CHAPTER - IV

SPECIAL STATUS TO JAMMU AND KASHMIR: ARTICLE 370

1 INTRODUCTION OF ARTICLE 370: A HISTORICAL VIEW

The genesis of the demand for the Constituent Assembly of India can be traced in the pronouncements of our revered nationalist leaders and the resolutions of the Indian National Congress. Demand for a Constituent Assembly as part of its official policy was made by the Indian National Congress in 1934.1 The demand for a Constituent Assembly was thereafter reiterated in a number of Congress resolutions.2

This demand was, however, resisted by the British Government until the outbreak of World War II when external circumstances forced them to realize the urgency of solving the Indian Constitutional problem.3 In 1940, the Coalition Government in England recognised the principle that Indians should themselves frame a new Constitution for autonomous India.4 In March, 1942, when the second world war was going on and Japanese were at the doors of India, the British Government issued a Draft Declaration containing the proposals on the future of India. For discussing the draft with the Indian leaders, British Cabinet sent Sir Stafford Cripps, a member of the War Cabinet to India. Though the negotiations between him and the nationalist leaders proved infurctuous, what is, however, significant is that Cripps accepted the idea that an elected body of Indians should frame the Indian Constitution.5 The British Government on March 11, 1942 declared to set up a Constituent Assembly to set up in India after the end of the Second World War to determine India’s Constitution.6 With the assumption of power by Labour Party in England, there was a definite change in the attitude of the British Government in relation to India. In the month of March, 1946, British

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1 H.R. Khanna, Making of India’s Constitution 5 (1981)
2 Ibid.
4 Ibid.
5 Supra note 1 at 6.
6 For the text of the declaration of the British Government, see Indian Constitutional Documents, Munshi Papers, Vol. II, p.5.
Government sent to India a Cabinet Mission to explore the possibility of an immediate settlement of the Indian problem. One of the avowed purpose of the Mission was to assist the Viceroy in setting up in India the machinery by which Indians could devise their own Constitution. The Cabinet Mission made its plan public on May 16, 1946. The plan laid down detailed provisions in relation to procedure for election of the future Constituent Assembly of India. In July 1946, the members of the Constituent Assembly were elected in accordance with the basis of the scheme of the Cabinet Mission Plan. It held its first sitting on the 9th December, 1946. But the Muslim League boycotted the Constituent Assembly. Muslim League demanded another Constituent Assembly for Muslim India. Signifying its acquiescence, on 26th July, 1947, the Governor-General announced the setting up of a separate Constituent Assembly for Pakistan. The representatives of Bengal, Punjab, Sind, North Western Frontier Province, Baluchistan and the Sylhet district of Assam (which had joined Pakistan by a referendum) now ceased to be members of the Constituent Assembly of India. As a result, there was a fresh election in the new provinces of West Bengal and East Punjab constituting Indian territory.

2 ABSORPTION OF PRINCELY STATES INTO THE INDIAN CONSTITUTIONAL STRUCTURE

During the reign of British Government, India consisted of two parts, i.e. British India and Indian India. The British India consisted of approximately two/third of the total area of the country divided into twelve provinces and it was directly ruled by British Government. Indian India which consisted of about 564 Princely States covered the remaining one third area of the country and contained one-fourth of its people. Although many States were insignificant, many were powerful. The larger States were financially self-sufficient, and at the time of independence forty-four had their own military forces. The British Government exercised paramountcy over Indian India. The paramountcy of the British Government over the Indian States lapsed through the Indian Independence
Act, 1947 and they were free to join either of the two independent Dominions namely India and Pakistan or to remain independent.

The problem of bringing the princely States into an Indian federation, bequeathed to the Assembly and the Union Government by the departing British, was one the British themselves had never been able to solve.\textsuperscript{12} As the Cabinet Mission projected a Union of India, embracing both British India were also invited to send their representatives to the Constituent Assembly. The maximum number of seats allotted to the Indian States in the Constituent Assembly was 93 out of the total strength of 385.\textsuperscript{13} By Independence Day, all the States, except Hyderabad, Kashmir, Junagadh, and two insignificant ones, had joined the Union, ceding as a minimum their authority over Defence, Communications and Foreign Affairs.\textsuperscript{14} The Covenants establishing the relationship between the Union and the various States and Unions of States, laid down that the States and Unions could convene their own Constituent assemblies and frame their own Constitutions.\textsuperscript{15} Though the Constituent Assemblies came into existence in the erstwhile Princely States of Mysore, Travancore and Cochin Union and Saurashtra but their functioning lacked direction.

