

CHAPTER – III

**THE CONSTITUTIONAL DEVELOPMENT IN THE STATE
OF JAMMU AND KASHMIR**

1 INTRODUCTION

The State of Jammu and Kashmir known for its extravagant natural beauty is the northernmost State of the Indian Union. It can be aptly described by famous farsi; couplet of Hazrat Amir Khusrau which states:

Agar firdaus bar roo-e zameen ast,
Hameen ast – o hameen ast – o hameen ast.¹

It means if there is a paradise on earth it is this, it is this, it is this. Jammu and Kashmir which occupies an extremely strategic position on the Indian frontiers, is the only State in the Indian Union with a Muslim majority.² It shares international with Russia, Afghanistan, Pakistan and China. It is bounded on the south by Himachal Pradesh and the Punjab, on the north by Chinese Turkistan and a little of Russian Turkistan, and on the east by Chinese Tibet.³ On the west lies Pakistan and to the north-west, Afghanistan.

Geographically, the State falls into four natural regions. In the south lies Jammu, the winter capital of the State; in the centre is the happy valley of Kashmir which contains the summer capital, Srinagar; to the north is Gilgit;⁴ and between The Kashmir valley and Tibet is the province of Ladakh.⁵ Kashmir, replica of heaven on this Earth, is known for its breathtaking beauty. Jammu also known as “City of Temples”, has innumerable temples and shrines. It is one of the most famous pilgrimage tourism destinations in India. Ladakh – little Tibet is renowned for its remote mountain beauty

¹ Available at: <http://www.dargahsharif.com/FARSICOUPLETS.html>.

² Sunita, *Politics of State Autonomy and Regional Identity – Jammu and Kashmir* 41 (2006).

³ Available at: <http://www.india.gov.in/allimpfrms/alldocs/9108.pdf>.

⁴ Gilgit is under Pakistani occupation since Nov. 4, 1947.

⁵ A.S. Anand, *The Constitution of Jammu and Kashmir : Its Developments and Comments* 4 (2010).

and Buddhist culture. Jammu and Kashmir is located between 32°17' to 37°5' N latitudes and 73°26' to 80°30'E longitudes, occupying central position in the Asian continent.⁶ The State covers an area of 2, 22, 236 sq.km which includes 78, 114 sq.km under occupation of Pakistan, 5180 sq.km handed over by Pakistan to China, and 37, 555 sq.km under occupation of China.⁷

As per detail from Census 2011, population of Jammu and Kashmir 12, 548, 926 which constitutes 1.04% of the country's population.⁸ Of this, rural population is 72.79% and urban population is 27.21%.⁹ The population density of Jammu and Kashmir is 56 persons per sq.km which is lower than national average of 382 per sq.km.¹⁰ The sex ratio is 883 per 1000 males, which is less than the national average of 940.¹¹

Known for its extravagant natural beauty, this land formed a major caravan route in the ancient times.¹² Trade relations through these routes between China and Central Asia made it a land inhabited by various religious and cultural groups.¹³ From the regions of Kashmir, Buddhism spread to Ladakh, Tibet, Central Asia and China.¹⁴

Article 1 of the Constitution of India defines Jammu and Kashmir as a State of Indian Union. The First Schedule to the Constitution of India defines the territory of Jammu and Kashmir as:

The territory which immediately before the commencement of the Constitution was comprised in the Indian State of Jammu and Kashmir.

⁶ Available at: <http://www.jkdosc.com/files/introduction.html>.

⁷ Available at: <http://india.gov.in/allimpfrms/alldocs/9108.pdf>.

⁸ Available at: <http://www.census2011.co.in/census/state/jammu+and+kashmir.html>.

⁹ *Ibid.*

¹⁰ *Ibid.*

¹¹ *Ibid.*

¹² Available at: <http://www.kashmirtounsm.ord/jammu-kashmir-information/culture-and-history/history.html>.

¹³ *Ibid.*

¹⁴ *Ibid.*

The territory of Jammu and Kashmir as defined in First Schedule to the Constitution of India is not similar to the territory of the erstwhile Princely State of Jammu and Kashmir. In October, 1947 in order to occupy, by force, the erstwhile Princely State of Jammu and Kashmir, Pakistan invaded the State.

Though Indian forces pushed back invaders from a large part of the territories of the State but due to fresh reinforcement from Pakistan, it was not possible to remove them completely out of the territory of the State without attacking their bases and sources of supply in Pakistan. So, at last, India filed an official complaint in United Nations. The United Nations succeeded in achieving cease fire between India and Pakistan and a cease-fire line was drawn between India and Pakistan. As such, a considerable area of the erstwhile Princely State of Jammu and Kashmir which fell on the other side of the cease-fire line came under the possession of Pakistan. That's why the First Schedule to the Constitution of India defines the territory of Jammu and Kashmir as the territory which immediately before the commencement of the Constitution i.e., 26 January, 1950 comprised in the Indian State of Jammu and Kashmir. So, it excludes the territories which fell under Pakistani occupation.

But if one scrutinizes the details of history from legal point of view, it is an accepted fact that Maharaja Hari Singh acceded to Indian Dominion by executing Instrument of Accession which covered the whole area of erstwhile Princely State of Jammu and Kashmir including the area now under Pakistani occupation. As correctly said by Ferguson:

It was the whole State of Jammu and Kashmir that acceded to India, and although some regions had broken away, they had done so illegally, and their illegal action could not confer any right on Pakistan...¹⁵

While understanding fully the implications of Instrument of Accession, the Constituent Assembly of Jammu and Kashmir visualized the possibility of that area being vacated

¹⁵ J.P. Ferguson, *Kashmir: an Historical Introduction* 91 (1961).

by the aggressor¹⁶ and consequently, defined the territory of the State under Section 4 of the Constitution of Jammu and Kashmir as states:

The territory of the State shall comprise all the territories which on the fifteenth day of August, 1947, were under the sovereignty or suzerainty of the Ruler of the State.

So, the Constitution of Jammu and Kashmir defines territory of the State as all the territories which on 15th August, 1947 were under the sovereignty or suzerainty of the Ruler of Jammu and Kashmir. Thus, it includes the territories which had come under Pakistani occupation. After the Indo-Sino war of 1962, China occupied a considerable portion of the State of Jammu and Kashmir in Ladakh known as Aksai Chin. In addition to this, 5180 sq.km.¹⁷ of the State of Jammu and Kashmir was illegally ceded to China by Pakistan under the March 1963 Sino-Pak Boundary agreement.¹⁸

Thus, the territory of the State of Jammu and Kashmir, as defined by the Constitution of Jammu and Kashmir includes Indian State of Jammu and Kashmir, the Pakistani States of Gilgit-Baltistan and Azad Kashmir, the Chinese regions of Aksai Chin and Trans Karakoram tract.

India claims the area of Gilgit-Baltistan along with Azad Kashmir, as part of its Jammu and Kashmir State, which are collectively referred to as Pakistan-Occupied-Kashmir. Aksai Chin is also claimed by India as part of the Ladakh district of the State of Jammu and Kashmir. In addition to it, the Trans-Karakoram tract which is entirely administered by the People's Republic of China is claimed by India as part of the State of Jammu and Kashmir.

Geologists believe that about ten crore years have passed when Kashmir valley which was once a lake called Satisar, the lake of goddess sati, came into its present form¹⁹ Once there was such a devastating earthquake that it broke open the mountain

¹⁶ *Supra* note 5 at 195.

¹⁷ This area is called as trans karakoram tract. It is also known as Shaksgam.

¹⁸ *Available at:* <http://www/jammu-kashmir.com/basicfacts/tour/regions.html>.

¹⁹ *Available at:* <http://ikashmir.net/geography/index.html>.

wall at Baramulla and the water of the Satisar lake flowed out....²⁰ Thus, in this way oval but irregular valley of Kashmir came into existence.

The State of Jammu and Kashmir in the most autonomous unit in the Indian Union. To understand the status of autonomy presently enjoyed by Jammu and Kashmir as one of the constituent unit of Indian Union, one must take into account history of the State.

2 HISTORY OF THE STATE OF JAMMU AND KASHMIR

Till 1846, Jammu, Kashmir and Ladakh were distinct areas under different rulers. In 1846, the State of Jammu and Kashmir came into existence as one State after consolidation of Jammu, Kashmir and Ladakh provinces and was ruled by a single ruler named Maharaja Gulab Singh. Till 1846, these provinces had different rulers and different histories. A brief account of each province till 1846 is given in following paragraphs.

2.1 Kashmir

According to Kalhan, the famous poet-historian of Kashmir, the political history of Kashmir began with King Gonanda I. But most of the present day historians trace the history from Asoka who lived in the third century B.C. Kashmir's old capital, Shrinagari was first founded Emperor Ashoka. In the ninth century Hinduism was introduced to the area and both religions thrived. In the fourteenth century, the Mongol ruler, Dulucha invaded the Kashmir region. This ended the Hindu and Buddhist rule of the area.²¹ Shah Mirs, the first Muslim rulers, ascended the throne in 1342 A.D.²² Next in the line were Chaks who were Shias and Gazi Khan became the first Chak Ruler in 1554 A.D. The Emperor Akbar conquered the valley in 1586 AD by defeating the Chaks. Moghul rule lasted in Kashmir something more than a century and a half.²³ Near about 1752 A.D., Ahmed Shah Abdali conquered Kashmir. For about seventy years,

²⁰ *Ibid.*

²¹ Available at: <http://geography.about.com/old/specificplacesofintrest/a/kashmir.html>.

²² A.S. Ananad, *The Constitution of Jammu and Kashmir – Its Development and Comments* 5 (6th ed., 2010).

²³ *Ibid.*

Kashmir was ruled by Afghans through Governors appointed by the King of Kabul. In 1819 AD, Maharaja Ranjit Singh of the Punjab captured Kashmir from the Afghan rulers. For nearly twenty-five years Kashmir was ruled by Governors appointed by the Sikh Durbar at Lahore.

2.2 Jammu

Around mid of eighteenth Century, Jammu was ruled by Ranjit Deo, a dogra chief of the rajput descent. After the death of Ranjot Deo in 1780 A.D., a dispute emerged among the three grand nephews of Ranjit Deo for ruling Jammu. Raja Ranjit Singh took advantage of the dispute and conquered Jammu in 1808 A.D. The three grand nephews of late Ranjit Deo took services under Raja Ranjit Singh. Pleased with services of three brothers, Raja Ranjit Singh in 1820 conferred the principality of Jammu on Gulab Singh, the eldest of the three brothers, with the hereditary title of Raja; Bhimber and Chibal including Poonch were given to Dhyan Singh and Ram Nagar to Suchet Singh. Both Dhyan Singh and Suchet Singh were subsequently killed and their jagir also fell in the hands of Gulab Singh. Thus, the whole province of Jammu came under a single ruler, for the first time in the history of Jammu.²⁴

2.3 Ladakh

In 1687 A.D, the Moghuls with the support of the rulers of Western Tibet, conquered the Ladakh and for about a century it remained with the Moghuls. In 1834 A.D., Raja Gulab Singh of Jammu sent his forces for conquering Ladakh. The king of Ladakh failed to defend it and Gulab Singh became Raja of Ladakh also. Thus, whether it was a policy or it was accident by 1840, Gulab Singh had encircled Kashmir²⁵.

