

CHAPTER 15

THE STATE OF JAMMU & KASHMIR

Peculiar position of the State.

THE State of Jammu & Kashmir holds a peculiar position under the Constitution of India.

It forms a part of the 'territory of India' as defined in Art. 1 of the Constitution, being the fifteenth State included in the First Schedule of the Constitution, as it stands amended. In the original Constitution, Jammu & Kashmir was specified as a 'Part B' State. The States Reorganisation Act, 1956, abolished the category of Part B States and the Constitution (7th Amendment) Act, 1956, which implemented the changes introduced by the former Act, included Jammu & Kashmir in the list of the 'States' of the Union of India, all of which were now included in one category.

Nevertheless, the special constitutional position which Jammu & Kashmir enjoyed under the original Constitution [Art. 370] has been maintained, so that all the provisions of the Constitution of India relating to the States in the First Schedule are *not* applicable to Jammu & Kashmir even though it is one of the States specified in that Schedule.

To understand why Jammu & Kashmir, being a State included in the First Schedule of the Constitution of India, should yet be accorded a separate treatment, a retrospect of the development of the constitutional relationship of the State with India becomes necessary. Under the British regime, Jammu & Kashmir was an Indian State ruled by a hereditary Maharaja. On the 26th of October, 1947, when the State was attacked by Azad Kashmir Forces with the support of Pakistan, the Maharaja (Sir Hari Singh) was obliged to seek the help of India, after executing an Instrument of Accession similar to that executed by the Rulers of other Indian States. By the Accession the Dominion of India acquired jurisdiction over the State with respect to the subjects of Defence, External Affairs and Communications, and like other Indian States which survived as political units at the time of the making of the Constitution of India, the State of Jammu & Kashmir was included as a Part B State in the First Schedule of the Constitution of India, as it was promulgated in 1950.

But though the State was included as a Part B State, all the provisions of the Constitution applicable to Part B States were not extended to Jammu & Kashmir. This peculiar position was due to the fact that having regard to the circumstances in which the State acceded to India, the

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Government of India had declared that it was the people of the State of Jammu & Kashmir, acting through their Constituent Assembly, who were to finally determine the Constitution of the State and the jurisdiction of the Union of India. The applicability of the provisions of the Constitution regarding this State were, accordingly, to be in the nature of an interim arrangement. (This was the substance of the provision embodied in Art. 370 of the Constitution of India.)

Since the liberality of the Government of India has been misunderstood and misinterpreted in interested quarters, overlooking the legal implications of the Accession of the State to India, we should pause for a moment to explain these legal implications lest they be lost sight of in the turmoil of political events which have clouded the patent fact of the Accession. The first thing to be noted is that the Instrument of Accession signed by Maharaja Hari Singh on the 26th October, 1947, was in the *same form*¹ as was executed by the Rulers of the numerous other States which had acceded to India following the enactment of the Indian Independence Act, 1947. The legal consequences of the execution of the Instrument of Accession by the Ruler of Jammu & Kashmir cannot, accordingly, be in any way different from those arising from the same fact in the case of the other Indian States. It may be recalled² that owing to the lapse of paramountcy under s. 7(1)(b) of the Indian Independence Act, 1947, the Indian States regained the position of absolute sovereignty which they had enjoyed prior to the assumption of suzerainty by the British Crown. The Rulers of the Indian States thus became unquestionably competent to accede to either of the newly created Dominions of India and Pakistan, in exercise of their sovereignty. The legal basis³ as well as the form of Accession were the same in the case of those States which acceded to Pakistan and those which acceded to India. There is, therefore, no doubt that by the act of Accession the State of Jammu & Kashmir became *legally and irrevocably* a part of the territory of India and that the Government of India was entitled to exercise jurisdiction over the State with respect to those matters to which the Instrument of Accession extended. If, in spite of this, the Government of India had given an assurance to the effect that the Accession or the constitutional relationship between India and the State would be subject to confirmation by the people of the State, under no circumstances can any *third party* take advantage of such extra-legal assurances and claim that the legal act had not been completed.