On 25 October 1948, P. Govinda Menon of Cochin State moved in the Steering Committee that the Constituent Assembly should set up a committee to prepare a model Constitution for the State Constituent assemblies to follow.\textsuperscript{16} In November 1948, B.N. Rau was chosen to head the committee for preparing a model Constitution for the States. By mid-March 1949, the committee’s report in relation to model Constitution was ready. But a conference of the prime ministers of the States and Unions of States with official of the States Ministry decided on 19th May, 1949 that Constituent assemblies in the various States and Unions should not frame their own Constitutions on the basis of the model prepared by Rau, but that a Constitution for all the States and Unions should be included in a special chapter of the Constitution.\textsuperscript{17} Later on, by October, 1949, this scheme had also in turn become obsolete.

\textsuperscript{12} Granville Austin, \textit{The Indian Constitution-Cornerstone of a Nation} 245 (2005).
\textsuperscript{14} Supra note 12 at 250.
\textsuperscript{15} Id at 251.
\textsuperscript{16} Ibid.
\textsuperscript{17} Id at 252.
At last, the Constituent Assembly of India adopted a new article, i.e., Article 238 of the Constitution, which applied, with certain minor exceptions, the Constitution of the Provinces to the States. Patel summed up the reasons behind this change:

As... the States came closer to the centre, it was realized that the idea of separate Constitutions being framed for the different Constituent units of the Indian Union was a legacy of the Ruler’s polity and that in a people’s polity there was no scope for variegated Constitutional patterns.\(^{18}\)

The absorption of the former princely States in the Indian Constitutional structure came to its triumphant ending on 26 November 1949, the day the members of the Constituent Assembly signed the completed Constitution.

It was agreed between States and Union of States and Union Government that the acceptance and the ratification of the Constitution of India shall be made by the Raj Pramukh or the Ruler, as the case may be, on the basis of the resolution to be adopted by the Constituent Assembly of the Union (of States) or the State concerned where such a body existed.\(^{19}\) In those States and Unions where the Constituent Assemblies had not yet come into existence, the Raj Pramukh or the Ruler was to accept the Constitution. In those States and Unions where the Constituent Assemblies had not yet come into existence, the Raj Pramukh or the Ruler was to accept the Constitution.\(^{20}\) Thus, by November 1949, the Rulers and Raj Pramukhs had issued Proclamations making the Constitution of India operative in their States.

In this whole process of integration of Princely States with Indian and Kashmir was the only State which choose to act differently. Unlike all other Princely States which decided to adopt the Indian Constitution as a whole and merged themselves fully in the national mainstream, the State of Jammu and Kashmir expressed its inability before the Constituent Assembly to extend the contents of the Instrument of Accession till the Constituent Assembly of the State had taken a decision in the matter. The merger of

\(^{20}\) Ibid.
Junagarh State and later Hyderabad were also different in the process of accession with the Union.

2.1 Factors Responsible For Limited Absorption of Jammu And Kashmir Within Indian Constitutional Structure

With the accession of the State of Jammu and Kashmir to India, jurisdiction in matters of External Affairs, Defence and Communications was transferred to the Government of India and the Union Parliament was given power to make laws for the State for the purposes of those three matters only.\textsuperscript{21} In June 1949, the Yuvraj Karan Singh, on the advice of his Council of Ministers nominated four representatives to the Indian Constituent Assembly. They took their seats in the Assembly on June 16, 1949. But whereas all the other 564 Princely States decided to surrender all their residual autonomy to the Indian Union and accepted all the terms of the Indian Constitution in full, the State of Jammu and Kashmir decided to retain its autonomy, keeping the door open, however, for further integration if and when the Union and the State considered it fit according to circumstances.\textsuperscript{22}

So, even after execution of Instrument of Accession internal sovereignty over the State of Jammu and Kashmir remained with the ruler of the State as provided by clause 8 of the Instrument of Accession:

\begin{quote}
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 exercise 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\textsuperscript{23}
\end{quote}

This position is also reiterated by Supreme Court of Indian in the case of Prem Nath Kaul


\textsuperscript{23} Supra note 21 at 359.
V. the State of Jammu and Kashmir\textsuperscript{24} in which it observed:

We must, therefore, reject the argument that the execution of the Instrument of Accession, affected in any manner the legislative, executive and judicial power in regard to the Government of the State, which then vested in the Ruler of the State. Again, the Supreme Court of India in the case of Rehman Shagoo V State of Jammu and Kashmir\textsuperscript{25} said:

> When certain subjects were made over to the Government of India by the Instrument of Accession, the State retained its power to legislate even on those subjects so long as the State law was not repugnant to any law made by the Central Legislature:

Moreover, under clause (7) of the Instrument of Accession, the State of Jammu and Kashmir did not commit itself to the acceptance of any future Constitution of India nor fetter its discretion to enter into agreements with the Government of India under any such future Constitution.

