CHAPTER - VI

THE CONSTITUTION OF JAMMU AND KASHMIR

1 INTRODUCTION

Jammu and Kashmir is a Constituent State of the Indian Union but its Constitutional position and its relation with the Central Government somewhat differs from that of the other States.¹ One of the most important characteristics of Article 370 is that it recognized the fact that a separate Constituent Assembly for the purpose of framing the Constitution of the State of Jammu and Kashmir would be convened. The need for convening of the constituent Assembly for the State of Jammu and Kashmir was not only intensely felt for framing the Constitution for Jammu and Kashmir but it was the Assembly only representing the will of the people of the State, which had the power to finally determine the sphere of the Union jurisdiction over the State.

2 CONSTITUENT ASSEMBLY OF THE STATE OF JAMMU AND KASHMIR

The establishment of the Jammu and Kashmir Constituent Assembly in September 1951 was an event of great significance in the political history of the State.² The Constituent Assembly met on 31st October, 1951.³ It started its work on November 5, 1951 at Srinagar.⁴ It was equipped with the power to frame the Constitution for the State. One of the senior most members Maulana Masoodi was appointed the protem Chairman of the Assembly.⁵ The next day Gulam Mohamad Sadiq was elected the

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⁴ Supra note 2.
President of the Assembly. It was inaugurated with a historical speech of the Prime Minister of the State Sheikh Mohammed Abdullah.

The task of Constitution making entered a decisive phase when in the 12th session of the Constituent Assembly, held from September 29, 1956 to November 19, 1956, the drafting committee on October 10, 1956 presented the draft Constitution which after detailed discussions was finally adopted on 17th November, 1956 and given effect to from January 26, 1957.

The Constitution of Jammu and Kashmir is a written document having 158 Sections divided into thirteen parts. There are seven schedules attached to it. The State of Jammu and 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 governs all other States of the Union. Before 26th January 1957, the internal government of the State even after its accession, was governed by the Jammu and Kashmir Constitution Act, 1939.

3 THE CONSTITUTION OF JAMMU AND KASHMIR, 1957

The Constitution of Jammu and Kashmir is in no way repugnant to the Constitution of India but it is complementary to it. The hallmark of the present Constitution is a complete change from the past monarchical form of government to a parliamentary form of government. It is partly rigid and partly flexible. Unlike other states of India, the State of Jammu and Kashmir enjoys special powers and privileges on account of having its own Constitution. As Jammu and Kashmir is governed by two sets of Constitutional provisions – the Constitution of India as applicable, subject to certain omission and modifications, by the Constitution (Application to Jammu and Kashmir) Order, 1954 and the Constitution of Jammu and Kashmir 1957, a study off those

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7 Supra note 2.
8 Ibid.
9 Available at: http://indiankanoon.org/doc/1977650
10 Act XIV of Samwat 1996 (A.D. 1939)
provisions of Constitution of Jammu and Kashmir 1957, a study of those provision of Constitution of Jammu and Kashmir which explain the relationship between the State and Indian Union is indeed essential so as to understand fully the extent of autonomy enjoyed by the State vis-à-vis Indian Union. The important provisions of the State Constitution which are related with relations of the State with the Union and which reveal a clear account of extent of State autonomy enjoyed by the State of Jammu and Kashmir as a constituent part of India Union are as follows:

1) The most important feature of the preamble to the Constitution of Jammu and Kashmir is that it accepts the fact of accession of the State of Jammu and Kashmir to Union of India. One of the objectives of the Preamble to the State Constitution is “to further define the existing relationship of the State with Union of India as an integral part thereof…”

2) Sections 1,2,3,4,5,6,7,8 and 158 came into force on 17th November, 1956 and the remaining Sections came into force on 26th January, 1957 which day is referred to in this Constitution as the commencement of this Constitution. That the people of Kashmir have chosen January 26, the Republic Day of India, as the date for full enforcement of their constitution is evidence of the emotional integration of the State with the rest of India.12

3) Section 3 declares that the State of Jammu and Kashmir is and shall be an integral part of the Union of India. To further strengthen the relationship of the State with the Union, the Constituent Assembly has put this Section beyond the amending power of the Legislature of Jammu and Kashmir.13