When India made her Constitution in 1949, it is natural that this dual attitude of the Government of India should be reflected in the position offered to the State of Jammu & Kashmir within the framework of that Constitution. The act of Accession was unequivocally given legal effect by declaring Jammu & Kashmir a part of the territory of India [Art. 1]. But the application of the other provisions of the Constitution of India to Jammu & Kashmir was placed on a tentative basis, subject to the eventual approval of the Constituent Assembly of the State. The Constitution thus provided that the only Articles of the Constitution which would apply of their own force to Jammu & Kashmir were—Arts. 1 and 370. The application of the other

Implications of the Accession.

Articles of the Constitution which apply of their own force to the State.

Articles was to be determined by the President in consultation with the Government of the State [Art. 370]. The legislative authority of Parliament over the State, again, would be confined to those items of the Union and Concurrent Lists as correspond to matters specified in the Instrument of Accession. The above interim arrangement would continue until the Constituent Assembly for Jammu & Kashmir made its decision. It would then communicate its recommendations to the President, who would either abrogate Art. 370 or make such modification as might be recommended by that Constituent Assembly.

In pursuance of the above provisions of the Constitution, the President made the Constitution (Application to Jammu & Kashmir) Order, 1950, in consultation with the Government of the State of Jammu & Kashmir, specifying the matters with respect to which the Union Parliament would be competent to make laws for Jammu & Kashmir, relating to the three subjects of Defence, Foreign Affairs and Communications with respect to which Jammu & Kashmir had acceded to India.

The Constitution Order of 1950. Next, there was an Agreement between the Government of India and of the State at Delhi in June, 1952, as to the subjects over which the Union should have jurisdiction over the State, pending the decision of the Constituent Assembly of Jammu & Kashmir. The Constituent Assembly of Jammu & Kashmir ratified the Accession to India and also the decision arrived at by the Delhi Agreement as regards the future relationship of the State with India, early in 1954. In pursuance of this, the President, in consultation with the State Government, made the *Constitution (Application to Jammu & Kashmir) Order, 1954*, which came into force on the 14th of May, 1954. This Order implemented the Delhi Agreement as ratified by the Constituent Assembly and also superseded the Order of 1950. According to this Order, in short, the jurisdiction of the Union extended to *all* Union subjects under the Constitution of India (subject to certain slight alterations) instead of only the three subjects of Defence, Foreign Affairs and Communications with respect to which the State had acceded to India in 1947. This Order, as amended in 1963, 1964, 1965, 1966, 1972, 1974 and 1986, deals with the entire constitutional position of the State within the framework of the Constitution of India, excepting only the internal constitution of the State Government, which was to be framed by the Constituent Assembly of the State.⁴

It has already been explained how from the beginning it was declared by the Government of India that, notwithstanding the Accession of the State of Jammu & Kashmir to India by the then Ruler, the future Constitution of the State as well as its relationship with India were to be finally determined by an elected Constituent Assembly of the State. With these objects in view, the people of the State elected a sovereign Constituent Assembly which met for the first time on October 31, 1951.

Making of the State Constitution. The Constitution (Application to Jammu & Kashmir) Order, 1954, which settled the constitutional relationship of the State of Jammu & Kashmir, did not disturb the previous assurances as regards the framing of the *internal* Constitution of the State by its own people. While the

Constitution of the other Part B States was laid down in Part VII of the Constitution of India (as promulgated in 1950), the State Constitution of Jammu & Kashmir was to be framed by the Constituent Assembly of that State. In other words, the provisions governing the Executive, Legislature and Judiciary of the State of Jammu & Kashmir were to be found in the Constitution drawn up by the people of the State and the corresponding provisions of the Constitution of India were not applicable to that State.