So, the Government of Jammu and Kashmir did not accept the Constitution of India as a Constitution for the State.\textsuperscript{26} Even after accession to India Dominion, the State of Jammu and Kashmir continued to be governed by the Jammu and Kashmir Constitution Act, 1939\textsuperscript{27} The Government of India could not force the State to accept the Constitution for that would violate the agreed terms of the association of Kashmir with India.\textsuperscript{28} The State had voluntarily surrendered three matters only and the Government of India could not enlarge the sphere of its jurisdiction at its own discretion.\textsuperscript{29} So, whereas the Constitution of India laid down Constitutional provisions, not only for the former Provinces of British India but also for the other Princely States as full-fledged Constituent units of the Union, in the case of Kashmir, it had to make special provisions to cover that

\begin{itemize}
\item \textsuperscript{24} AIR 1959 SC 749.
\item \textsuperscript{25} AIR 1960 SCI.
\item \textsuperscript{26} Supra note 21 at 104.
\item \textsuperscript{27} Act XIV of Samwat 1996 (A.D.; 1939).
\item \textsuperscript{28} Supra note 21 at 104.
\item \textsuperscript{29} Ibid.
\end{itemize}
particular case. Considering that State of Jammu and Kashmir’s representatives (including Sheikh Abdullah) had insisted in the Constituent Assembly that their State’s relationship with India would be based only with on the terms of the Instrument of Accession and knowing it well that the Jammu and Kashmir’s question was hanging delicately in the United Nation Security Council and any attempt by India to coerce the State into a merger with the Constitution of India have raised hackles inter nationally – a situation which the Indian Government under Nehru’s leadership was temperamentally not attuned to, it was decided to have an interim arrangement in the Constitution of India regarding the State of Jammu and Kashmir. Accordingly, the draft Article 306-A was introduced in the Constituent Assembly and thereafter formally added to the Constitution of India as Article 370.

Dr. B.R. Ambedkar, proclaimed as the architect of the Indian Constitution, was apparently opposed to Article 306-A. After hearing Sheikh Abdullah patiently, Dr. B.R. Ambedkar told him:

You want that India should defend Kashmir, India should develop Kashmir and Kashmiri’s should have equal rights as the citizens of India but you do not want India and any citizen of India to have any rights in Kashmir. I am the Law Ministers of India. I cannot betray the interest of my country. It was then that Nehru asked Ayyanga to draft what was number Article 306-A. In the draft Constitution of India

The need and justification for making special provisions for Jammu and Kashmir came up for considerable discussion while drafting the Constitution. A reference to the

30 Ibid.
31 He was the Head of the Emergency Administration in the State. When the Emergency Administration was replaced by a popular Interim Government in accordance with the Proclamation of the Maharaja of the State of March 5, 1948, he was appointed by the Maharaja as the Prime Minister of the State with effect from March 1, 1948.
33 Id at 17.
34 Id at 17-18.
35 Ibid.
speech of Gopalaswami Ayyangar which was delivered by him on October 17, 1949 while moving

Article 370 (then Article 306-A) is quite illustrative:

Kashmir’s conditions are as I have said, special and require special treatment….. I shall briefly indicate what the special conditions are, in the first place, there has been a war going on within the limits of Jammu and Kashmir State.

There was a cease – fire agreed to at the beginning of this year and that cease-fire is still on. But the conditions in the State are still unusual and abnormal. They have not settled down. It is therefore, necessary that the administration of the State should be agreed to these unusual conditions until normal life is restored as in the case of the other States.

Part of the State is still in the hands of rebels and enemies. We are entangled with United Nations in regard Jammu and Kashmir and it is not possible to say now when we shall free from this entanglement. That can take place only when the Kashmir problem is satisfactorily settled.