2.4 Treaties of Lahore and Amritsar

In November 1845, the first Sikh war broke out between the British Government and the Lahore Durbar at Sobraon. The Lahore Durbar asked Gulab Singh for help against British forces. But Gulab Singh evaded it on one pretext or another. By

²⁴ *Ibid.*

²⁵ *Imperial Gazetteer of India*, 1908 Vol. XV, p.95.

remaining aloof, Gulab Singh wanted to earn the gratitude of the British diplomats.²⁶ The Sikhs faced defeat in the battle of Sobraon. The British Government demanded a war indemnity of rupees one and a half crore. The British Government knew that Sikh Durbar was not in a position to pay such a big amount and it was expecting that Sikh Durbar may offer to cede a greater part of its principality. On 9th March, 1846, Treaty of Lahore was concluded between the British Government and Raja Dhuleep Singh of Lahore.²⁷ The Treaty laid down that the Maharaja Dhuleep Singh of Lahore would pay an indemnity of one and a half-crore of rupees to the British for the expenses of the war, in addition to the cession of ‘all his forts, territories, and rights in the Doab and country, hill or plain, situated between Beas and Sutlej rivers’. Since Maharaja Dhuleep Singh was not in a position to pay the whole amount of one and a half crore of rupees of indemnity, he was forced to cede a much greater part of his principality to East India Company. In lieu of one crore rupees of war indemnity, Sikh Durbar offered to cede its forts, territories, rights and interest in the hill region situated between the rivers Beas and Indus, including the ‘Provinces of Cashmere and Hazarah’.²⁸ The British Government accepted that offer readily. Among other things, it was also provided in this treaty that “in consideration of the services rendered by Raja Gulab Singh of Jammu, to the Lahore State towards procuring the restoration of the relations of amity between the Lahore and British Government, the Maharaja (Dhuleep Singh) hereby agrees to recognize the independent sovereignty of Raja Gulab Singh in such territories and districts in the hills as may be made over to the Raja Gulab Singh by separate agreement between himself and the British Government....”²⁹ After few days, another treaty was concluded between Raja Gulab Singh and the British Government on March 16, 1846 which is known as Treaty of Amritsar. The British Government, vide this treaty transferred and made over, “forever, in independent possession, to Maharaja Gulab Singh and the heirs male of his body, all the hilly or the mountainous country,

²⁶ P.N. Bazaz, *The History of struggle for freedom in Kashmir* 122 (1954).

²⁷ For the Text of the Treaty See Aitchison, ‘*A Collection of Treaties, Engagements and Sunnuds, Relating to India and Neighboring countries*’, Vol. II (1863), p. 259.

²⁸ *Ibid.* The above territories were transferred in lieu of Rupees One Crore. Article V provided that the Maharaja will pay to the British Government the sum of 50 lakhs of rupees on or before the ratification of this Treaty. The treaty was ratified on the same day.

²⁹ *Supra* note 22 at 7.

situated to the eastward of the River Indus and the westward of the River Ravee.”³⁰ In consideration of this transfer, Gulab Singh paid “to the British government the sum of seventy-five lacs (seven and a half millions) of rupees (nanukshahee).”³¹ Maharaja Gulab Singh entered Srinagar as its Ruler on November 9, 1846. The Treaty of Amritsar by which the cession of Kashmir took place by way of sale is significant as it alone enabled Maharaja Gulab Singh to hold the independent sovereignty over what was later to become the present State of Jammu and Kashmir.³² Thus, the Treaty of Amritsar made Kashmir a part of the Kingdom of Maharaja Gulab Singh and a new State consisting of Jammu, Kashmir and Ladakh came into existence. With the passage of time, the boundaries of the new State were further extended by its different rulers through a number of military expeditions, of course, with the express concurrence of the British Government. Ranbir Singh, son of Gulab Singh, added Gilgit in the life time of his father to his dominion. He also subdued Yasin in 1863 and Dard Valley in 1865. Later during the rule of Maharaja Pratap Singh, grandson of Gulab Singh, his forces defeated the rulers of Chitral in 1891 and of Hunza and Nagar in 1895 who accepted the suzerainty of the Dogra Durbar.³³ Thus, under such circumstances, the then Princely State of Jammu and Kashmir came into existence as a single political entity.

2.5 Rulers in Jammu and Kashmir Reign of Maharaja Gulab Singh

2.5.1 Reign of Maharaja Gulab Singh

The first ruler to rule this newly created State of Jammu and Kashmir was Maharaja³⁴ Gulab Singh and with him began the ruler of Dogra dynasty in the State of Jammu and Kashmir. Maharaja Gulab Singh concentrated in regard to consolidation and building up of Jammu and Kashmir State. He was the source of all legislative, executive and judicial powers. Maharaja had divided the State into three provincial divisions i.e., Jammu, Kashmir and the frontier region of Ladakh and Gilgit. Each division had been put under the charge of a Chief Officer who was equivalent to the status of a Governor.

³⁰ Article I, Treaty of Amritsar.

³¹ *Ibid*, Article III.

³² H.O. Agarwal, *Kashmir Problem – Its Legal Aspects* 3 (1979).

³³ Balraj Puri, *Jammu and Kashmir: Triumph and Tragedy of Indian Federalization* 22 (1981).

³⁴ In the Treaty of Amritsar, Raja Gulab Singh has been called Maharaja.

Each division was sub-division into districts headed by a District Officer.³⁵ He always considered himself as an obedient and faithful servant of the East India Company. He died in 1858 A.D.

2.5.2 Reign of Maharaja Ranbir Singh

About two years before his father's death, Ranbir Singh, the third son of Maharaja Gulab Singh, succeeded to the throne in 1856 A.D. For improving the administration in the State, Maharaja Ranbir Singh modified the provincial administration and the modified the provincial administration and the provinces were re-distributed in more smaller districts. Maharaja himself administered Jammu province while Kashmir was administered by a Governor appointed by him. In 1860, he abolished in Jammu Province, the collection of revenue in kind.

In 1877, an Adalat-i-Alia (High Court) was established as the highest court of appeal which has to work subject to the control and judicial powers exercised by Maharaja Ranbir Singh. The famous Ranbir Penal Code was enacted during in reign. The State Civil procedure code was published in 1873A.D.³⁶

The Maharaja's armed forces mostly consisted of Dogras and practically there were no Kashmiris in the army. During his reign, there was a discrimination against non-Dogra communities and generally Dogras were preferred for high offices in the State. Ranbir Singh had remained a friend of the British and at the time of Indian Mutiny had led the state forces in putting down the mutiny.³⁷ Maharaja Ranbir Singh fell ill and died on September 14, 1885 A.D.

2.5.3 REIGN OF MAHARAJA PRATAP SINGH

Pratap Singh, son of Maharaja Ranbir Singh, ascended to the throne in 1885 A.D., the year in which Maharaja Ranbir Singh died.

³⁵ *Supra* note 22 at 11.

³⁶ *The Jammu and Kashmir Administrative Report*, 1911.

³⁷ *Supra* note 22 at 14.

During the reign of Maharaja Pratap Singh, British Government appointed Mr. T.C. Plowden as Resident of the State of Jammu and Kashmir. Maharaja Pratap Singh protested against the appointment of Resident as it was a violation of Treaty of Amritsar³⁸ and also contrary to the solemn promise made by the Queen Empress on her assumption of direct rule in India to accept all the Treaties and Engagements made by East India Company³⁹ and to respect the rights dignity and honour of Native Princess.

The Anglo Afghan war of 1878 and the gradual extension of the Russian empire almost upto the borders of the State increased its strategic value for the British Empire.⁴⁰ According to British Government, increased political importance of Jammu and Kashmir necessitated appointment of Resident. So, in spite of the resistance of Maharaja Pratap Singh, British appointed resident in the State. Maharaja Pratap Singh wanted to lessen the interference of the Resident in the affairs of the State. On the contrary, British wanted the Resident to be in complete charge of the State. So, a plan was prepared by British to deprive Maharaja Pratap Singh of power. It was alleged that Maharaja Pratap Singh was making secret plans with Russia and Dalip Singh (the dethroned ruler of the Punjab). So, the temporary deposition of Maharaja Pratap Singh took place on 8th March, 1889 when he was made to sign an edict of resignation. According to it, he relieved himself of all part in the administration and the administration was placed in the hands of a Council of Regency which has to function under the control of Resident. The President of the council was Raja Amar Singh, younger brother of Maharaja Pratap Singh, a devoted British loyal. The British government was criticized in Indian and British political circles as it failed to justify the temporary deposition of the Maharaja.

Maharaja Pratap Singh's powers were nominally restored in 1891 when he was appointed the President of the Council of Regency. Raja Amar Singh was made the Vice-President of the Council. The real power still remained with Resident. Meanwhile,

³⁸ A unique feature of the State's relation with the paramount power was absence of stipulation, in the Treaty of Amritsar of 1846, for stationing British Resident in the State which was the practice in other Princely States of the country.

³⁹ The East India Company was a private trading enterprise which was incorporated in England on December 31, 1600. In the initial stages, its only interest was to carry on trade and commerce. It was in the process of protecting its commercial affairs in the Country that the Lord Clive actually laid down the foundation of the British Empire in India.

⁴⁰ *Supra* note 33 at 23.

Gilgit Agency had been set up in 1889 which was under the Charge of British. In 1905, the Viceroy Lord Curzon abolished the council and partially restored his powers. Raja Amar Singh, who remained the Prime Minister and the Commander-in-Chief of the State forces, of course, wielded the real power and could be trusted to look after the British interest.⁴¹ In September 1920, the Maharaja made request for restoration of further powers to him. In return, Government of British India demanded an assurance that “the Maharaja would accept the advice of the Resident in administrative matters, whenever it was offered and would also inform the Resident of any important changes in the existing rules and regulations and the frontier policy.”⁴² The Maharaja agreed to accept these conditions and consequently, all his powers were restored to him on 4th February 1921.

As far as Maharaja’s contribution towards the state is concerned, he took interest in the improvement of administration. He framed a scheme for the reorganization of his government. The Government of British India accepted the scheme with some modifications and the scheme was enacted in the shape of Sri Pratap Reforms Regulation and was promulgated in January 1922. He recognized the army and supplied it with modern equipment but he, like his father and grandfather, did not give any opportunity to the Kashmiris to serve either in the army or in the civil service. After the restoration of his powers in 1921, Maharaja faced a new problem. During his deposition, lot of western educated men were appointed from neighbouring Punjab and other places in large number to posts in the state administration. The people of the state resented this encroachment from outside with the slogan “State for the State’s People”. But Maharaja Pratap Singh paid little heed to this movement and failed to take the resentment seriously.

Maharaja Pratap Singh, who had no son, was not allowed to nominate his adopted son as his heir. So, after his death in 1925, his nephew Hari Singh, the only son of his brother Amar Singh, ascended the throne.

⁴¹ *Supra* note 33 at 27.

⁴² Jammu and Kashmir Archives, File No. 104 of 1920.

2.5.4 Reign of Maharaja Hari Singh

Maharaja Hari Singh was the first Prince from his dynasty who received education in a Public School. He studied at Meo College Ajmer and in the Imperial Cadet Corps, Dehradun.⁴³ Even before ascending the throne, he was associated with the administration of the State as Commander-in-Chief of the State Army. At the age of 27 he was appointed senior Member in the State Council.⁴⁴ During the reign of Maharaja Hari Singh, the agitation with the Maharaja Hari Singh, the agitation with the slogan “State for State’s People” became so strong that Maharaja Hari Singh issued an order on 31st January, 1927 which provided that the ‘State Subjects’ would be preferred to outsiders in case of employment in Government services. The Notification⁴⁵ in Note I provided the privileges of the State Subjects:

Note I: In matters of grants of State scholarship, State lands for agriculture and house building purposes and recruitment to state service, states subjects of class I should received preference over other classes and those of class II over class III, subject however, to the order dates 31st January, 1927, of His Highness the Maharaja Bahadur regarding employment of hereditary State Subjects in Government service.

As a result of this order, although recruitment of non - State Subjects in State Services was topped yet muslims were still unable to get jobs in government services due to pro - Dogra policy of Maharaja Hari Singh. The degree of communal discrimination was revealed from the fact that non - Dogras were not given any chance to serve in the army till 1930.⁴⁶

Inspired by the freedom movement of British Indian and aggrieved by the communal discrimination which the oppressed muslim subjects of the State were facing since the reign of Maharaja Gulab Singh, in 1931, muslims revolted and made a head on

⁴³ *Supra* note 22 at 24.

⁴⁴ *Ibid.*

⁴⁵ The State Subject Definition Notification, No. I-L/84, dates the 20th April, 1927.

⁴⁶ *Jammu and Kashmir Administration Report*, 1931 pp. 6-10.

collision with the Dogra rule. Despite the repressive machinery of State, the movement could not be crushed and people continued their struggle. To pacify the rising public feeling, Maharaja Hari Singh, from time – to – time, introduced certain Constitutional reforms which can be termed as small initiatives towards the democratic governance of the State. The reign of Maharaja Hari Singh gained a lot of importance in the annals of the State of Jammu and Kashmir as the event of an outstanding importance i.e., accession of the State of Jammu and Kashmir with Indian Dominion took place during his reign.