The first official act of the Constituent Assembly of the State was to put an end to the hereditary princely rule of the Maharaja. It was one of the conditions of the acceptance of the accession by the Government of India that the Maharaja would introduce popular Government in the State. In pursuance of this understanding, immediately after the Accession, the Maharaja invited Sheikh Mohammad Abdullah, President of the All Jammu & Kashmir National Conference, to form an interim Government, and to carry on the administration of the State. The interim Government later changed into a full-fledged Cabinet, with Sheikh Abdullah as the first Prime Minister. The Abdullah Cabinet, however, would not rest content with anything short of the abdication of the ruling Maharaja Sir Hari Singh. In June 1949, thus, Maharaja Hari Singh was obliged to abdicate in favour of his son Yuvaraj Karan Singh. The Yuvaraj was later *elected* by the Constituent Assembly of the State (which came into existence on October 31, 1951) as the '*Sadar-i-Riyasat*'. Thus, came to an end the princely rule in the State of Jammu & Kashmir and the head of the State was henceforth to be an elected person. The Government of India accepted this position by making a Declaration of the President under Art. 370(3) of the Constitution (15th November, 1952) to the effect that for the purposes of the Constitution, 'Government' of the State of Jammu & Kashmir shall mean the *Sadar-i-Riyasat* of Jammu & Kashmir, acting on the advice of the Council of Ministers of the State. Subsequently, however, the name of *Sadar-i-Riyasat* has been changed to that of Governor.

We have already seen that in February, 1954, the Constituent Assembly of Jammu & Kashmir ratified the State's Accession to India, thus fulfilling the moral assurance given in this behalf by the Government of India, and also that this act of the Constituent Assembly was followed up by the promulgation by the President of India of the Constitution (Application to Jammu & Kashmir) Order, 1954, placing on a final footing the applicability of the provisions of the Constitution of India governing the relationship between the Union and this State.

The making of the State Constitution for the internal governance of the State was now the only task left to the Constituent Assembly. As early as November, 1951, the Constituent Assembly had made the Jammu & Kashmir Constitution (Amendment) Act, which gave legal recognition to the transfer of power from the hereditary Maharaja to the popular Government headed by an elected *Sadar-i-Riyasat*. For the making of the permanent Constitution of the State, the Constituent Assembly set up several Committees and in October, 1956, the Drafting Committee presented the Draft Constitution, which after discussion, was finally adopted on November 17, 1957, and given effect to from *January 26, 1957*. The State of Jammu & Kashmir thus acquired the distinction of having a *separate Constitution for the*

administration of the State, in place of the provisions of Part VI of the Constitution of India which govern all the other State of the Union.⁵

Important provisions of the State Constitution. The more important provisions of the State Constitution of Jammu & Kashmir (as amended up to 1984) are as follows:

The Constitution declares the State of Jammu and Kashmir to be "an integral part of Union of India".

The territory of the State will comprise all the territories, which, on August 15, 1947, were under the sovereignty or suzerainty of the Ruler of the State (*i.e.*, including the Pakistan-occupied area of Jammu & Kashmir). This provision is immune from amendment.

The executive and legislative power of the State will extend to all matters except those with respect to which Parliament has powers to make laws for the State under the provisions of the Constitution of India.

Every person who is, or is deemed to be, a citizen of India shall be a permanent resident of the State, if on the 14th of May, 1954, he was a State subject of Class I or Class II, or, having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than 10 years prior to that date. Any person who, before the fourteenth day of May, 1954, was a State subject of Class I or of Class II and who, having migrated after the first day of March, 1947, to the territory now included in Pakistan, returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of any law made by the State Legislature will on such return be a permanent resident of the State.⁶ The permanent residents will have all rights guaranteed to them under the Constitution of India [s. 10].

Under the original Constitution of Jammu & Kashmir, there was a difference between this State and other States of India as regards the Head of the State Government. While in the rest of India, the head of the State Executive was called 'Governor' and he is appointed by the President [Arts. 152, 155], the Executive head of the State of Jammu & Kashmir was called *Sadar-i-Riyasat* and he was to be elected by the State Legislative Assembly. This anomaly has, however, been removed by the Constitution of Jammu & Kashmir (6th Amendment) Act, 1965, as a result of which the nomenclature has been changed from *Sadar-i-Riyasat* to 'Governor' and he is to be 'appointed by the President under his hand and seal' [ss. 26-27] as in other States [Art. 155]. In the result, there is now *no differences on this point*, between Jammu & Kashmir and other States. As in other States, the executive power of the State will be vested in the Governor and shall be exercised by him with the advice of the Council of Ministers (except in the matter of appointment of the Chief Minister [s. 36] and of issuing a Proclamation for introducing 'Governor's Rule' in case of breakdown of constitutional machinery [s. 92]). The Governor will hold office for a term of five years. The Council of Ministers, headed by the Chief Minister, will be collectively responsible to the Legislative Assembly.