Again the Government of India have committed themselves to the people of Kashmir in certain respects. They have committed themselves to the position that an opportunity would be given to the people of the State to decide for themselves whether they will remain with the Republic or wish to go out of it. We are also committed to ascertaining this will of the people by means of a plebiscite provided that peaceful and normal conditions are restored and the impartiality of the plebiscite could be granted.

We also agreed that the will of the people, through the Instrument of a

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36 Supra note 13 at 126.
Constituent Assembly, will determine the Constitution of the State as well as the sphere of the Union Jurisdiction over the State.

At present, the Legislature, which was known as the Prajasabha in the State is dead. Neither that Legislature nor a Constituent Assembly can be convoked or can function until complete peace comes to prevail in the State. We have therefore, to deal with the Government of the State which, as represented in its Council of Ministers, reflects the opinion of the largest political party in the State. Till a Constituent Assembly comes into being, only an interim arrangement is possible and not and arrangement which could at once be brought into line with the arrangements that exists in case of the other States… .

He also made the following argument in seeking support for his amendment on Article 306-A:

Till India became a Republic, the relationship of all the States with the Government of India was based on the Instruments of Accession. In the case of other Indian States, the Instruments of Accession will be a thing of the past in the new Constitution; the States have been integrated with the Federal Republic in such a manner that they do not have to accede or execute a document of accession for becoming units of the Republic. It would not be so in the case of Kashmir since that particular State is not yet ripe for this kind of integration due to special conditions prevailing in Kashmir.

Accordingly, draft Article 306-A was discussed in the Constituent Assembly and thereafter formally added to the Constitution of India as Article 370.

2.2 Proclamation by Yuvraj Karan Singh

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38 Ibid.
As the Constitution of India was soon to come into force, it was necessary to take measures for the enforcement of provisions of Constitution of India as applicable to the state of Jammu and Kashmir.\(^39\) Therefore, Yuvraj Karan Singh, Regent of Jammu and Kashmir; acting on the advice of his council of Ministers issued a proclamation on November 25, 1949, to the following effect:

Whereas with the inauguration of the new Constitution for the whole of India now being framed by the Constituent Assembly of India, the Government of India Act, 1935, which now governs the constitutional relationship between this State and the Dominion of India will stand repealed… .

I now hereby declare and direct that the Constitution of India shortly to be adopted by the Constituent Assembly of India shall, insofar as it is applicable to the State of Jammu and Kashmir govern the Constitutional relationship between this State and the contemplates Union of India and shall be enforced in this State by me, my heirs and successors in accordance with the tenor of its provisions;

That the provisions of the said Constitution shall, as from the date of its commencement, supersede and abrogate all other Constitutional provisions inconsistent therewith which are at present in force in this State.\(^40\)

The above proclamation stated that the Constitution of Indian shall 'in so far as it is applicable to the State of Jammu and Kashmir, govern the Constitutional relationship between the State and the Contemplated Union of India'.\(^41\) This may be interpreted to mean that only such provisions of the Constitution as are really applicable to the State of

\(^39\) On June 20, 1949, Maharaja Hari Singh had issued a proclamation by which he abdicated in favour of his son, Yuvraj Karan Singh. By virtue of this proclamation, Yuvraj Karan Singh was empowered to issue proclamations. The popular Interim Government established earlier continued to function even after the issue of the proclamation of June 20, 1949.

\(^40\) *White Papers on Indian States*, Appendix LIV, pp. 317-2

\(^41\) Supra note 13 at 125.
Jammu and Kashmir, shall be applied. Consequently, the Proclamation did not carry the Constitutional position any further than where it stood after and as a result of the execution of the Instrument of Accession by Maharaja Hari Singh. Thus, since the commencement of the Constitution, it is article 370 which governs the relationship between Union and State of Jammu and Kashmir.

Simply put, Article 370 provides that Parliament’s power to make law for the State shall be limited to those matters in the Union and Concurrent lists which, in consultation with the State Government, are declared by the President to correspond to matters specified in the Instrument of Accession and such other matters in these lists as the President may, with the concurrence of the State Government, by order specify. Similar provisions are made in Article 370 in relation to other articles of the Constitution of India.

So, in view of the clearly expressed reservation, the State even after the Proclamation of the Rule enjoyed sovereignty in all other matters which were possessed by it after the Instrument of Accession.

