullah, is emblematic of the interests which this provision reflects. People of Jammu and Ladakh and, in general, the minority communities within J&K felt that their interests had been neglected in this bilateral bargain and that autonomy would only serve to cement the domination of the Kashmiri Muslims in legal terms. The internal opposition against the introduction of Article 370 clearly marked a turning point. From then onwards, relations between J&K internal minorities and the State government, as well as between the latter and the Union government, have increasingly soured. In addition to all this, the international context changed for the worse as the rapprochement between Pakistan and the West alienated India. The removal of Sheikh Abdullah, for Kashmiris the very symbol of autonomy, from the office of J&K prime minister and the subsequent State puppet governments then enabled the Union to gradually curtail the autonomy.

While the impact of the autonomy arrangement in the last decades has certainly been a negative one, there have been some signs which may foreshadow more positive developments in the future. Firstly, in the international arena, the end of the Cold War has reduced the geopolitical interests at stake. Together with the fear of a nuclear war, this has contributed to an emerging consensus that the conflict can only be resolved peacefully (Behera 2006, 276). Secondly, in relations between India and Pakistan, the bilateral approach towards a solution, which Sheikh Abdullah had demanded from Nehru in vain during the early years of autonomy, has been reinforced by both sides. Regular talks focusing on the Four-Point formula,<sup>74</sup> specific confidence-building measures such as bus connections and the permission for divided families to meet, as well as Pakistan's shift from demanding a plebiscite to *maximum self-governance* under the Musharraf government (Reddy 2005) have resulted in a slight rapprochement between the two rivaling neighbors. Nevertheless, India and Pakistan still tend to make the possession of Kashmir a cornerstone of their respective self-perception, i.e., the secular state on the one hand and the homeland of all Muslims of the subcontinent on the other (Bose 2003, 8). To some extent, the conflict is therefore still overloaded with ideology that makes it an immutable zero-sum test for both sides. Thirdly, in J&K itself, the return to democratic politics in 2002 is certainly a positive sign. However, violence continues to this day and an autonomy arrangement that is inclusive of different autonomy claims of different groups at different levels is still being sought. The fact of the matter is that the distinctive status of J&K within the Union and its ethnic, linguistic and religious diversity requires the establishment of a two-level autonomy model: on one hand, the reinforcement of the State autonomy within India's asymmetric federalism and, on the other hand, the internal autonomy of Jammu, Kashmir and Ladakh within J&K. The establishment of a network of devolved institutions with legislative, administrative and financial powers at all levels of governance – region, district and *Panchayat* – could give voice and offer solutions for the different aspirations of all regions and ethnic, linguistic and religious communities. However, the idea of an internal devolution of powers enjoys virtually no support in the Kashmir Valley and it also raises fears regarding the division of the State along communal lines.

It is obvious that the complexity of the J&K case requires a coordinated set of measures that could tackle the symbiotic relationship between the political and governance related issues. Indeed,

[e]ven if the question of Jammu and Kashmir's status is resolved at the political level, no resolution will be felt on the ground without improvement in governance. Conversely, improvements in governance are stymied by the lack of political resolution because morale

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<sup>74</sup> The four points are reducing the relevance of the Line of Control, demilitarization, autonomy and a joined management mechanism with members nominated from both sides.

within the services is and will remain low as long as there is ambiguity on the State's relation to the Union. (Padgaonkar et al. 2011, 91).

This set of measures would deal with a wide range of political, cultural and economic concerns including *inter alia* the special status of J&K within the Union, the internal autonomy of the regions within the State, the protection and preservation of the J&K ethnic, linguistic and religious diversity, and equal access to resources by the entire population. The process of finding a long-lasting solution in the case of J&K may start with a symbolic change: the replacement of the word *temporary* in Article 370 of the Indian Constitution with *special* in order to assert the distinctive status of J&K within the Union of India.<sup>75</sup>

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<sup>75</sup> As a matter of fact, the term *special* is used in the Indian Constitution for several other states, i.e., Maharashtra and Gujarat (Article 371), Nagaland (Article 371A), Assam (Article 371B), Manipur (Article 371C), Andhra Pradesh (Article 371D), Sikkim (Article 371F), Mizoram (Article 371G), Arunachal Pradesh (Article 371H) and Goa (Article 371I).

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## List of abbreviations

- CO – Constitution (Application to Jammu and Kashmir) Order issued by the Indian President
- IC – Constitution of India
- INC – Indian National Congress
- J&K – State of Jammu and Kashmir
- J&KC – Constitution of Jammu and Kashmir
- JKNPP – Jammu and Kashmir National Panthers Party
- LA – Legislative Assembly of Jammu and Kashmir
- LC – Legislative Council of Jammu and Kashmir
- MLA – Member of Legislative Assembly
- MLC – Member of Legislative Council

NCTC – National Counter-Terrorism Centre

SASB – Shri Amarnath Shrine Board

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