The Legislature of the State will consist of the Governor and two Houses, to be known respectively as the Legislative Assembly and the

Legislative Council. The Legislative Assembly will consist of one hundred members chosen by direct election from territorial constituencies in the State; and two women members nominated by the Governor. Twenty-four seats in the Legislative Assembly will remain vacant to be filled by representatives of people living in Pakistan-occupied areas of the State. The Legislative Council will consist of 36 members. Eleven members will be elected by the members of the Legislative Assembly from amongst persons who are residents of the Province of Kashmir, provided that of the members so elected at least one shall be a resident of Tehsil Ladakh and at least one a resident of Tehsil Kargil, the two outlying areas of the State. Eleven members will be elected by the members of the Legislative Assembly from amongst persons who are residents of the Jammu Province. The remaining 14 members will be elected by various electorates, such as municipal councils, and such other local bodies.

The High Court of the State will consist of a Chief Justice and two or more other Judges. Every Judge of the High Court will be appointed by the President after consultation with the Chief Justice of India and the Governor, and in the case of appointment of a Judge other than the Chief Justice, the Chief Justice of the High Court.

There will be a Public Service Commission for the State. The Commission along with its Chairman will be appointed by the Governor.

Every member of the civil service or one holding a civil post will hold office under the pleasure of the Governor.

The official language of the State will be Urdu, but English will, unless the Legislature by law otherwise provides, continue to be used for all official purposes of the State [s. 145.]

The State Constitution may be amended by introducing a Bill in the Legislative Assembly and getting it passed in each House by a majority of not less than two-thirds of the total membership of that House. But no Bill or amendment seeking to make any change in the provisions relating to the relationship of the State with the Union of India, the extent of executive and legislative powers of the State or the provisions of the Constitution of India as applicable in relation to the State shall be introduced or moved in either House of the Legislature [s. 147].

Notwithstanding the liberal measures introduced in the State by the adoption of a separate State Constitution, the pro-Pakistani elements in Jammu & Kashmir continued their agitation for the holding of a plebiscite to

Indira-Abdullah Agreement of 1975. finally determine whether the State should accede to India or Pakistan and there were violent incidents initiated by the 'Plebiscite Front',—a pro-Pakistani party which had been formed with the avowed object of secession from India. Sheikh Abdullah got involved in these anti-Indian movements and went on criticising the Indian policy towards the State, as a result of which he had to be placed under preventive detention in 1955. After a short release in 1964 on the profession of a changed attitude, he again went wrong, so that he was again detained in 1965 under the D.I.R., and eventually expelled from the State in 1971. This was followed by a period of blowing hot and cold, leading to a series of negotiations between

the representatives of India and the Plebiscite Front, and an agreement was eventually reached and announced, on February 24, 1975.⁷

The net political result of this Agreement was that the demand for plebiscite was abandoned by Abdullah and his followers and, on the other hand, it was agreed that the special status of the State of Jammu & Kashmir would continue to remain under the provisions of Art. 370 of the Constitution of India, which was described as a 'temporary' measure, in the original Constitution. A halt was, thus, cried to the progress of integration of this State with the Union of India, which had started in 1954, by giving larger autonomy to the State Assembly in certain matters.

It should, however, be mentioned that owing to differences over matters arising out of the Agreement, it has *not* been implemented by issuing a fresh Presidential Order under Art. 370.⁴

The salient features of the constitutional position of the State of Jammu & Kashmir in relation to the Union, as modified up-to-date, may now be summarised.