The various cognate reasons assigned for the inclusion of Article 370 indicate the fact that Constituent Assembly while making the provisions with respect to the State of Jammu and Kashmir acted very wisely. Article 370 was described in the Constitution as a “temporary provision” because the power to finalize the Constitutional relationship between the State and the Union of India had been specifically vested in the Constituent Assembly of Jammu and Kashmir which at that time had not come into existence.

The Constitution makers envisaged a transition period during which the Kashmiri’s would have an opportunity to experience the sort of life that they would have to leads as citizens of the Indian Union; only thereafter they would be able to make voluntary declaration whether or not they would like to get absorbed in the mainstream of

42 Ibid.
India’s national life.\textsuperscript{45}

The makers of the Constitution fully understood the reasons that made the relationship between India and Jammu and Kashmir tenous and what they could do to make it strong and perennial. So, Article 370 was incorporated as an integrating mechanism with a hope that in due course even the State of Jammu and Kashmir will become ripe for the same sort of integration as has taken place in the case of other States.\textsuperscript{46} By making special provisions for the State of Jammu and Kashmir, the Indian federal system has clearly proved the maxim advanced by Livingston which States:

Federations rise in response to definite set of stimuli.\textsuperscript{47} So, with the commencement of the Constitution of India the basis of the Constitutional relationship of Jammu and Kashmir with India were being changed from those create by the Instrument of Accession to the position under Article 370 of the Constitution of India.\textsuperscript{48}

3 DEFINING ARTICLE 370 OF THE CONSTITUTION OF INDIA

Jammu and Kashmir is a Constituent State of the Indian Union, but its Constitutional position, and its relations with the Central Government, somewhat differ from that of the other States.\textsuperscript{49} Article 370 is a special provision for amending the Constitution of India in its application to the State of Jammu and Kashmir. Since Article 370 is the sole repository of the Constitutional morality which has been governing the relationship with the State of Jammu Kashmir, it would, therefore, be pertinent to mention the ideals embodied therein.\textsuperscript{50} Article 370 of the Constitution of India reads as under:


(1) Notwithstanding anything in this Constitution

\textsuperscript{45} P.N. Bazaz, \textit{Kashmir in Crucible} 42 (1967).
\textsuperscript{46} Constituent Assembly Debates (Indi) Vol. X No. 10, pp. 423-427.
\textsuperscript{47} Livingston, S.W., “A note on the Nature of Federalism”. In Wildaskt, Aaron, ed. American Federation in Perspective, Boston: 1967, p. 36.
\textsuperscript{48} Supra note 21 at 106.
\textsuperscript{50} Avalilable at://indiankanoon.org/doc/1977650 (visited on May 31, 2012)
(a) the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir;

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

1) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for the State, and

2) Such other matters in the said Lists as, with the concurrence of the Government of the State, the President may be order specify.

51 Explanation: For the purposes of this article, the Government of the State means the person for the time being recognized by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in official under the Maharaja’s proclamation dated the fifth Day of March 1948; is substituted, namely.

In exercise of the powers conferred by this article the President, on the recommendation of the constituent assembly of the State of Jammu and Kashmir, declared that, as from the 17th day of November, 1952, the said Article 370 shall be operative with the modification that for the explanation in cl(1) thereof, the following explanation

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

51 In exercise of the powers conferred by this article, the president, on the recommendation of the constituent Assembly of the State of Jammu and Kashmir, declared that, as from the 17th day of November, 1952, the said Art. 370 shall be operative with the modification on that Explanation in Cl. (1) thereof, the following Explanation. Now :Governor by the Constitution (Application Second Amendment Order 1965(C.O 74 dated 24/11/1965.
(d) Such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order\textsuperscript{52} specify:

PROVIDED that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

PROVIDED FURTHER that no such order which relates to matters other than those referred in the last preceding proviso shall be issued except with the concurrent of that government.

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

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

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

3.1 **Inclusion of Article 370 under Part XXI**

When Article 370 was incorporated in the Constitution of India, it was included

\textsuperscript{52} See the Constitution (Application to Jammu and Kashmir) Order, 1954, published with the Ministry of Law Notification No. C.O. 48, dated the 14\textsuperscript{th} May, 1954, Gazette of India, Extraordinary, Part II, & 3, p. 821, as amended from time to time.
under Part XXI of the Constitution of India, it was included under Part XXI of the Constitution which was originally labeled as ‘Temporary And Transitional Provisions’ and Article 370 itself was dubbed as ‘Temporary provisions with respect to the State of Jammu and Kashmir’. By the Constitution (Thirteenth Amendment) Act 1962, the title of Part XXI of the Constitution was changed to ‘Temporary, Transitional And special Provisions, the word ‘Special’ being the significant addition to the previous title.53