3 CONSTITUTIONAL DEVELOPMENT IN THE STATE OF JAMMU AND KASHMIR UPTO ITS ACCESSION TO INDIAN DOMINION

From 1932 A.D. to 1947 A.D., some important constitutional developments took place in the State of Jammu and Kashmir which initiated the process of democratization in State, i.e., a shift of power from the hands of monarch into the hands of masses. In the following pages, a brief history of constitutional development in the State of Jammu and Kashmir upto its accession of Indian Dominion has been traced.

3.1 Muslim Grievances and Constitutional Act of 1934

The first step in the direction of constitutional development in the State of Jammu and Kashmir was the Constitutional Act of 1934. The Act came into existence so as to pacify the oppressed Muslims subjects who formed a predominant part of the population of the State. One of the most important events which led to the passing of the Constitution Act of 1934 was the revolt of 1931. As already discussed, in 1931, the oppressed Muslim subjects of the State revolted against the State Government's policy of communal discrimination and agitation got tremendous support from oppressed Muslims. When the Maharaja failed to curb the movement by the repressive machinery of the State Government, he in order to restore peace in the State so as to impede British intervention in the affairs of State, announced a general amnesty and offered to consider the reasonable demands of his subjects. The Government of British India directed the Maharaja to appoint a commission to inquire into the Mulsim grievances. Maharaja Hari Singh set up a Commission to enquire into the grievances of people of the State

and to make such recommendations as it deemed necessary. The commission was headed by Mr. (later Sir) B.J. Glancy. The Commission submitted its report on 22nd March, 1932. Some important recommendations of the Glancy Commission were:

- i) Muslims should be given greater share in employment in State Services;
- ii) The policy of State Government in the matter of reserving State appointments for State Subjects should be adhered to as far as possible;
- iii) Encouragement should be given to education among Muslim students;
- iv) There should be no interference with religious observance and severest notice should be taken against insult of any religion.

After the enquiry into grievances of the different communities had been completed, a Constitutional Reforms Conference, which too was headed by Mr. B.J. Glancy, was appointed to recommend measures so as to associate the masses with the administration of the state. The conference submitted its report in April, 1932. It made recommendation for the establishment of a legislative assembly in the state. At the same time, the Conference suggested the appointment of a Committee to collect the necessary data on which further action could be based.⁴⁷

In May 1932, a Franchise Committee was appointed under the Presidency of Sir Barjor Dalal. It also recommended the establishment of the Legislative Assembly based on Morley - Minto model. In other words, it recommended council with a non-official majority which would pass legislation, ask questions, discuss budget and pass resolutions.⁴⁸

In 1932 A.D., another important event took place in the political history of the State of Jammu and Kashmir. It was the formation of Muslim Conference and Sheikh Mohammad Abdullah, who had directed the Muslim struggle against the Dogras, was elected the President of the Conference. The Muslim Conference committed itself to fight for the due rights of Muslims and against the tyrant and unjust rule of Maharaja. It

⁴⁷ *Census of India*, 1941, Vol. 22, p. 5.

⁴⁸ Sir William Barton, *The Princes of India* 127 (1934).

also demanded immediate implementation of the recommendations of 'Glancy Commission'.

After receiving all these recommendations and with the aim of pacifying the muslim agitation, His Highness the Maharaja Bahadur Hari Singh enacted and issued a Constitutional Act⁴⁹ on 22nd April, 1934 providing for the establishment of the Legislative Assembly (Praja Sabha) and laid down his own legislative, executive and judicial powers. The Constitutional Act of 1934, consisted of 46 Sections, did not implement the recommendations of Glancy Commission in toto and had certain defects in it. The following were the main defects of the Act:

1. In the Praja Sabha, there was official majority in place of elected majority.
2. Woman and illiterates were not entitled to vote.
3. Under Section 3 of the Regulation, Maharaja fully reserved in himself all of his pre-existing powers.
4. The Praja Sabha could not pass a law until His Highness signified his assent thereto. It was the absolute discretion of His Highness to assent to such a law or not.
5. The Council of Ministers was responsible to His Highness and not to the Praja Sabha.
6. The Praja Sabha was only a recommendatory body and its vote was not binding on the Council of Ministers.

In 1934, election for Praja Sabha, which was first election ever held in the State of Jammu and Kashmir, took place and Muslim Conference captured 14 out of the 21 seats.

But the people of the State were not satisfied with the constitutional reforms done by Maharaja. For them it was mere on eye-wash. In fact, there was no real transfer of power from the Maharaja to masses. As the ultimate aim of the people of the State was to have responsible government in place of arbitrary and oppressive government,

⁴⁹ Regulation No. 1 of Samwat 1991 (A.D. 1934).

so, they continued, their struggle for 'responsible government' and contrary to the expectations of Maharaja, the struggle became more turbulent than before.

3.2 The Jammu and Kashmir Constitution Act, 1939⁵⁰

With the objective of making the struggle, which aimed at emancipation of the people of the State, more broad based and secular, on 28th June, 1938, a meeting of the Working Committee of the Muslim Conference was held in which Sheikh Mohammad Abdullah moved a resolution suggesting to change the name of the Conference to National Conference and to amend the Constitution so as to 'throw its door open' to non-Muslims. The resolution was passed by a majority of 17 against 3 votes.⁵¹ It enabled the non-Muslim communities to join in the national struggle. The National Conference conducted a vigorous campaign in the State for the institution of self-government and Constitutional reforms.⁵²

In order to pacify the rising public feelings, on 11th February, 1939, His Highness the Maharaja Bahadur issued a Proclamation sanctioning further constitutional reforms.⁵³ The two most important features of this Proclamation were:

1. It provided for elected majority in the Praja Sabha in place of official majority.
2. The Praja Sabha was granted the right to vote (with certain exceptions) on the demands made by Government for budget appropriation.

No doubt, it was an important Proclamation in the constitutional history of State which could be considered as one more step towards the goal of responsible government.

In order to consolidate and amend the law relating to the Government of Jammu and Kashmir, His Highness the Maharaja Bahadur promulgated the Jammu and Kashmir Constitution Act on September 7, 1939. Although mainly it was a consolidating and amending Act it also dealt with new provision⁵⁴. It was a significant

⁵⁰ Act XIV of Samwat 1996 (A.D. 1939).

⁵¹ All India State People's Conference, *Kashmir* 19 (1939).

⁵² Mohan Krishan Teng, *Kashmir-Article 370* 7 (1990).

⁵³ Government of Jammu and Kashmir *A Handbook of Jammu and Kashmir State* 35/3rd ed., (1947).

⁵⁴ *Supra* note 22 at 36.

event in the annals of the State. It was not made by any Constituent Assembly elected by people but was promulgated by His Highness himself. It consisted of 78 sections and five schedules. The following were the most striking features of the Act:

1. Sections 4 and 5 of the Act made His Highness the source of all authority both in theory and in practice.
2. The Council was to consist of the Prime Minister and “such other Ministers as His Highness may appoint by Royal Warrant of appointment. The Prime Minister was to be the President of the Council and the Prime Minister and the other Ministers shall be responsible to His Highness and shall hold office during the pleasure of His Highness.⁵⁵ Since the council was not chosen from the elected members of the Praja Sabha, there was no fixed term of their office; they could remain in office for as long as His Highness desired.⁵⁶
3. It provided for a unicameral legislature consisting of His Highness and the Praja Sabha.⁵⁷ It also provided for an elected majority in the Praja Sabha.⁵⁸
4. There were certain reserved matters in relation to which Praja Sabha could not make law.⁵⁹
5. The Prime Minister was empowered to forbid the discussion of a particular resolution or the introduction of a Bill in the legislature if he, certified that such discussion would affect the safety or tranquility of the State or any part thereof and effect had to be given to the directions of the Prime Minister.⁶⁰
6. The members of the Praja Sabha were given freedom of speech and no member shall be liable to any proceedings in any court in respect of anything said or any vote given by him in the Praja Sabha.⁶¹
7. The expenditure which described by this Act as expenditure charged upon the revenues of the State though open to discussion in the Praja Sabha, was not

⁵⁵ The Jammu and Kashmir Constitution Act, 1939, S. 7.

⁵⁶ *Supra* note 22 at 37.

⁵⁷ The Jammu and Kashmir Constitution Act, 1939, S. 13.

⁵⁸ *Ibid.*, s. 14

⁵⁹ *Ibid.*, s.24.

⁶⁰ *Id.*, s. 35.

⁶¹ *Id.*, S. 29.

subject to vote.⁶² The demands for grants to meet anticipated expenditure might be assented to; refused or reduced by the Praja Sabha but Council could supersede the decision of Praja Sabha if council considers it necessary for administration.

8. The High Court, which was established by His Highness in 1928,⁶³ continued to be the High Court for the State.⁶⁴ The power of appointment and removal of judges vested in His Highness which made interference of executive in the functioning of judiciary possible.
9. No discussion was allowed in the Praja Sabha with regard to the conduct of any member of His Highness's Board of Judicial Advisers or of any Judge of the High Court in the discharge of his duties.⁶⁵
10. The High court was not the final interpreter of the Constitution. This power was enjoyed by council and the decision of the council, subject to the provisions of section 5 (relating to inherent powers of His Highness), was final.⁶⁶
11. His Highness appointed a Board of Judicial Advisers to advise him for the disposal of such civil and criminal appeals as lay to him from the decision of the High court and on such other matters as His Highness chose to refer to the Board for advice.⁶⁷ The appointment of its members vested in His Highness.⁶⁸

After a careful perusal of above features of the Constitutional Act, 1939, it can be said that though it gave the people of the State some opportunity to associate themselves with the administration of the State and also granted certain privileges to the members of Praja Sabha which enables them to criticize the acts of government without any fear of punishment yet it maintained the supremacy of the Maharaja of Jammu and Kashmir. As rightly laid down by Supreme Court of India in *Prem Nath Kaul V. The State of Jammu and Kashmir*:⁶⁹

⁶² Id., S. 45(1)

⁶³ By order No. 1 of Samvat 1985 (A.D. 1928, March).

⁶⁴ The Jammu and Kashmir Constitution Act, 1939, S. 48 (a).

⁶⁵ Id., S. 37.

⁶⁶ Id., S. 75.

⁶⁷ Id., S. 71 (1).

⁶⁸ *Ibid*, s. 71(2)

⁶⁹ *Prem Nath Kaul V. The State of Jammu and Kashmir*, AIR 1952 SC 749.

There can be no doubt that though this Act (Act XIV of 1996) marked the second step taken by His Highness in actively associating his subjects with the administration of the State, it did not constitute even a partial surrender by His Highness of his sovereign rights in favour of the Praja Sabha.

The leaders of National Conference, supported by masses, voiced their resentment against the Jammu and Kashmir Constitution Act, 1939 as they were not satisfied with a puppet assembly and a Council of Ministers responsible only to His Highness as envisaged under the Act. The role of National conference, as a political party of the State of Jammu and Kashmir, is very important in the constitutional history of the State as it not only led the movement for constitutional reforms in the State but also committed itself to a secular struggle for Indian freedom, the realization of a political India comparing the British Indian Provinces and the Indian states and institution of self-rule in the States.⁷⁰ In 1941, the National Conference became a formal member of the All India State People's Conference which spearheaded the liberation struggle in the Indian States.

In British India too, the political conditions were changing with tremendous speed. The Lahore session of the Muslim League held on 26th March 1940 was a crucial day in the history of the Indian National Movement as on that day the Muslim League adopted the infamous Pakistan resolution. In his presidential address Jinnah expanded his 'two - nations' theory and declared that Muslims were 'a nation by any definition'.⁷¹ The Muslims League resolution stated the reorganization of the Muslim majority provinces in India into a separate and independent Muslim State of Pakistan. The Muslim League's Pakistan resolution made a very crucial impact on the politics of the State of Jammu and Kashmir. The response of National conference to League resolution was not positive and it rejected it. Notwithstanding the rejection of Pakistan resolution by National conference, a considerable section of conference leaders and cadres advocated the acceptance of Pakistan resolution and later on left the National

⁷⁰ *Supra* note 32.

⁷¹ Jamil-ud-din, *Speeches and Writings of Mr. Jinnah*, (ed.) vol. I, pp. 155-56.