4) The territory of the State of Jammu and Kashmir shall comprise of all the territories which on the fifteenth day of August, 1947, were under the sovereignty or suzerainty of the Ruler of the State.14 It means the territory of the State of Jammu and Kashmir also includes the area which has been illegally occupied by Pakistan as it was the whole area of the State which had acceded to Indian Union. Whereas Indian Constitution defines the territory of Jammu and

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12 Supra note 2 at 193.
14 Id., Sec. 5.
Kashmir as the territory which immediately before the commencement of this Constitution was comprised in the Indian State of Jammu and Kashmir.\textsuperscript{15} As the State of Jammu and Kashmir is a constituent Unit of India, the territory of the State of Jammu and Kashmir as defined in State Constitution automatically becomes part of Indian Union. The importance of the provisions relating to the State territory can be assessed from the fact that Section 4 of the States Constitution is immune from amendment.\textsuperscript{16}

5) The State Constitution provides that the executive and legislative power of the State extends to all matters except those with respect to which the parliament has the power to make laws for the State under the Provisions of the Constitution of India.\textsuperscript{17} The Constitution (Application to Jammu and Kashmir) Order 1954, as amended from time-to-time, applies to a number of entries of the Union List and the Concurrent List to Jammu and Kashmir. Section 5 is merely confined to matters over which the State Legislature can legislate.\textsuperscript{18} This Section has also been put beyond the amending power of the State legislature.\textsuperscript{19}

6) The Constitution of the State defines the term ‘Permanent residents’\textsuperscript{20} It states:

1. Every person who is, or is deemed to be, a citizen of India under the provisions of the Constitution of India shall be a permanent resident of the State, if on the fourteenth day of May, 1954:
   (a) He was a State subject of Class I or the Class II; or
   (b) Having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than ten years prior to the date.
2. 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

\textsuperscript{15} See Art. 1, Sch. 1, \textit{The Constitution of India}.
\textsuperscript{16} \textit{Supra} note 13.
\textsuperscript{17} Id., sec.-5
\textsuperscript{18} \textit{S. Mubarik Shah Naqashbandi v. I.T.O.}, AIR 1971 J&K 120.
\textsuperscript{19} \textit{Supra} note 13.
\textsuperscript{20} Id., sec. 6.
permanent return issued by or under the authority of any law made by the State Legislature shall on such return be a permanent resident of the State.

3. In this Section, the expression “State Subject of Class I or of Class II” shall have the same meaning as the [State Notification No. 1-L 84 dated the twentieth April, 1927, read with State Notification No. 13L dated on the twenty-seventh June, 1932].

The Section 8 of the State Constitution gives the State Legislature the right to define permanent residents while Section 9 permits the State Legislature to alter the definition of the classes of persons who are or shall be permanent residents to make provisions conferring any special rights or privileges on them and to regulate or modify such special rights and privileges as enjoyed by permanent residents.

The provisions relating to Permanent Residents read with Article 35-A as applied to the State of Jammu and Kashmir by the Constitution (Application to Jammu and Kashmir) Order 1954 is the most striking feature of the Constitution of Jammu and Kashmir. The State Legislature of Jammu and Kashmir by law, can confer special rights and privileges on the permanent residents of the State and such law shall be valid notwithstanding that it is inconsistent with the fundamental rights, conferred by the Constitution of India, upon the other citizens of India. Thus, persons who are not ‘Permanent Residents’re:

(i) not entitled to purchase immovable property,
(ii) denied employment with the State Government,
(iii) disqualified from being a member of a Village Panchayat under Section 6(a) of the Panchayati Raj Act, 1989,\(^\text{21}\)
(iv) denied State Government scholarships and
(v) not eligible to vote\(^\text{22}\) in or contest elections\(^\text{23}\) of the State legislature due to the reason that State legislature enjoys special rights to define Permanent

\(^{22}\) *Supra* note 13, sec. 140.
\(^{23}\) *Supra* note 13, sec. 51.

(vi) The Constitution of Jammu and Kashmir provides that the permanent residents of the State shall have all the rights guaranteed to them under the Constitution of India.25 The Constitution of Jammu and Kashmir is restrictive to the extent that it stipulates the availability of the fundamental rights only to the permanent residents of the State leaving out the citizens of India who are not the permanent residents of Jammu and Kashmir. Therefore, the fundamental rights envisaged by the Constitution of India are not conferred on the “non-permanent residents” of the State by Section 10 of the State Constitution but by the Constitution of India as it is applicable to the State by virtue of the Constitution (Application to Jammu and Kashmir) order, 1954 as amended from time-to-time.