Subsequent Constitutional amendments were enacted and added as ‘Special Provisions’ of one kind or other for various States of the Indian Union Part XXI, of the Constitution. However, Article 370 has continued under the ‘Temporary’ Status54 The word ‘temporary’ was included in the title to Article 370 as the State of Jammu and Kashmir had not notified its decision by that time as the Constituent Assembly in the State was yet to be constituted55 and the power to finalise the Constitutional relationship between the State and the Union of India had been specifically vested in the Jammu and Kashmir Constituent Assembly.56 The Constitution of India clearly envisaged the convening of a Constituent Assembly for the State of Jammu and Kashmir57 and also provides that whatever modifications, amendments or exceptions that might become necessary either to Article 370 or to any other Articles in the Constitution of India in their application to Jammu and Kashmir State were subject to the decision of that Assembly.58

3.2 Position of the State under the Original Constitution of India

Article 1 and the First Schedule of the Constitution enumerate the component units of the Indian Union. Before 1956 there were part A States, the former provinces, the part B States, the former princely States, and the Part C States, which were centrally administered areas and included the former Chief Commissioner’s provinces.59

Like other Indian States which survived as political units at the time of making of

53 Supra note 32 at 23.
54 Ibid.
55 Supra note 13 at 128.
56 Supra note 21 at 110.
57 Constituent of India, art. 370 (2).
58 Ibid.
59 There were also Part D States limited to the Andaman and Nicobar Island.
the Constitution of India, the State of Jammu and Kashmir was included as a Part B State in the First Schedule of the Constitution of India as it was promulgated in 1950. But all these categories of States were wiped out by the States Reorganization Act, 1956. The Constitution (Seventh Amendment) Act, 1956 which, implemented the changes 1956 which, implemented the changes introduced by the former Act, reorganized the States largely on the basis of the recommendations of the States Reorganization Commission. All references to Part B States were removed from the Constitution and the Princely States issue breathed its last. As a result of the Constitution (Seventh Amendment) Act, 1956 all the States of the Union were put in single category, the State of Jammu and Kashmir, being the fifteenth State included in the first Schedule of the Constitution.

4 ANALYSIS OF ARTICLE 370

4.1 The Prelude

Article 370 consists of three clauses out of which clause (1) of Article 370 consists of four sub-clauses from (a) to (d) words ‘Notwithstanding anything in this Constitution’ indicate that Article 370 has been given overriding effect. It applies without having to depend on any other provision of the Constitution of India for its enforceability. This prelude has been rarely used in the rest of the Constitution of India.

4.2 Article 370 (1) (a)

Article 370 (1) (a) says that the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir. Article 238 which applied with certain minor exceptions, the Constitution of the provinces to the States in part B of the First Schedule was not made applicable to the State of Jammu and Kashmir though the State of Jammu and Kashmir was also labeled as part B State under the Constitution of India as promulgated in 1950. In part B of the First Schedule were listed those erstwhile Princely States which had acceded to the Dominion of India but which had not been merged with

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60 Supra note 50.
61 Supra note 12 at 254.
62 Supra note 32 at 24-25.
any province or had not been reorganized into centrally Administered Areas.\(^{63}\) Hyderabad, Jammu and Kashmir, Mysore, Madhya Bharat, Patiala and East Punjab States Union, Rajasthan, Saurashtra, Travancore – Cochin and Vindhya Pradesh were included in Part B of the First schedule.\(^{64}\) Part VII was included in the Constitution of India, which contained only on article, i.e., Article 238 which provided internal Constitution of all Part B States. The provisions of Part VII of the Constitution provided that Part VI of the Constitution, which contained provisions for Part A States, corresponding to Governor’s provinces, would also apply to the Part B States, subject to certain modification and exceptions. But the State of Jammu and Kashmir was exempted from the application of Part VII of the Constitution as unlike other Indian States, the State of Jammu and Kashmir refused to accept the application of the Indian Constitution in its entirety.\(^{65}\) Moreover, having regard to the circumstances in which State acceded to India, Government of India declared that it was the people of the State of Jammu and Kashmir acting through their Constituent Assembly who could determine the Constitution of the State as well as the sphere of the Union jurisdiction over the State.