Conference. On 13 June 1941, the breakaway factions of the National Conference revived the erstwhile Muslim Conference. Chowdhry Gulam Abbas was elected the President of the Conference. In the open session of the Muslim Conference, Abbas called upon the Muslims in the State to support the League demand for Pakistan.⁷²

3.3 Naya Kashmir

In July, 1943, in order to pacify the growing resentment of the subjects of the State, Maharaja Hari Singh appointed a high power Commission of enquiry under the president-ship of Chief-Justice of the State High Court (as he then was), Rai Bahadur Ganga Nath, to review the working of the Constitution of the state.⁷³

This Commission (also called as the Royal Commission) invited all political parties in the State to send their representatives for participation in the deliberations of the Commission. Though the National Conference expressed dissatisfaction with the terms of reference of the commission as these covered unnecessarily wide areas of investigation and did not include any specific directives for political and economic reform, it still decided to cooperate with the commission and agreed to send its representatives to participate in the deliberations of the Commission. The deliberations of the Commission were protracted, irregular and not smooth. Differences set in among the participants of the commission on a wide variety of matters and the commission failed even to evolve an agreement on the interpretation of its terms of reference.⁷⁴ As a result National Conference recalled its representation unhappy with the functioning of the commission; National Conference itself evolved a programme of reform and reconstruction for the State and submitted it to the commission for its consideration. The Commission, however, found itself unable to accept any of the suggestions envisaged in the programme.⁷⁵ At last Rai Bahadur Ganga Nath, the President of Royal Commission, submitted to the Maharaja, in spite of all the odds a long and detailed

⁷² *Supra* note 32.

⁷³ Command of Maharaja Hari Singh, dated 12 July, 1943, published in Government Gazette, dated 15th July, 1943.

⁷⁴ *Supra* note 32 at 8.

⁷⁵ Ram Krishan Kaul Bhatt, *Political and Constitutional Development of the Jammu and Kashmir* 102 (1984).

report on the working of the existing Constitutional provisions and in effect sought to legitimize the many structural and functional defects in the State Government.⁷⁶ The National Conference presented to a Maharaja Hari Singh a revised version of the programme provisions of reform and reconstruction which it has submitted to the Royal Commission. Later, in 1944, the programme was adopted by the National conference as its official manifesto and published under the name of 'Naya Kashmir'.⁷⁷ The 'Naya Kashmir' plan envisaged a scheme of Constitutional reforms for the State, a bill of rights and a frame of representative political institutions besides a national economic plan and a plan for cultural and educational development.⁷⁸

3.4 Dyarchy

In the aftermath of Muslim agitation in the State, in 1944, Maharaja Hari Singh announced by a proclamation that he had decided to appoint two of his ministers from among the members of the Praja Sabha. This proclamation was a step towards false hopes and promises of reform by associating the subjects with the administration of the State. Pursuant to this announcement of the Maharaja Bahadur, the non-official members of the Praja Sabha elected a panel of six members.⁷⁹ Out of these six, His Highness appointed Mirza Afzal Beg, the Deputy leader of the National Conference Party, and Wazir Ganga Ram from Jammu to the office of ministers in the Council. Mirza Afzal Beg was entrusted with the portfolios of Public Works and Municipalities whereas Wazir Ganga Ram was allocated Education. The scheme of appointment of the two ministers from the Praja Sabha was erroneously called dyarchy. The so called dyarchy created illusions about the existence of dual government. The actual reality was that there was no dual government as within the structure of the Government the two Ministers were vested with little initiative to influence any policy formulation. Not only were the two ministers denied initiative in the formulation of the administrative policy, they were also deprived of the technical operatives necessary for their function.⁸⁰

⁷⁶ *Ibid.*

⁷⁷ *Supra* note 32 at 8.

⁷⁸ *Supra* note 56 at 104.

⁷⁹ *Supra* note 22 at 53.

⁸⁰ *Supra* note 56 at 109.

In 1945, then Prime Minister of the State, Pandit Ram Chandra Kak made it clear to both the ministers who were apparently charged to carry out the mandate of the Praja Sabha that he would expect the two ministers to vote in favour of every official measure that would come up before the sabha and also not to express views against any official motion that would be tabled in the sabha. He wrote to Mirza Afzal Beg:

With regard to the question of voting and this applied also to speaking it is not possible to allow an individual member of the Government to act in a manner which is at variance with the policy of the Government. No Government can satisfactorily be carried on this basis.⁸¹

It took no time for National Conference to realize that the diarchy was nothing more than organized puppetry and the two ministers, being in minority, could never alter or influence the policies adopted by the official block.

So, dyarchy came to its end in March 1946, when Mirza Afzal Beg resigned from his office in protest. On 19th March, 1946 his resignation was accepted.⁸² This resignation was the beginning of a struggle which, at last, made His Highness to quit the state.

3.5 Quit Kashmir Movement

Against the backdrop of the crisis in the Dyarchy and the resignation of Mirza Afzal Beg from the Ministry in the State of Jammu and Kashmir, the cabinet mission arrived in India on 23rd March, 1946 which besides trying to find a solution for the Indian problem had also to review the relationship of the Indian Native Princes with the paramount power. Sheikh Mohammad Abdullah sent a telegram to the cabinet mission stating:

As Mission is at moment reviewing relationship of Princes with the Paramount Power with reference to treaty rights we wish to

⁸¹ Pandit Ram Chandra Kak to Mirza Afzal Beg, dated 14 March, 1946.

⁸² Pandit Ram Chandra Kak to Mirza Afzal Beg dated 19 March, 1946.

submit that for us in Kashmir re-examination of this relationship is vital matter because hundred years ago in 1846 land and people of Kashmir were sold away to servitude of Dogra House by British for seventy five lacs of Sikh rupees equivalent to fifty lakhs of British Indian rupees. Then Government of Kashmir resisted transfer, but was finally reduced to subjection with aid of British. Thus sale deed of 1846 misnamed treaty of Amritsar sealed fate of Kashmir masses. We declare to world that the sale deed confers no privileges equivalent to those claimed by States governed by treaty rights. As such case of Kashmir stands on unique footing and people of Kashmir press on Mission their unchallengeable claims to freedom on withdrawal of British power from India....⁸³

Subsequently, a memorandum was submitted to the cabinet mission in which National Conference reiterated its demand for independence in the following words:

Today the national demand of the people of Kashmir is not merely the establishment of responsible Government, but their right to absolute freedom from autocratic rule.⁸⁴

But the memorandum evoked no response from the Mission as it refused to consider the claims made by Native States.

The failure of dyarchy and government's lack of sincere initiative towards the demand of responsible government culminated at last in the form 'Quit Kashmir' movement. It started in May, 1946. Sheikh Abdullah, leader of the National Conference challenged the Dogra sovereignty in Jammu and Kashmir. He refused to accept Treaty of Amritsar and demanded its abrogation. The National Conference demanded the termination of the Dogra rule and the transfer of power to the people in the State. The State Government dealt with the movement with a stern hand and on 20th May, Sheikh

⁸³ *Supra* note 56 at 113-114.

⁸⁴ As quoted by sheikh mohammed Abdullah opening address to the Jammu and Kashmir Constituted Assembly on November 5, 1951, Srinagar, 1851, p.7.

Mohammad Abdullah was arrested while he was on his way to Delhi.⁸⁵ Other important leaders of National Conference were also arrested by the State Government and troops were deployed all over the major towns of the State. At many places the troops clashed with the demonstrators and opened fire on them.⁸⁶ The Congress leaders and the leaders of the States People's Conference criticized the State Government for its indiscreet policies.

Pandit Jawaharlal Nehru, one of the acknowledged leaders of the Congress, expressed his willingness to bring about a peaceful settlement of the trouble between the National Conference and the Government of Jammu and Kashmir. The Maharaja spurned the offer and advised him not to come to Srinagar. Notwithstanding Maharaja's express advice not to intervene, on 19th June 1946, Nehru reached Kohalla, a border outpost on the Rawalpindi - Srinagar road. Before he could cross into the State borders he was served with an order prohibiting him from entering the State. But Pandit Nehru decided to proceed. Late in the night, he was put under arrest at Domel, wayside station on the road to Srinagar thirty miles inside the border.⁸⁷ He was kept in detention for two days.⁸⁸ Maulana Abul Kalam Azad made a request to Maharaja Hari Singh for urgent release of Pandit Nehru and consequently he was released and he returned to Delhi. Within a month, the Quit Kashmir movement was suppressed by the ruthless repressive machinery of the government of Jammu and Kashmir. A case of sedition was instituted against Sheikh Abdullah and he was sentenced to imprisonment for nine years.

In August 1946, the State Government decided to hold elections to the Praja Sabha and in the last week of November, 1946 it issued a notification which fixed the date of January 4, 1947 for elections to the Sabha. Due to the repressive attitude of the government which aimed to undermine the National Conference, National Conference decided to boycott, the elections to the Praja Sabha. As the State of Jammu and Kashmir was passing through great political unrest, simultaneously changes of far reaching importance were on way in India.

⁸⁵ *Supra* note 56 at 114.

⁸⁶ *Supra* note 32 at 8.

⁸⁷ *Supra* note 56 at 116.

⁸⁸ Maulana Abul Kalam Azad, *India Wins Freedom* 148-149 (1959).

4 KASHMIR ACCEDES TO INDIA

4.1 The Advent of Cabinet Mission in India

The aftermath of the Second World War and the assumption of power by a Labour Ministry in England, brought about a change in the British policy towards India.⁸⁹ On 19 February, 1946, the Secretary of State for India, Pethick Lawrence, announced his government's decision to send a delegation of three Cabinet Ministers to India to find a solution for the problem of India and to review the relationship of the Indian Native Princess with the paramount power. The delegation popularly known as 'Cabinet Mission'⁹⁰ arrived in India on 23rd March, 1946. The cabinet Mission plan of 1946 was in fact, the first important statement of the British Government regarding the future of Indian States in an independent federal India.⁹¹

The Cabinet Mission Plan rejected the Muslim League's demand for Pakistan and proposed a federal union of India including British India and Indian states. The Plan envisaged a federal set-up of the country by grouping it in three parts called A, B and C and formation of a Constituent Assembly to frame the Constitution of a Free India.⁹² The Constitution was to be based on the principle that the centre would control only three subjects viz. Foreign Affairs, Defence and Communications, all other subjects were to be administered by autonomous provinces and States.⁹³

On 25.05.1946, the Cabinet Mission circulated a memorandum dated 12.05.1946,⁹⁴ in regard to the Native States. In this memorandum, the mission affirmed:

- (1) On the withdrawal of British Government from India, the relationship which had existed between the states and British India would no longer be possible and

⁸⁹ A.S. Anand, "Accession of Jammu and Kashmir State Historical & Legal Perspective", *Journal of the India Law Institute* Vol. 43, no. 4, p. 455 (2001).

⁹⁰ The cabinet mission consisted of Lord Pethick-Lawrence Sir Stafford Cropps and Mr. A.V. Alexander.

⁹¹ *Supra* note 46 at 133.

⁹² *Supra* note 33 at 5-6.

⁹³ *Supra* note 56 at 132.

⁹⁴ The memorandum was present on May 12, 1946. Therefore it came to be known as the 'memorandum of 12th May, 1946'. In fact, the memorandum was published and released on May 22, 1946 and was known as 'Memorandum on State's Treaties and Paramountty'.

“His Majesty’s Government will cease to exercise the power of Paramountcy”.⁹⁵

This meant that “the rights of the states which they use to exercise during the relationship with Crown had ceased to exist. All the rights surrendered by the States to the Crown were returned to the States.”⁹⁶

- (2) British Government could not and will not in any circumstances transfer Paramountcy to an Indian Government.⁹⁷
- (3) It also stressed that the political arrangements between the States on the one side and the British Crown and British India on the other will thus be brought to an end. The void will have to be filled either by States entering into a federal relationship with the successor Government or Governments in British India, or failing this, entering into particular political arrangements with it or them.⁹⁸

The Cabinet Mission, however, advised the rulers of the Native states to enter into negotiations with the successor government or governments and evolve a scheme of the precise form of their relationship.⁹⁹ The Cabinet Mission plan also laid down that pending the framing of new Constitution, the existing Executive Council of the Governor-General would be replaced by an interim Government composed of representatives of principal political parties.¹⁰⁰ But the Muslim League decided to boycott the Constituent Assembly and insisted on its demand for Pakistan.