(vii) Prior to the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965 the Head of the State was designated as the Sadar-i-Riyasat and the requirement of law was that he should be a person who for the time being is recognized by the President as such and no person could be so recognized unless he is a permanent resident of the State of Jammu and Kashmir and has been elected as Sadar-i-Riyasat by a majority of the total membership of the State Legislative Assembly. After the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965 the nomenclature of the head of the State has been changed to ‘Governor’26 and he is appointed by the president by warrant under his hand and seal after the Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965 the requirement of to be a permanent resident of State for being eligible for appointment as Governor has been

24 Supra note, 2 at 215.
25 Supra note 13, sec. 10.
26 Supra note 13, sec. 26.
removed and now qualification for appointment of Governor is that he should be a citizen of India and has completed the age of thirty years.27

(viii) The clause (2) of Section 26 of the State Constitution states:

(2) The executive power of the State shall be vested in the Governor and shall be exercised by him either directly or through officers subordinate to him in accordance with this Constitution.

In this connection ‘ministers have been held28 to be officers subordinate’. The State Legislature can, however vest the executive functions in authorities other than the Governor also.29

(ix) One of the important characteristics of the Jammu and Kashmir Constitution is that all functions of the Governor except those under Sections 36, 38 and 92 shall be exercised by him only on the advice of the Council of Ministers.30 The Governor of the State appoints the Chief Minister31 at his discretion and the remaining ministers at the advice of the Chief Minister.32 The discretionary power of the Governor may not seem important if there is a party in the legislature which has an overall majority and whose leader enjoys its confidence, but it becomes important in a situation where there is no such party and a coalition government is essential.33 It will then be for the Governor to consider what coalitions are possible and choose those which are most likely to endure.34

The Governor is not bound by the advice of the Council of Ministers while appointing from amongst the members of either House

27 Id., sec. 29.
29 Supra note 13, sec. 26(3).
30 Id., sec.35(2)
32 Supra note 13, sec. 36.
33 Supra note 2 at 236.
34 Ibid.
of Legislature such number of Deputy Ministers as may be necessary.\textsuperscript{35} The Governor is also not bound by the advice of the council of Ministers while issuing a proclamation for introduction of “Governor’s Rule” in the case of breakdown of Constitutional Machinery in the State of Jammu and Kashmir.\textsuperscript{36}

(x) Section 38 of the State Constitution has been amended by the Constitution of Jammu and Kashmir (Thirtieth Amendment) Act, 2006 which states that the total number of Ministers including the Chief Minister and the Deputy Ministers shall not exceed twenty per cent of the total membership of the State Legislature. The State of Jammu and Kashmir is being exempted from the Constitution (Ninety-first Amendment) Act, 2003\textsuperscript{37} which, applies to other States of Indian Union limiting the total number of Ministers, including the Chief Minister, in the Council of Ministers to fifteen percent of the total number of members of the Legislature Assembly of that State.\textsuperscript{38}

(xi) The Ministers of the State of Jammu and Kashmir hold office during the pleasure of the Governor of the State.\textsuperscript{39}

(xii) There shall be a Legislature for the State which shall consist of the Governor and two Houses to be known respectively as the Legislative Assembly and the Legislative Council.\textsuperscript{40}

(xiii) The Legislature Assembly shall consists of\textsuperscript{41} [One hundred and eleven] members chosen by direct election from territorial constituencies in the State provided that the Governor may if he is of opinion that women are not adequately represented in Assembly, nominate not more than two women to be members thereof.\textsuperscript{42} But until the area of the State under occupation of Pakistan ceases to be so occupied and the people residing in that area elect

\textsuperscript{35} Supra note 13, sec. 38.
\textsuperscript{36} Id., sec. 92.
\textsuperscript{38} The Constitution of India, art. 164 (1A)
\textsuperscript{39} Supra note 13, sec. 39.
\textsuperscript{40} Id. sec. 46.
\textsuperscript{42} Sec. 47, Constitution of Jammu and Kashmir.
their representative,\textsuperscript{43} [twenty four seats) in the Legislative Assembly shall remain vacant and shall not be taken into account for reckoning the total membership of the Assembly.\textsuperscript{44} The Legislative Council shall consist of thirty-six members.\textsuperscript{45}

(xiv) One of the qualifications for a person to be chosen to fill a seat in the State Legislature is that he should be permanent resident of the State of Jammu and Kashmir.\textsuperscript{46} It means a citizen of India who is not a permanent resident of the State cannot contest elections for the State Legislature of Jammu and Kashmir.