(a) *Jurisdiction of Parliament.* The jurisdiction of Parliament in relation to Jammu & Kashmir shall be confined to the matters enumerated in the Union List, and the Concurrent List,⁸ subject to certain modifications, while it shall have no jurisdiction as regards most of the matters enumerated in the Concurrent List. While in relation to the other States, the residuary power of legislation belongs to Parliament, in the case of Jammu & Kashmir, the residuary power shall belong to the Legislature of that State, excepting certain matters, specified in 1969, for which Parliament shall have exclusive power, e.g., prevention of activities relating to cession or secession, or disrupting the sovereignty or integrity of India. The power to legislate with respect to preventive detention in Jammu & Kashmir, under Art. 22(7), shall belong to the Legislature of the State instead of Parliament, so that no law of preventive detention made by Parliament will extend to that State.

By the Constitution (Application to Jammu & Kashmir) Order, 1986, however, Art. 249 has been extended to the State of Jammu & Kashmir, so that it would now be competent to extend the jurisdiction of Parliament to that State, in the national interest (e.g., for the protection of the borders of the State from aggression from Pakistan or China), by passing a resolution in the Council of States [Constitution Order, 129].

(b) *Autonomy of the State in certain matters.* The plenary power of the Indian Parliament is also curbed in certain other matters, with respect to which Parliament cannot make any law without the consent of the Legislature of the State of Jammu & Kashmir, where that State is to be affected by such legislation, e.g., (i) alteration of the name or territories of the State [Art. 3], (ii) international treaty or agreement affecting the disposition of any part of the territory of the State [Art. 253].

Similar fetters have been imposed upon the executive power of the Union to safeguard the autonomy of the State of Jammu & Kashmir, a privilege which is not enjoyed by the other States of the Union. Thus,

(i) Similarly, no decision affecting the disposition of the State can be made by the Government of India, without the consent of the Government of the State.

(ii) The Union shall have *no* power to suspend the Constitution of the State on the ground of failure to comply with the directions given by the Union under Art. 365.

(iii) Arts. 356-357 relating to suspension of constitutional machinery have been extended to Jammu & Kashmir by the Amendment Order of 1964. But "failure" would mean failure of the constitutional machinery as set up by the Constitution of Jammu & Kashmir and not Part VI of the Constitution of India.

In Jammu & Kashmir two types of Proclamations are made: (a) the "Governor's Rule" under s. 92 of the Constitution of Jammu & Kashmir, and (b) the "President's Rule" under Art. 356 as in the case of other States.

(a) The first occasion when President's Rule was imposed in Jammu & Kashmir was on 7-9-1986. It followed Governor's Rule which expired on 6-9-1986. The Proclamation was revoked on 6-11-1986 when Farooq Abdullah formed a ministry.

(b) Governor's Rule was imposed on 27-3-1977 for the first time and later on 19-1-1990.

Since 19-7-1990 the State had continuously been under President's Rule until 9-10-1996 when a popular Government, under the leadership of Farooq Abdullah, was formed on the basis of an election held in September, 1996 [*Statesman*, 10-10-1996].

Governor's Rule is provided by the State Constitution. In exercise of this power the Governor has the power, with the concurrence of the President, to assume to himself all or any of the functions of the Government of the State, except those of the High Court.

(iv) The Union shall have no power to make a Proclamation of Financial Emergency with respect to the State of Jammu & Kashmir under Art. 360.

In other words, the federal relationship between the Union and the State of Jammu & Kashmir respects 'State rights' more than in the case of the other States of the Union.

(c) *Fundamental Rights and the Directive Principles.* The provisions of Part IV of the Constitution of India relating to the Directive Principles of State Policy do *not* apply to the State of Jammu & Kashmir. The provisions of Art. 19 are subject to special restrictions for a period of 25 years. Special rights as regards employment, acquisition of property and settlement have been conferred on 'permanent residents' of the State, by inserting a *new* Art. 35A. Articles 19(1)(f) and 31(2) have *not* been omitted, so that the fundamental right to property is still guaranteed in this State.