On 20th February, 1947, His Majesty’s Government made an announcement¹⁰¹ to the effect that independence would be granted to British India.

4.2 Plan of June 3, 1947

As differences between the Congress and the Muslim League in Cabinet Mission Plan could not be resolved, on June 3, 1947, His Majesty’s Government made

⁹⁵ White paper on Indian States (Ministry of States, Government of India 1950), p. 15. The following explanatory note was issued by the cabinet mission in New Delhi on date of publication (22 May, 1946) It was that this document on States treaties and paramountcy was drawn up before the Mission began its discussions with party leaders.

⁹⁶ *Ibid.*

⁹⁷ Cmd. 6835, para. 20 as quoted by A.S. Anand, *Supra* note 2 at 58.

⁹⁸ *Id.* At 57.

⁹⁹ *Supra* note 70 at 456.

¹⁰⁰ *Supra* note 56 at 132 - 133.

¹⁰¹ Cmd. 7047 as quoted by A.S. Anand, *Supra* note 2 at 58.

another statement setting out its plan for the transfer of power. It provided for partition of British India into Dominions of India and Pakistan and declared that the British Government would relinquish power by 15 August 1947 and that the British Paramountcy would also lapse on that date.¹⁰² The plan provided that the Muslim majority areas in British India would constitute the Dominion of Pakistan and the Hindu majority areas would constitute the Dominion of India.

In this plan the position of the Princely States was dealt within a small paragraph which read:

His Majesty's Government wish to make it clear that the decisions announced above (about partition) relate only to British India and that their policy towards Indian States contained in the Cabinet Mission Memorandum of 12th may, 1946 (cmd. 6835) remains unchanged.¹⁰³

When implementation of the plan in the statement of June 3 commenced, as part of the partition machinery, the State Department was set up on 27 June, 1947, to deal with matters concerning States.¹⁰⁴

It was divided into two sections, one of which was to be headed by a Congress leader, the other by a Muslim League leader. V.P. Menon, who was to play a prominent role in securing the integration of the States with the Indian Union, was appointed by Sardar Patel as Secretary of his section.¹⁰⁵

The State Department - as the Political Department of the Government of India was renamed - finalized the drafts for the Instrument of Accession and the Standstill Agreement.¹⁰⁶ There were different kinds of Instruments of Accession and the Instrument of Accession containing provision for accession only on three subjects

¹⁰² *Supra* note 33 at 6.

¹⁰³ Cmd. 7136, para, 18 as quoted by A.S. Anand, *Supra* note 2 at 58.

¹⁰⁴ *Supra* note 76 at 32.

¹⁰⁵ *Id.* At 33.

¹⁰⁶ *Supra* note 33 at 7.

namely, Defence, Foreign Affairs and communication conceding residual sovereignty to the states applied only to 140 members of the Chamber of Princes.

The draft Standstill Agreement, which, inter alia, needed to tackle the economic and commercial vacuum which British India and Princely States would face on the lapse of Paramountcy, stated that “all agreements and administrative arrangements as to matters of common concern now existing between the crown and any Indian State should continue unless new arrangements in this behalf are made.”¹⁰⁷

In his statement of 4th June, 1947 Lord Mountbatten explained the position “that after the transfer of power, though the States were free to enter either Constituent Assembly or make such other arrangement”¹⁰⁸ as they deemed necessary, yet they could not enter the commonwealth separately as dominions.¹⁰⁹

4.3 Indian Independence Act, 1947

In order to complete necessary constitutional formalities and to facilitate independence, the British Parliament enacted the Indian Independence Act on 18th July, 1947¹¹⁰ which came into force from the appointed day i.e., from 15th August, 1947. Though nowhere did the Indian Independence Act, 1947 lay down that the Rulers should join any of the new Dominions¹¹¹ yet it was not practically possible for the States, especially small States, to remain as independent and sovereign States as many of them had no defence forces, no administrative experience and no means of communications of their own. Moreover the British Government refused to recognize the Indian Princely States as separate international entity.

¹⁰⁷ *Supra* note 76 at 173-174.

¹⁰⁸ Indian Annual Register, Vol. I, 4 June, 1947, pp. 72 – 73.

¹⁰⁹ The Under Secretary of State for India Sir Shawcross emphatically maintained in a speech that the British Government would not recognize any State as a separate international entity, and Prime Minister Attlee speaking on Independence Bill, hoped that no irrevocable decisions to stay out prematurely will be taken. Parliamentary Debates, House of Commons, Vol. 439, 1946-47, 23 June, 1947. *The Hindu*, 16 July, 1947.

¹¹⁰ The Bill was introduced in the House of Commons by the Prime Minister on July 4, 1947. The Bill received the Royal Assent on July 18, 1947.

¹¹¹ *Supra* note 32 at 24.

Later, Lord Mountbatten in his capacity as Crown Representative addressed the chamber of Princes on July 25, 1947. He stressed the urgency of the situation and advised them of make a link with either of the Dominions. He appealed to them (Princess) to join either Union before 15th August, 1947.¹¹²

Lord Listowel, the Secretary of State for India said in the House of Lords on July 16, 1947:

From that moment (when the Indian Independence Act comes into operation) the appointments and functions of the ground representatives and his officers will terminate and the States will be the masters of their own fate. They will be then entirely free to choose whether to associate with one or the other of the Dominion Governments or to stand alone, and His Majesty's Government will not use the slightest pressure to influence their momentous and voluntary decisions.¹¹³ The Paramountcy of His Majesty over the Indian States lapsed through this Act and they were free to join either of the two dominions or to remain independent. The sovereignty was to revert to the ruler and not to the people. The power to accede to either dominion was given to him and he was to sign the Instrument of Accession in exercise of his 'sovereignty in and over his State'.¹¹⁴ A state could exceed to either dominion by executing an Instrument of Accession signed by the Ruler and accepted by the Governor – General of the dominion concerned. In the Indian Dominion, the accession was to be made under section 6 of the Government of India Act, 1935, as adapted by section 9 of the Indian Independence Act, 1947.¹¹⁵

¹¹² (Bracket supplied). Patiala Archives Chamber, Section VII (A), 38 of 1947.

¹¹³ (Bracket supplied) House of Lords, Official Report, 150 H.L. Debate 5s, C. 812, cited in Clyde Eagleton, 'The case of Hyderabad before the Security Council' A. J. I.L. Vol. 44, pp. 282-283 (1950).

¹¹⁴ *Supra* note 22 at 59.

¹¹⁵ *Ibid.*

The State of Jammu and Kashmir like any other Native State had three alternatives viz., to assert complete independence, to accede to Pakistan or to accede to India. The Native states were to take a decision in respect of accession before 15th August, 1947. The day fixed for the transfer of power to take decision vested exclusively in the Ruler according to the British Government's declared policy.¹¹⁶ Hyderabad, Junagarh and Kashmir were the only States which did not sign the Instrument of Accession by August, 1957. The State of Jammu and Kashmir did not accede to either dominion by the 15th August, 1947. Maharaja Hari Singh failed to visualize the effect of withdrawal of Britishers and its consequences on the Princely order in India. In view of the peculiar problems, specially of Hyderabad and the State of Jammu and Kashmir¹¹⁷, the offer of accession was kept open to them even after 15th August, 1947.

5 KASHMIR'S ACCESSION TO INDIAN DOMINION

The State of Jammu and Kashmir did not accede to either dominion by the 15th August and so became independent as from that date. The then Prime Minister of the State of Jammu and Kashmir, Ram Chandra kak, was known to be an advocate of an independent Kashmir. The Maharaja Hari Singh was also supported on this issue by the Muslim Conference and it also assured the Ruler that he would be acclaimed as the first Constitutional King of a 'democratic and independent Kashmir'.

On 19th June, 1947, Lord Mountbatten arrived in Srinagar on a visit to the State. He remained there for four days and had long discussions with the Maharaja on the issue of accession. Mountbatten frankly told the Maharaja that the British Government would not recognize the State as a Dominion, and therefore, independence was not a feasible proposition for him to adopt.¹¹⁸ Lord Mountbatten persuaded the Maharaja to make up his mind to accede to one of the two Dominions before 15th August, 1947. He

¹¹⁶ *Supra* note 70 at 457.

¹¹⁷ *White Paper on Jammu and Kashmir* (Ministry of States, Government of India, 1949), J & K was the State where there was Hindu ruler and Muslim majority.

¹¹⁸ *Supra* note 56 at 155-156.

was also quoted as having told the Maharaja that he may accede to Pakistan if he wished in which case the States Department would not take it as an unfriendly act.¹¹⁹

He advice Maharaja to ascertain the wishes of his people in view of the composition of the population before taking any decision in regard to accession.¹²⁰ The Maharaja was, however, evasive and avoided to commit himself to any of the alternatives underlined by the Governor General.¹²¹ It is not known what inspired Lord Mountbatten to give such advice though it made the issue more complicated.

On 15th August, 1947, when India got its independence, most of the leaders of the National Conference and the Muslim Conference were in prison. When the people of the State saw that in India independence had come, they once again raised their heads and demanded the establishment of responsible government.¹²² Due to the lapse of British Paramountcy and consequent absence of British help in the State made it difficult now for Maharaja to counter any internal rebellion or external aggression. He disliked the idea of becoming a part of India, which was being democratized or of Pakistan, which was a Muslim.... He thought of independence.¹²³

5.1 Standstill Agreement

Three days before the transfer of power, the Maharaja of Kashmir sent two indetical telegrams to both India and Pakistan on August 12, 1947 in the following words:

Jammu and Kashmir Government would welcome Standstill Agreement with India/Pakistan on all matters on which there exist at the present moment with outgoing British India Government. It

¹¹⁹ V.P. Menon, *The Story of the Integration of the Indian States* 376 (19).

¹²⁰ 'Time Only to Look Forward': *Speeches of Earl Mountbatten*, pp. 268-269.

¹²¹ *Supra* note 56 at 156.

¹²² *The Khidmat*, Sept. 15, 1947.

¹²³ W.N. Brown, *The United States and India and Pakistan* 1625 (1953).

is suggested that existing arrangements should continue pending settlement of details and formal execution of fresh orders.¹²⁴

Nothing in this Agreement includes the exercise of any Paramountcy functions.¹²⁵ Pakistan immediately accepted the agreement on 15th August through telegraphic communication.¹²⁶ The Government of India replied to the Prime Minister of Kashmir:

Government of India would be glad if you or some other Minister duly authorized in this behalf could fly to Delhi for negotiating Standstill Agreement between Kashmir Government and Indian Dominion. Early action desirable to maintain intact existing agreements and administrative arrangements.¹²⁷

The Government of India did not accept the offer immediately as it wanted time to examine its implications.¹²⁸ Moreover, one of the reasons for not accepting the offer can be the general policy of the States Department not to sign Standstill Agreement until the Instrument of Accession had been signed by the Ruler of the State.¹²⁹ Whatever the reason, the absence of a formal agreement between India and the Maharaja was interpreted by the Pakistanis to mean that ultimately Kashmir would become a part of Pakistan.¹³⁰

After the acceptance of the standstill agreement by Dominion of Pakistan, private secretary to Mr. Jinnah visited Srinagar and “His Highness was told that he was an independent sovereign, that he alone had the power to give accession; that he need consult nobody, that he should not care for the National Conference or Sheikh Abdullah... that he need not delegate any of his powers to the people of the State and

¹²⁴ P.L. Lakhanpal, *Essential documents and notes on Kashmir Dispute* (1958).

¹²⁵ *White paper on J&K State* (Ministry of States, Govt. of India, 1948), p. 20.

¹²⁶ Secretary Govt. of Pak., Karachi to P.M. of J&K, Srinagar, dated 15/08/1947.

¹²⁷ *Supra* note 107 at 45.

¹²⁸ *Supra* note 102 at 376.

¹²⁹ In a conference 1 Aug., 1947, it was made clear to the rulers of Princely States by the Government of India that it had decided to execute standstill agreements with only those who had already signed the Instrument of Accession.