(xv) The duration of the Legislative Assembly of the State is\textsuperscript{47} [six years] from the date appointed for its first meeting.\textsuperscript{48} If a Proclamation of Emergency issued under Article 352 of the Constitution of India is in operation in the State of Jammu and Kashmir, then the duration of the Legislative Assembly 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 has ceased to operate.\textsuperscript{49}

If this situation is compared with other States of Indian Union then the power to extend the life of Legislative Assembly of the State during the proclamation of emergency resides with the Union Parliament and not with concerned State Legislature.\textsuperscript{50}

Section 52(2) of the State Constitution provides for continuity in the life of Legislative Council by providing the one-third of its members shall retire on the expiration of every second year in accordance with the provisions made

\begin{footnotes}
\item\textsuperscript{43} Subs. by the Constitution of Jammu and Kashmir (Twelfth Amendment) Act, 1975 (w.e.f. 17.09.1975).
\item\textsuperscript{44} Supra note 13, sec. 48.
\item\textsuperscript{45} Id. sec. 50.
\item\textsuperscript{46} Id. sec. 51.
\item\textsuperscript{47} The duration of all the State Legislatures of Union was increased to six years by the Constitution (Forty-second Amendment) Act., 1976. So, a corresponding change was made in Section 52 of the Constitution of Jammu and Kashmir by the Constitution of Jammu and Kashmir (Sixteenth Amendment) Act, 1977. Later on, the Constitution (Forty fourth Amendment) Act, 1978 restored the duration of the State Assemblies to five years but the State Constitution was not amended. Therefore, the duration of State Legislature continues to be six years.
\item\textsuperscript{48} Id. sec. 52.
\item\textsuperscript{49} Ibid. Proviso to cl. (1).
\item\textsuperscript{50} Supra note 38, proviso to cl. (1) of art. 172.
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in that behalf by State Legislature by law. Whereas, in other States of Indian Union where Legislative Council exists, one-third of its members shall retire on the expiration of every second year in accordance with the provisions made in that behalf by Parliament by law.\textsuperscript{51}

(xvi) One of the striking features of the State Constitution is the power of Governor to issue a proclamation in case he is satisfied that the Government of the State cannot be carried on in accordance with the provisions of the Constitution of Jammu and Kashmir.\textsuperscript{52} Section 92 (1) of the Constitution of Jammu and Kashmir enacts:

The Governor may by Proclamation\textsuperscript{53}

(a) assume to himself all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by anybody or authority in the State;

(b) make such incidental and consequential provisions as appear to the Governor to be necessary or desirable for giving effect to the objects of the proclamation, including provisions for suspending in whole or in part the operation of any provision of this Constitution relating to any body or authority in the State:

Provided that nothing in this Section shall authorise the Governor to assume to himself any of the powers vested in or exercisable by the High Court or to suspend in whole or in part the operation of any provision of this Constitution relating to the High Court.

The proclamation issued by Governor may be revoked or varied by a subsequent proclamation.\textsuperscript{54} The life span of any such proclamation shall, except where it is a proclamation revoking a previous proclamation, be six months from the date on which it was first issued.\textsuperscript{55}

The power of Governor to issue proclamation is very important as he is empowered by the state Constitution to exercise this power in his own discretion without depending on the advice of his Council of Ministers.\textsuperscript{56} But the power of the Governor to

\textsuperscript{51} Ibid. Cl. (2) of art. 172.
\textsuperscript{52} Supra note 13, sec. 92 (1).
\textsuperscript{53} Ibid.
\textsuperscript{54} Id. Cl. (2) of sec. 92.
\textsuperscript{55} Id., Cl. (3) of sec. 92.
\textsuperscript{56} Id., sec. 35(2).
issue proclamation is subject to a limitation that no proclamation under sub-Section (1) of Section 92 shall be issued except with the concurrence of the President of India.57