(d) *Separate Constitution for the State.* While the Constitution for any of the other States of the Union of India is laid down in Part VI of the Constitution of India, the State of Jammu & Kashmir has its own

Constitution (made by a separate Constituent Assembly and promulgated in 1957).

(e) *Procedure for Amendment of State Constitution.* As already stated, the provisions of Art. 368 of the Constitution of India are not applicable for the amendment of the State Constitution of Jammu & Kashmir. While an Act of Parliament is required for the amendment of any of the provisions of the Constitution of India, the provisions of the State Constitution of Jammu & Kashmir (excepting those relating to the relationship of the State with the Union of India) may be amended by an Act of the Legislative Assembly of the State, passed by a majority of not less than two-thirds of its membership; but if such amendment seeks to affect the Governor or the Election Commission, it shall have no effect unless the law is reserved for the consideration of the President and receives his assent.

It is also to be noted that no amendment of the Constitution of India shall extend to Jammu & Kashmir unless it is extended by an Order of the President under Art. 370(1).

(f) No alteration of the area or boundaries of this State can be made by Parliament without the consent of the Legislature of the State of Jammu & Kashmir.

(g) *Other Jurisdictions.* By amendments of the Constitution Order, the jurisdictions of the Comptroller and Auditor-General, of the Election Commission, and the Special Leave Jurisdiction of the Supreme Court have been extended to the State of Jammu & Kashmir.

Power to put an end to Art. 370. Clause (3) of Art. 370 provides—

"Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification."

Recently, a plea has been raised by the Bharatiya Janata Party that the President should declare that Art. 370 shall cease to operate, so that the special status of J & K would be abolished and that State would be brought to the same level as that of the other States, to be governed by all the provisions of Part VI of the Constitution.

Since the Constituent Assembly, referred to in the Proviso to Cl. (3) [above] no longer exists, the President's power appears to be unfettered now. The arguments of the B.J.P. to abolish the special status are—

(a) The makers of the Constitution of India intended that the special status was granted to J. & K. only as a temporary measure, and that is why Art. 370 was included in Part XXI under the label—'Temporary, Transitional and Special Provisions', and Cl. (3) was appended to Art. 370.

(b) The people of J. & K. have abused the special status and entered into a conspiracy with the Government of Pakistan and the leaders of 'Pakistan-occupied Kashmir' to invite a veiled invasion from Pakistan.

The Congress Government has so far resisted the demand of the B.J.P. on *political* grounds. History only can say what would happen if and when the B.J.P. ever gains a position of predominance.

REFERENCES

1. *Vide White Paper on Indian States* (MS. 6) rule pp. 111, 165.
2. *Vide Author's Commentary on the Constitution of India*, 5th Ed., Vol. 4, p. 38.
3. Sections 5-6 of the Government of India Act, 1935, read with s. 7(1)(b) of the Indian Independence Act, 1947.
4. As to the Constitution of Jammu & Kashmir see pp. 27ff. of *Author's Commentary on The Constitution of India*, 6th Ed., Vol. P. Momentous other changes were proposed to be introduced after the agreement arrived at between the Government of India and Sheikh Abdullah, in February, 1975. But this agreement could not be implemented owing to difference in matter of detail (see also f.n. 8, below.)
5. The very definition of 'State' (in Art. 152) for the purpose of Part VI excludes the State of Jammu & Kashmir.
6. Their position is sought to be drastically changed by a Resettlement Bill passed by the Jammu & Kashmir Legislature, which has been referred by the President to the Supreme Court of India for its opinion as to its constitutional validity.
7. *Vide Statesman*, Calcutta, 25-2-1975, pp. 1, 7. He was released shortly after this Agreement and made the Chief Minister in February, 1975, on the resignation of the Mir Qasim ministry. At the election held in July, 1975, Sheikh Abdullah was elected to the Jammu & Kashmir Assembly and his Chief Ministership was thus upheld by election. He was retaining that office till his death in 1982.
8. Until the amendment of the Order in 1963, the Concurrent List was altogether inapplicable to Jammu & Kashmir. Its application has been extended by the Amendment Order of 1964, subject to exceptions introduced in 1972.