¹³⁰ Michael Brecher, *The Struggle for Kashmir* 23. (1953).

that Pakistan would not touch a hair of his head or take away an iota of his power”¹³¹ if he acceded to Pakistan.

The Muslim conference also changed its earlier stand and on September 22, 1947, a Convention of Muslim Conference workers formally asked for the State’s accession to Pakistan.¹³²

5.2 Pakistan’s Invasion

As the Maharaja fondled with hope of carving out an independent Kingdom for himself and to make it the Switzerland of the East – a complete neutral State,¹³³ he followed a policy of biding time and hoped to succeed by delay.

In the second week of August 1947, there occurred the Poonch revolt’ in the State of Jammu and Kashmir. Maharaja’s Government alleged that the revolt in Poonch was due to infiltration from Pakistan and the Pakistan Government charge the Kashmir Government with attacking the Muslim villages in the State.¹³⁴ On 4 September 1947, the British Chief of staff of Jammu and Kashmir State forced submitted a report to the State Government to the effect that on 2 and 3 September a band of about 400 armed Muslim residents mainly of Rawalpindi district in Pakistan was infiltrating into the State over the river Jhelum.¹³⁵ On receipt of this report the Prime Minister of Kashmir sent a prompt telegram to the Chief Minister of West Punjab on 4 September, conveying the information received with a request for prompt action.¹³⁶ The government of West Punjab denied the existence of these raids. In order to bring pressure on the Maharaja for the accession of Jammu and Kashmir with Pakistan, the government of Pakistan also violated the terms of the Standstill Agreement by blocking the supply of essential commodities to the State of Jammu and Kashmir. The action of Pakistan was similar to that of an economic blockade. This pressure was serious as it

¹³¹ Article of Anand, M.C. Mahajan, *Accession of Kashmir to India: The Inside Story 2* (1950).

¹³² *Supra* note 32 at 30.

¹³³ Sisir Gupta, *Kashmir – A Study in India – Pakistan Relations* 106.

¹³⁴ *Supra* note 108 at 6-13.

¹³⁵ Copy of a Report submitted by the Chief of the Staff J&K State forces, Major General Scott, on 4 September 1947 to the Deputy Prime Minister of the State.

¹³⁶ *Supra* note 108 at 6.

was not easy for Jammu and Kashmir to obtain the supplies of these commodities from India on account of difficulties of communications, and also because of the fact that India had not accepted the Standstill Agreement offered by the Maharaja.¹³⁷

In order to tackle the problem of infiltration faced by the State of Jammu and Kashmir on 3rd October, 1947, the Kashmir Prime Minister sent a telegram to the External Affairs Ministry Karachi, accusing Pakistan of deliberate refusal to supply essential commodities covered by the Standstill Agreement, and of armed raids from Rawalpindi, Jhelum and Sialkot.¹³⁸ Instead of stopping infiltration of its tribal forces into Kashmir frontier areas, the Government of Pakistan charged Kashmir's Maharaja with sending of Dogra gangs and non-muslim refugee into Punjab.

On 18th October, 1947 Government of Kashmir, through its telegram, which was sent simultaneously to the Prime Minister, Pakistan Dominion Karachi, and His Excellency the Governor – General, Pakistan, Karachi¹³⁹ again protested against the violations of the Standstill Agreement and continuous border raids. The telegram dated 18th October, 1947 also communicated:

If unfortunately this request is not heeded the Government (of Jammu and Kashmir)¹⁴⁰ fully hope that you would agree that it would be justified in asking for friendly assistance and oppose trespass on its fundamental rights.

This made Pakistan suspect that it might ask for assistance from India and accede to the Indian Dominion.¹⁴¹ More telegrams found their way to Kashmir and meanwhile the historic raid of the tribesmen through Pakistan took place on 21-22 October, after which attempts at negotiations were bound to fail and they did.¹⁴²

¹³⁷ *Supra* note 32 at 31.

¹³⁸ *Supra* note 108 at 7.

¹³⁹ *Id.*, p.9. Telegram dated 18 October sent to Premier, Pak Dominion, Karachi and his Excellency the Governor – General, Pak, Karachi.

¹⁴⁰ The Bracket supplied.

¹⁴¹ *Supra* note 56 at 161.

¹⁴² *Ibid.*

5.3 Negotiations for Accession with India

While Pakistan continued to build pressure on the State of Jammu and Kashmir by organizing infiltration and by imposing economic blockade so as to coerce it to accede to Pakistan, the Maharaja Hari Singh decided to release Sheikh Abdullah from jail. He took a qualified letter of apology from Sheikh Abdullah and released him on September 29, 1947. The Maharaja probably thought that the Sheikh Abdullah, the popular leader of the masses, would be able to arrest the dangerous developments taking place in the State. In the ensuing months, Maharaja's decision proved correct as the National Conference throughout the pension of disturbance due to its secular outlook, helped in the maintenance of peace and restored confidence among the people of Jammu and Kashmir.

As Pakistan thought that the State of Jammu and Kashmir would accede to India, on October 22 1947 hither to infiltrations and raids done from the territory of Pakistan got transformed into a full scale invasion from the north-west of Pakistan. On 22 October large bands of armed raiders entered Kashmir via Abbottabad road near Muzaffarabad¹⁴³ The remnants of the Dogra army, depleted and poorly equipped, offered dogged resistance to the raiders, who rolled on like an avalanche, killing thousands of Hindus and Sikhs and destroying everything that fell in their way.¹⁴⁴ Within a few days Pakistan mounted offensive all along the borders of the State of Jammu and Kashmir. The few Dogra battalions which were posted at the frontiers offered heroic resistance¹⁴⁵ and tried to hold the enemy's onrush but were over-run without much difficulty as prolonged resistance to well trained and well equipped invaders was not possible.

The tribal invasion by Pakistan caused great loss and devastation in Jammu and Kashmir. The raiders were fast approaching Srinagar, destroying and looting whatever came in their way.¹⁴⁶ As the State of Jammu and Kashmir was in imminent danger, Maharaja Hari Singh became more concerned about saving his State and its people from

¹⁴³ Id. at 164.

¹⁴⁴ *Supra* note 32 at 13.

¹⁴⁵ *Supra* note 56 at 164.

¹⁴⁶ *Supra* note 70 at 459.

devastation at any cost. He gave up his dream of independent State of Jammu and Kashmir and thought of accession. In the words of Panikkar- ... it was only as a last resort that the Maharaja approached the Dominion of India to accept the accession.¹⁴⁷

5.4 Invasion of Jammu and Kashmir by Pakistan

Even before the tribal invasion of October 22, 1947, Maharaja Hari Singh sent a request to the Government of India for arms assistance so as to counter the infiltrations and raids of State borders. But before any decision could be taken with the Government of India, State of Jammu and Kashmir had to face full scale invasion from the north-west of Pakistan. As the State forces were completely inadequate to meet the challenge and invaders were fast approaching Srinagar, on October 24, 1947, the Maharaja sent a frantic appeal to the Government of India for military help.¹⁴⁸ The request of Maharaja Hari Singh, seeking India's military assistance was considered on 25th Oct 1947.¹⁴⁹ At a special meeting of India's Defence Committee which was presided over by Governor General Lord Mountbatten himself.

The Defence Committee first considered the request of the Maharaja for arms and ammunition.¹⁵⁰ It was decided the help of arms and ammunitions should be given immediately. As far as the question of military help was concerned, no final decision was taken by the committee except to send V.P. Menon, the Secretary of the States Ministry, to Srinagar to study the situation on the spot and to report to the Government of India. Menon on his arrival in Kashmir discussed the situation with Maharaja Hari Singh and explained to him the constitutional position.¹⁵¹ Menon found the State in great distress, surrounded by raiders, who had reached up to Baramulla.¹⁵² At that time

¹⁴⁷ K.M. Panikkar, *A Study of Kashmir and Jammu 4* (1948).

¹⁴⁸ *Supra* note 32 at 32-33.

¹⁴⁹ On October 25, Sheikh Abhullah, the leader of the National Conference also flew to New Delhi to appraise the Indian Govt. of the gravity of the situation and to appeal personally for effective military aid.

¹⁵⁰ *Supra* note 56 at 165.

¹⁵¹ P.B. Gajendragadkar, *Kashmir: Retrospect and Prospect*.

¹⁵² *Supra* note 56 at 165.

if the raiders succeeded in maintaining the same pace advance as they had achieved, then it was not even safe for Maharaja, to stay in Srinagar.¹⁵³

He flew back to Delhi on 26 October where he pointed out the supreme necessity of saving Kashmir from the raiders.¹⁵⁴

Lord Mountbatten was, however of the opinion that the Indian troops should not enter into an independent country but should do so only when the State had acceded to India.¹⁵⁵ He feared that if the forces were to be sent without the accession of the State to India, Kashmir would become a battle ground between India and Pakistan.¹⁵⁶ The Defence Committee agreed that before military help could be extended to the State of Jammu and Kashmir, there should be an offer of accession by the Maharaja and its due acceptance by the Government of India.

Accordingly, V.P. Menon, accompanied by the Prime Minister of Kashmir, again rushed to Jammu where the Maharaja was staying. He explained to the Maharaja the difficulty in sending military help to the State without its accession to the Dominion of India. Due to the great emergency of the situation as it existed at that time in the State of Jammu and Kashmir, Maharaja had no alternative other than acceding to Dominion of India as he wanted to save his State at any cost. In the words of Maharaja-

Give army, take accession and give whatever power you want to popular party, but army first fly to Srinagar this evening otherwise I will go and negotiate terms with Mr. Jinnah as the city must be saved.¹⁵⁷

5.5 Accession of the State

On 26th October, 1947, Maharaja Hari Singh at last sent Instrument of Accession duly signed by him to Lord Mountbatten, the then Governor-General of India. The

¹⁵³ Menon advised Maharaja as the raiders had already reached Baramula, it would not be in the interest of His Highness to stay in the Capital. The Maharaja on his advice went to Jammu with his wife and son.

¹⁵⁴ V.P. Menon, *The Story of the Integration of the Indian States* 381.

¹⁵⁵ *Supra* note 56 at 165.

¹⁵⁶ *Supra* note 32 at 34.

¹⁵⁷ Mehr Chand Mahajan, "Facts on Kashmir – II" *Amrit Bazar Patrika*, June 9, 1957.

operative part of same read: Whereas, the Indian Independence Act, 1947, provides that as from the fifteenth day of August, 1947, there shall be set up an independent Dominion known as INDIA, and that the Government of India Act, 1935 shall with such omissions, additions, adaptations and modifications as the Governor-General may by order specify, be applicable to the Dominion of India;

And whereas the Government of India Act, 1935, as so adapted by the Governor-General provides that an Indian State may accede to the Dominion of India by an Instrument of Accession executed by the Rules thereof:

Now, therefore, I Shriman Indar Mahander Rajrajeshwar Maharajadhiraj Shri Hari Singhji Jammu Kashmir Naresh Tatha Tibbet adi Deshahpathi Ruler of JAMMU AND KASHMIR State in the exercise of my sovereignty in an over my said state do hereby execute this my Instrument of Accession....¹⁵⁸ The Instrument of Accession which was sent by Maharaja Hari Singh to Government of India was also accompanied by a letter written by Maharaja to Lord Mountbatten. The Maharaja by this letter of October 26, 1947 informed the Governor-General of India about the 'grave emergency' that had arisen in the State of Jammu and Kashmir which had left no option with him but to ask for help from the Indian Dominion. He also conveyed his decision for accession of his State with Indian Dominion and made a request for acceptance of Instrument of Accession which he had attached with his letter. In order to pacify the masses of his State and to appease Government of India, he also wrote in his letter-

I may also inform Your Excellency's Government that it is my intention at once to set up an Interim Government and ask Sheikh

¹⁵⁸ *Supra* note 22 at 358.

Abdullah to carry the responsibilities in this emergency with my Prime Minister.¹⁵⁹

Concluding the letter, Maharaja Hari Singh also urged-

If my State has to be saved, immediate assistance must be available at Srinagar¹⁶⁰

At the meeting of the Defence Committee on October 27, it was decided to accept the Maharaja's offer for the accession.¹⁶¹ Lord Mountbatten, the Governor-General of India indicated his acceptance in the following words:

I do hereby accept this Instrument of Accession.