(xvii) The State of Jammu and Kashmir may make provision for the reservation of appointments or posts in favour of any class of permanent residents which is in the opinion of the Government is not adequately represented in the services under the State and State can do it without consulting Public Service Commission as respect the manner in which such a provision may be made by State of Jammu and Kashmir.58

(xviii) The superintendence, direction and control of the preparation of the electoral rolls for, and the conduct of, elections to either House of the State Legislature held under State Constitution shall vest in the Election Commission of India.59 Thus, the elections to the State legislature are to be conducted by the Election Commission of India according to the Constitution of Jammu and Kashmir and the electoral laws made by the State Legislature. The power of State Legislature to make provision with respect to elections to Legislature of Jammu and Kashmir has been given under Section 141 of the Constitution of Jammu and Kashmir. It is in contrast with the position prevailing in other States where the elections to the State Assemblies are held in accordance with the laws made by the Parliament.

(xix) Only the permanent residents of the State can exercise right to vote in the elections to the Legislative Assembly of the State.60 It means a person who is not a permanent resident of a State cannot exercise voting rights.


The Flag of the State shall be rectangular in shape and red in colour with three equidistant white vertical stripes of equal width next to the staff and a white plough in the middle with the handle facing the stripes.

57 Id., sec. 92 (5).
58 Id. sec. 133 (3).
59 Id. sec. 138.
60 Id. sec. 145.
The ratio of the length of the flag to its width shall be 3:2.

(xxi) The official language of the State shall be Urdu but the English language shall unless the Legislature by law otherwise provides, continue to be used for all the official purposes of the State for which it was being used immediately before the commencement of this Constitution. Thus, the directive for the development of the Hindi language does not apply to the State of Jammu and Kashmir.

(xxii) The provisions of Article 368 of the Constitution of India are not applicable for the amendment of the State Constitution of Jammu and Kashmir. While an Act of Parliament is required for the amendment of any of the provisions of the Constitution of India, the Constitution of Jammu and Kashmir may be amended by introducing a Bill in the Legislative Assembly of the State and Bill is required to be passed in the House by a majority of not less than two-third of the total membership of that House and at last assented to by the Governor of that State. But no Bill or amendment seeking to make any change in –

a. this Section; or
b. the provisions of Sections 3 and 5; or
c. 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.

Thus, this Section imposes limitations on the amending power of the Legislature of Jammu and Kashmir. The State Legislature is not competent to amend Section 147. Moreover, the Legislature of State cannot amend Section 3 which declares Jammu and Kashmir as an integral part of the Union of India. Since no change can be made in the extent of the executive and legislative power of the Union with regard to the State except with the concurrence of both the Governments, Section 5, dealing with the extent

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61 Id. sec. 145.
62 Supra note 38, art. 351.
63 Supra note 9.
64 Supra note 13, sec. 147.
65 Ibid.
of legislative and executive power of the State, has also been put beyond the amending powers of the legislature.66

The amending power of the Legislature of Jammu and Kashmir does not include the power to amend the provisions of the Constitution of India as applicable in relation to the State of Jammu and Kashmir. Thus, the amending power of the State Legislature shall be confined to the provisions of the State Constitution and shall not affect any provisions of the Constitution of India.67

The objective behind imposing the limitations on the amending power of the State Legislature of Jammu and Kashmir is to keep immune the sanctity of Constitutional relationship existing between Indian Union and State of Jammu and Kashmir.

(xxiii) One of the interesting characteristics of the State Constitution is, the comprehensive and radically progressive list of the directives which are modelled on some of the basic rights and obligations enumerated in “New Kashmir” programme as well as part IV of the Indian Constitution.68 The Part IV69 of the Constitution of India is not applicable to the State as State of Jammu and Kashmir has its own set of directive principles of State policy given in Part IV of the State Constitution.70

4 CONCLUSIVE APPRAISAL

The State of Jammu and Kashmir constitutes a special category as it is the only State of Indian Union which have its own Constitution and the flag. It enjoys a considerable internal sovereignty as a distinctive variation of Indian Federal system. There is no parallel to it in the Indian federal polity in regard to quantum of autonomy

66 Supra note 2 at 196.
69 Part IV of the Constitution of India deals with directive principles of State policy.
70 Supra note 13, sec. 11-sec. 25.
enjoyed by it. The federal relation between the Union and the State of Jammu and Kashmir respects “State rights” more than in case of other States of Union.