Dated this twenty seventh day of October Nineteen Hundred and Forty Seven¹⁶²

The Governor-General, after accepting the Instrument of Accession, wrote a personal letter to the Maharaja in reply to his letter stating:

....my Government have decided to accept the accession of Kashmir State to the Dominion of India. In consistence with their policy that in the case of any state where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government's wish that, as soon as law and order have been restored in Kashmir and its soil cleared of the invader, the question of State's accession should be settled by a reference to the people.¹⁶³

¹⁵⁹ Id. at 357 (appendix III).

¹⁶⁰ *Ibid.*

¹⁶¹ *Supra* note 102 at 382.

¹⁶² *Supra* note 22 at 359 (appendix IV).

¹⁶³ For the text of the letter, See *select Document on Asian Affairs, India 1947-50*, Vol.I, *Internal Affairs*, Edited by S.C. Poplai, Oxford University Press, pp. 373-374.

Lord Mountbatten concluded the letter by expressing his and his government's satisfaction at the decision of the Maharaja to invite Sheikh Abdullah to form an Interim Government to work with his Prime Minister.¹⁶⁴

With regard to settlement of the question of accession, the statement of Lord Mountbatten by a reference to the people of the State, has emerged as a controversial feature of Kashmir's accession to India. The critics of the accession maintain that this stipulation has rendered the accession conditional and that the question of Jammu and Kashmir's accession has to be settled by a reference to the people of the State. However this view is not correct. The only documents relevant to the accession were the Instrument of Accession and the Indian Independence Act, 1947 and both the constitutional documents did not contemplate any conditions and therefore, there was no question of the accession being conditional.¹⁶⁵ In the words of M.C. Mahajan:

The Dominion's Governor-General had the power to accept the accession or reject the offer but he had no power to keep the question open or attach conditions to it....¹⁶⁶

He further observed:

Finality which is statutory cannot be made contingent on conditions imposed outside the powers of the statute. Any rider which militates against the finality is clearly ultra vires and has to be rejected.¹⁶⁷

So, the wish expressed by Lord Mountbatten could be at the most called as a sacred hope. It was a unilateral declaration of the existing policy of the Government of India to which Maharaja Hari Singh was never asked to agree.

¹⁶⁴ *Ibid.*

¹⁶⁵ *Supra* note 70 at 461.

¹⁶⁶ M.C. Mahajan, *Accession of Kashmir to India: The Inside Story* 19-20 (1950).

¹⁶⁷ *Id.* at 21.

That “wish”, therefore, had no legal effect.¹⁶⁸ Moreover, letter of Lord Mountbatten to Maharaja was not a part of the Instrument of Accession and thus, expression of wish did not create any binding obligation upon India.

The Instrument was signed and accepted in the same manner as was executed in the case of other Indian States, i.e., according to the provisions of Section 6 of the Government of India Act, 1935, as adopted by the Indian (Provisional Constitution) Order, 1947.¹⁶⁹ The contents and the form of the Instrument of Accession was similar to as adopted by the rulers of fully empowered States. Thus, the accession of the State of Jammu and Kashmir was final and irrevocable.¹⁷⁰

However, Pakistan refused to recognise the accession.¹⁷¹ It charged that the accession had been obtained by force. The official organ of Muslim League – Dawn, on 05/11/1947 from Karachi, quoted Mr. Liaqat Ali Khan saying:

We do not recognize this accession. The accession of Kashmir to India is a fraud, perpetrated on the people of Kashmir by its cowardly Ruler with the aggressive help of Indian Government.¹⁷²
In fact, there was no truth in the allegations made by Pakistan.

As rightly said by Lord Mountbatten in his reply to Mr. Jinnah in a meeting on 01/11/1947. The accession had indeed been brought about by violence, but the violence came from tribesmen, for whom Pakistan and not India was responsible.¹⁷³ There is no doubt about the legality of accession and as rightly said by Campbell-Jhonson- the legality of the accession is beyond doubt.... It should be stressed that the accession has complete validity both in terms of the British Governments and Jinnah’s expressed policy statements.¹⁷⁴ The State of Jammu and Kashmir acceded to Indian Dominion on three subjects – Defence, External Affairs, Communications and ancillary items. It did

¹⁶⁸ *Supra* note 70 at 461.

¹⁶⁹ *Supra* note 32 at 35-36.

¹⁷⁰ *Id.* at 42-43.

¹⁷¹ The recognition by either Dominion was not required for the legality of accession. The accession of the States was purely a matter between the State’s Ruler and the concerned Dominion.

¹⁷² *Supra* note 70 at 461.

¹⁷³ *Id.* at 462.

¹⁷⁴ Alan Campbell-Jonson, *Mission with Mountbaatten* 225 (1951).

not commit the Ruler to accept any future Constitution of India or fetter his discretion to enter into arrangements with the Government of India under any such future Constitution.

The Instrument of Accession left the residual sovereignty of the State entirely unaffected. Para 8 of the Instrument of Accession states:

Nothing in this Instrument affects the continuance of my sovereignty in and over this State, or save as provided by or under this Instrument, the exercises of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.¹⁷⁵

The Instrument of Accession also states that the terms of Instrument of Accession shall not be varied by any amendment of the Government of India Act, 1935 or of the Indian Independence Act, 1947 unless such amendment is accepted by an Instrument supplementary to this Instrument.¹⁷⁶

As the accession of the State of Jammu and Kashmir made it a part of Indian Dominion, it imposed an obligation on the Dominion of India to defend it by driving the invaders out of the State territory. On the morning of 27 October, 1947, first contingents of airborne Indian troops landed in Srinagar.¹⁷⁷ The same day the Indian troops also arrived at Jammu. The Indian army pushed back the raiders from a large part of the territories of the State occupied by them. However, with fresh reinforcement from Pakistan the raiders entrenched themselves in the districts of Muzaffarabad, Mirpur and Poonch, the Gilgit Agency and its Dardic dependencies and the greater part of Baltistan.¹⁷⁸

¹⁷⁵ *Supra* note 22 at 359 (appendix IV, para 8).

¹⁷⁶ *Ibid*, paara 5.

¹⁷⁷ *Supra* note 32 at 13.

¹⁷⁸ *Ibid*.

5.6 Pakistan's Reaction of Accession

After accession of the State of Jammu and Kashmir to Indian Dominion, the first task which Pandit Nehru did on 28th October 1947 was to telegraph the then Prime Minister of Pakistan, Mr. Liaquat Ali Khan stating:

The Government of India had no desire to intervene in the affairs of Kashmir after the raiders have been driven away. In regard to accession also it has been made clear that this is a subject to reference to people of State and their decision. Government of India have no desire to impose any decision and will abide by people's wishes. But these cannot be ascertained till peace and law and order prevail. Protection of Kashmir from armed raids thus becomes first objective and in this we trust we shall have your co-operation.¹⁷⁹

The Indian telegram of 28 October hoped that Pakistan would co-operate in ousting the raiders from Kashmir and to create conditions under which alone the commitment of a reference to the people could be carried out.¹⁸⁰ But Mr. Liaquat Ali Khan replied to Mr. Nehru on October 30, 1947 by his telegram in which he alleged:

Your recent action of sending troops to Kashmir on the pretext of accession has made things infinitely worse. The whole of the frontier is stirring and the feeling of resentment among tribes is intense. The responsibility of what is happening is entirely yours.¹⁸¹

After this reply, a war of allegations and counter-allegations started between Pakistan and India. The Indian Army during its operations against invaders discovered that invaders had the active assistance of Pakistan and their bases and sources of supply were located in Pakistan territory. In order to remove raiders completely out of the

¹⁷⁹ *Supra* note 108 at 48.

¹⁸⁰ *Supra* note 56 at 172.

¹⁸¹ *Supra* note 107 at 68.

territory of Jammu and Kashmir, it was necessary to attack their bases and sources of supply in Pakistan. So, on December 22, 1947 India warned Pakistan that unless Pakistan denied her assistance and bases to the invaders, India would be compelled to take such action.¹⁸² But Lord Mountbatten urged Nehru not to wage war against Pakistan as... embroilment in war with Pakistan would undermine the whole of Nehru's independent foreign policy and progressive social aspirations.¹⁸³

As the requests and warnings of Government of India to the Government of Pakistan to deny assistance and bases to invaders met with no response, Mr. Nehru on the advice of Lord Mountbatten, decided to lodge a complaint to the Security Council.¹⁸⁴

5.7 Jammu and Kashmir case in the Security Council

On 1st January, 1948, P.P. Pollai, representation of India to the United Nations, filed an official complaint to the President of the Security Council against Pakistan invoking Article 35 of the United Nation Charter.¹⁸⁵ Under Article 35, a member is entitled to bring before the Security Council a 'situation', which imperils international peace. So, India invoked Article 35 of the United Nations Charter as Pakistan's support to invaders had given rise to situation which imperiled international peace.

The Government of India appealed to the Security Council to ask the government of Pakistan:¹⁸⁶

1. To prevent Pakistan Government personnel military and civil, participating in or assisting the invasion of Jammu and Kashmir State;
2. To call upon other Pakistani National to desist from taking any part in the fighting in Jammu and Kashmir State;
3. To deny to the invaders:
 - a. Accesses to and use of its territory for operations against Kashmir;

¹⁸² High Commission of India, *Kashmir* 4 (1962).

¹⁸³ *Supra* note 157 at 256.

¹⁸⁴ *Supra* note 22 at 72.

¹⁸⁵ SCOR 1948, 20 meeting, p. 3, quoted *Supra* Note 56 at 175-176.

¹⁸⁶ United Nations Security Council Doaimen No. 5/628, dated 02.01.1948.

- b. Military and other supplies;
- c. All kinds of aid that might tend to prolong the present struggle.

On 15.01.1948, Pakistan Government delivered its reply to the Secretary General of the United Nations in which it emphatically rejects the Indian charges. The letter made counter charges against India. These amongst included¹⁸⁷:

1. A persistent attempt to undo the partition scheme;
2. A pre-planned and extensive campaign of genocide against the Muslims in East Punjab and Punjab Princely States;
3. The acquisition of Kashmir's accession by fraud and violence.

The result of the deliberations at the floor of the Security Council was the passing of various resolutions on different dates. The Security Council adopted a resolution on January 20, 1948¹⁸⁸ with the consent of India and Pakistan. It proposed the establishment of a Commission which was to act under the authority of the Security Council. It was unfortunate the Commission as agreed to, was not constituted. Though it constituted later on and this delay result in further deuteron of situation in the State Jammu and Kashmir.

On January 27, 1948, India and Pakistan submitted draft proposal to the President of the Security Council on the appropriate methods of solving the Kashmir Dispute.¹⁸⁹ It was in this proposal that India agreed to the holding of a plebiscite in Jammu and Kashmir as the ultimate determinant of Jammu and Kashmir States. The Indian representatives gave an impression on the floor of the Council that the accession was temporary and that the final status of Jammu and Kashmir was to be determined by plebiscite. It caused doubts in the minds of the members of the Security Council about the finality and legality of the accession. The resolution of April 21, 1948¹⁹⁰ was of immense importance and with this resolution, in accordance a Commission known as

¹⁸⁷ Id. No. 5/646 dated 15.01.1948

¹⁸⁸ Id. No. 5/654 of January 20, 1948

¹⁸⁹ Text in S/P.V. 236.

¹⁹⁰ SCOR, 646 meeting, 3 Dec., 1948, 5/726.

UNCIP¹⁹¹ was constituted to proceed 'at once' to the Indian sub-continent and to place its goods offices and mediation at the disposal of the Government's of India and Pakistan with a view to facilitate restoration of peace and order and to hold a free and impartial decide whether the State of Jammu and Kashmir would accede to India or Pakistan. The Commission was compared of Czechoslovakia, Argentina, Belgium, Colombia and the United States.¹⁹² The Commission proceeded to the sub-continent on July 5, 1948.

The Commission prepared a resolution which was adopted by the Security Council on August 13, 1948.¹⁹³ Out of all the resolution of Security Council, the resolution of 13 August 1948 was very important. It had three parts. The Part-I required a cease-fire between all forces under the control of India and Pakistan in the State of Jammu and Kashmir non-augmentation of the military potential on either side and the maintenance of a peaceful atmosphere conducive to further negotiations.

Under Part-II of the resolution after (i) the tribesmen and Pakistani Nationals has withdrawn, thereby terminating the situation represented in the Indian complaint to the United Nations¹⁹⁴ and after the Pakistani forces were being withdrawn, the Government of India was to withdraw Indian Forces in stages to be agreed upon with Commission. The Part-II of the resolution also contained that India would temporarily maintain within in the cease-fire line such forces which in agreement with the Commission were considered necessary to assist local authorities in the observance of law and order.

Part-II of the resolution visualized a method whereby the free will of the people of the State could be as curtailed in a peaceful manner.¹⁹⁵ So, the resolution of 13th August, 1948 which provided that Pakistani forces should be withdrawn first from the State and Indian forces were to be withdrawn subsequently impliedly proved the fact that the entry of Pakistan forces in the State was illegal. However, the Government of

¹⁹¹ United Nations Commission for India and Pakistan.

¹⁹² Czechoslovakia was selected by India on February 10, 1948, Argentina by Pakistan on May, 1948. Belgium, Colombia and the United States were nominated by Security Council on April 23, 1948, April 23, 1948 and May 7, 1948 respectively.

¹⁹³ 5/995 of August 13, 1948. s

¹⁹⁴ Kartar Singh, Kashmir and Imperialist Intervention 13-14 ()

¹⁹⁵ Supra note 56 at 178.

India accepted the resolution dated 13th August, 1948. On the other hand, Pakistan refused to accept the proposals contained in the resolution of 13th August, 1948 without certain reservations.

Thus, the first attempt of UNCIP to settle the issue failed and fighting in the State of Jammu and Kashmir continued which resulted in chaos and great devastation in the State. But one of the greatest achievement of the United Nations in its attempt to settle the Kashmir dispute was cease-fire between India and Pakistan which came into effect at one minute before mid-night on January 1, 1949.¹⁹⁶ Which was supplementary to the resolution of 13th August 1948 and contained elaboration of the principle embodied on Part-III of the resolution date 13th August, 1948 was eventually accepted by both the governments of Pakistan and India. Clearly the resolution of 5th January, 1949 could come to the stage of implementation only when the resolution of 13th August, 1948 was full implement¹⁹⁷. But the Commission failed to implement the resolutions of August 13, 1948 and January 5, 1949 as Pakistan refused to withdraw the forces which had fighting in the State of Jammu and Kashmir under the name of ‘Azad Kashmir’ forces as Pakistan claimed that these forces were not a part of Pakistan army. As Pakistan failed to carry out its obligation under Part –II of the resolution of August 13, 1948, India was in no way bound to discharge its obligation regarding plebiscite which were mentioned in Part-II of the above mentioned resolution, as the implementation of the obligations of Part III was to be made after the implementation of Part II of the said resolution. Has Pakistan withdrawn, at that time, its forces which were fighting in the State in the name of Azad Forces, India would have not denied the assurance of plebiscite which it had earlier given...¹⁹⁸

The UNCIP failed to settle the Kashmir issue altogether. Pakistan still occupies a large part of the State in the name of ‘Azad Kashmir’. Legally speaking, the

¹⁹⁶ Supra note 12 at 79.

¹⁹⁷ Supra note 56 at 178.

¹⁹⁸ Supra note 12 at 82.

Government of India has no constitutional power to reconsider the question of Kashmir's accession.¹⁹⁹

In the words of M.C. Mahajan the question of aggression alone falls within Security Council's competence. I donot see what constitutional power the Indian Government had to enter into such an agreement (regarding plebiscite) with Pakistan on the floor of the Security Council...²⁰⁰. As such it would seem that the undertaking given at the floor of the Security Council is wholly ultra vires the Independence Act and the Constitutional power of the two Dominions.....²⁰¹

The Supreme Court of India also in re Berubari Union Case²⁰² has observed that there is no provision in the Constitution of India which provides for cession of National territory. Moreover, Article 253 of the Constitution of India which deals with the power of Parliament to make laws for the whole or any part of the territory of India for giving effect to International Agreement, in its application to Jammu and Kashmir, is subject to following proviso.²⁰³

Provided that after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954²⁰⁴, no decision affecting the disposition of the State of Jammu and Kashmir shall be made by the Government of India without the consent of the Government of that State, so, according to the Constitution of India, Government of India cannot cede the State of Jammu and Kashmir without the consent of the Government of Jammu and Kashmir. No doubt, the Constitution of India can be amended to meet the requirements of changing times but it is submitted that even the amendment to the Constitution of India will not apply to the State of Jammu and Kashmir.²⁰⁵

¹⁹⁹ Supra not 2 at 74.

²⁰⁰ Supra not 114 at 19.

²⁰¹ Id. at 20.

²⁰² In re. Berubari Union (1960) 3SCR 250.

²⁰³ See the Constitution (Application to Jammu and Kashmir) Order, 1954.

²⁰⁴ C.O. 48, published with the Ministry of Law Notification No. S.R.O. 1610, dated the 14th May, 1954.

²⁰⁵ Proviso to clause (2) of Article 368 (in its application to the State of Jammu and Kashmir) read with clause (1) of Article 370, Constitution of India.

So, as the positions now stand, no cession of Indian Territory can take place without a Constitutional amendment.²⁰⁶ Even the State of Jammu and Kashmir cannot secede from the Union of India without an abrogation of the Constitution of India of Jammu and Kashmir, 1957.²⁰⁷

So, Constitutionally and legally, Government of India neither at that time nor even today have any power to give commitment for plebiscite before Security Council as it could lead to cession of national territory. Moreover, there is also no moral obligation on the part of the Government of India to hold a plebiscite in Jammu and Kashmir even if Pakistan now agrees to fulfil its obligations under the resolutions of security council as the offer once made cannot, in any case, stand for ever and these resolutions were not implemented during that time because Pakistan did not fulfil certain essential pre-conditions.²⁰⁸ So, it would indeed be a violation of the Constitution of India and the sovereignty and territorial integrity of India, if a question such as self-determination on the basis of a plebiscite is raised again.

5.8 Installation of Interim Government

Soon after accession, according to his promise made to Government to India, Maharaja Hari Singh instituted an Emergency Administration²⁰⁹ headed by Sheikh Mohammad Abdullah, as a step towards the realization of self-government in the State. The Maharaja presumed that Emergency Administration would function within the ambit of the authority his council of Minister earmarked for it and in subordination to the establishment of the Maharaja.²¹⁰ There was now “Dual Administration” in the State, i.e. one was of the Prime Minister and other of the Sheikh Mohammad Abdullah as Head of the Emergency Administration as instituted by Maharaja were neither defined nor the sphere of its authority specified. The Emergency Administration, as it was constituted, was a shoddy structure which was bound to lead nowhere. The

²⁰⁶ M.P. Singh, V. N. Shukla's Constitution of India 6.

²⁰⁷ The section 3 of the Constitution of Jammu and Kashmir which that the State of Jammu and Kashmir is and shall be an integral part of the Union of India, by virtue.

²⁰⁸ See *U.N. Monthly Chronicle*, November, 1976, p. 59.

²⁰⁹ Emergency Administration order No. 176-H of 1947 dated 30th October, 1947.

²¹⁰ *Supra* note 32 at 13.

Conference complained loudly that the Maharaja was reluctant. To part with any substantial authority and the Maharaja and his ministers protested that the Emergency Administration had usurped the authority, which did not rightfully belong to it.²¹¹

In November, the Government of India advised the Maharaja to appoint an interim Government under the leaders of Sheikh Mohammad Abdullah till a model of representative administrative institution was evolved.²¹² The Indian Government wanted Maharaja to adopt Mysore model for institution Interim Government in the State. The National Conference leaders did not approve of the *Mysore Model* as it reserved several subjects exclusively for the Maharaja and provided for the appointment of the Maharaja's Dewan as a member of the Council of Ministers to function as a link between the Ministry and the Maharaja.

To defuse the tension, a fresh scheme in regard to the formation of the Interim Government was sent to Maharaja Hari Singh by Mr. Gopaldaswami Ayyangar, a minister in the Indian Government who had served Maharaja Hari Singh as his Prime Minister from 1937 to 1943. *The Ayyangar Scheme* made certain modifications in Mysore model. The scheme envisaged non-inclusion of Maharaja Dewan in the Council of Ministers and permitted Maharaja to retain the power to place restrictions on the functions of the Council of Ministers by special directions in respect of certain matters of administration.²¹³ The Maharaja Hari Singh refused to accept the Ayyangar scheme and drew up fresh scheme for the institution of an Interim Government in the State. It demarcated certain reserved sphere of power for Maharaja and also envisaged the appointment of his Dewan to the Council of Ministers. But the National Conference conveyed its inability to accept the Maharaja's scheme.

Mr. Ayyangar agreed to reconsider the reservation of certain subjects for the exclusive control of the Ruler. The dispute was finally resolved and the interim government was instituted by a proclamation made by the Maharaja on 5th March, 1948. Sheikh Mohammad Abdullah was appointed the Prime Minister of the State. The

²¹¹ *Id.* at 14.

²¹² *Supra* note 56 at 167.

²¹³ Durga Das, *Sardar Patel's Correspondence*, Gopaldaswami Ayyangar to Maharaja Hari Singh, dated 9 Dec., 1947, p. 108.

Council of Ministers was to function on the principle of joint responsibility. But the dual interim government did not take long to run into trouble.²¹⁴ It ensued a tussle of power between national conference and Maharaja Hari Singh. The National Conference wanted to control the entire sphere of power showing scant regard to the powers reserved for the Maharaja. Unhappy with the situation Maharaja Hari Singh complained to the Government of India about the high-handedness of the Interim Government. This led to sharp reaction from Sheikh Mohammad Abdullah and he openly demanded Maharaja Hari Singh's abdication.

This was the time when the Government of India was under heavy pressure in the security Council.²¹⁵ So, in April 1949, Maharaja Hari Singh was advised by Sardar Patel to leave the State and make his son, Yuvraj Karan Singh, the Regent²¹⁶ of the State. Accordingly, Maharaja Hari Singh relinquished his office on 9th June, 1949²¹⁷ and by the proclamation of 20th June, 1949,²¹⁸ issued by Maharaja, transferred all his powers and functions with regards to the Government of the State of Yuvraj Karan Singh to be exercised by him during the period of Maharaja absence from the State.

5.9 The Proclamation of June 20, 1949

Whereas I have decided for reasons of health to leave the State for a temporary period and to entrust to Yuvraj Shree Karan Singh Ji Bahadur for that period all my powers and functions in regard to the Government of the State;

Now, therefore, I hereby direct and declare that all powers and functions, whether legislative, executive or judicial which are exercisable by me in relation to the state and its Government, including in particular my right and prerogative of making laws, of issuing proclamations, order and ordinances, of remitting, commuting or reducing sentences and of pardoning offenders, shall during the period of my absence from the State be exercisable by Yuvraj Shree Karan Singh Ji Bahadur.,

²¹⁴ *Supra* note 56 at 170.

²¹⁵ *Supra* note 32 at 16.

²¹⁶ *Supra* note 196.

²¹⁷ *Supra* note 56 at 171.

²¹⁸ *Supra* note 70 at 464.

6 CONCLUSIVE APPRAISAL

To sum up, it can be said that the then ruling Dogra dynasty in Jammu and Kashmir adopted anti-muslim policies and failed to reflect the will of the people of the State. It kept the public in a state of discontent and ultimately paved the way for State-wide agitation which started in 1931 and shaped the future of the State of Jammu and Kashmir to a great extent. The resultant political awakening of the people of the state made a considerable contribution to the promulgation of the Jammu and Kashmir Constitution Act, 193 It was a significant constitution a reform in the history of Jammu and Kashmir and gave the people in the State some opportunity to associate themselves with the administration of the state. The tribal invasion, Maharaja's independent kingdom for himself and the resultant failure on Maharaja part to decide the fate of the state of Jammu and Kashmir before 15th August 1947 and India's decision on the floor of the security council to hold plebiscite in Jammu and Kashmir so to finally settle the issue of accession are main reasons which made accession of the State of Jammu and Kashmir to India. Dominion a controversial one. All these circumstance status to the State of Jammu and Kashmir under article 370 of the constitution of India.