Later on, as discussed already, the States Reorganisation Act was passed leading to the enactment of the Constitution (seventh amendment) Act, 1956 which came into force on November 1, 1956. It repealed Part VII of the Constitution containing Article 238 which governed the relationship of Part B States with the Union of India. By the above Amendment Act, the First Schedule of the Constitution was substituted. The categories of the States which hitherto existed were abolished and the territories of India were divided into ‘the States’ and ‘The Union Territories’. The State of Jammu and Kashmir was placed in the category of ‘The States’.

So, the reference in clause (1) (a) of Article 370 to the non-application of Article 238 to Jammu and Kashmir State is superfluous today.\(^{66}\) But the consequential change in Article 370 has not been carried out. The implication of clause (1) (a) of Article 370 today is that the provisions of Part VI of the Constitution of India do not apply to the State of

\(^{64}\) Ibid.
\(^{65}\) Supra note 21 at 111.
\(^{66}\) Supra note 32 at 25.
Jammu and Kashmir which has its own Constitution.\textsuperscript{67}

\textbf{4.3 Article 370 Clause (1) (b)}

The essence of clauses (1) (b) (i) and (1) (b) (ii) combined is that laws of Parliament on matters in the Union List and the Concurrent List can be made for Jammu and Kashmir State only after ‘consultation’ with the State Government or after ‘concurrence’ of the State government depending on the subject matter of the law.\textsuperscript{68}

Clause (1) (b) of Article 370 refers to the legislative authority of Parliament over the State of Jammu and Kashmir. According to clause (1) (b) (i), Parliament has power to make laws on those matters in the Union list and the Concurrent list which correspond to matters already surrendered by Instrument of Accession. The elaboration of these subjects in terms of the entries in the two Lists is to be done by the President by Order in consultation with the State Government.\textsuperscript{69} The Instrument of accession (which was signed by Maharaja Hari Singh) on under para 3 laid down that the Dominion Legislature may make laws for the State only in those matters which are specified in the Schedule appended to the Instrument.\textsuperscript{70} In the Schedule, three major heads have been mentioned, viz., defence, foreign affairs and communications. Each of these broad heads has a number of items which were also listed in the Schedule.

Besides the three major heads, a number of ancillary matters have also been mentioned in the schedule appended to the Instrument of Accession. It was necessary to identify those items in the Union and Concurrent List which correspond to matters mentioned in Schedule appended to the Instrument of Accession and this task was left to the President to be performed by him in consultation with the State Government.\textsuperscript{71}

Clause (1) (b) (ii) of Article 370 provides that subjects, which are mentioned in Union list and concurrent list of the seventh schedule to the Constitution of Indian but

\textsuperscript{68} Arvind Lavakare, p. 25.
\textsuperscript{69} M.P. Jain, \textit{Indian Constitutional Law} 785 (2008)
\textsuperscript{70} Supra note 13 at 37. (Amphasis mine).
\textsuperscript{71} See \textit{supra} note 69.
which are not mentioned in the Schedule appended to Instrument of Accession, can be brought within the purview of Parliament only with the concurrence of the Government of Jammu and Kashmir which the President may by order specify. This provided for subsequent enlargement of the Union power if this were deemed necessary in the interest of the union or state.  

After this sub-clause follows an explanation of what the “Government of the State” meant viz. “Maharaja of Jammu and Kashmir acting on the advice of the Council of his ministers…” In 1952, the Constituent Assembly of Jammu and Kashmir, on the recommendations of the Basic Principle Committee abolished the hereditary rulership and substituted in its place an elected head, designated as Sadar-i-Riyasat  
Consequently, the president of India, on the recommendation of the Constituent Assembly of Jammu and Kashmir, modified the explanation as follows:

Explanation: For the purpose of this article the government of the state means the person for the time being recognized by the president on the recommendation of the legislative assembly of the state as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the council of ministers for the state for the time being in office.

Thus, by this amendment, the Government of India accepted the act of the Constituent Assembly of Jammu and Kashmir abolishing hereditary rulership and substituting an elected head of the State.

4.4 Article 370 Clause (1) (c)

Clause (1) (C) of Article 370 merely says that only articles of the Constitution of India which apply of their own force to the State of are Articles 1 and 370. This means to make the provisions of these two articles applicable to the State neither Presidential Order is necessary nor any consultation with the State Government is necessary. Article 1 defines the territory of India. Sub-clause (2) of Article 1 adds that the States shall be as

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72 Supra note 21 at 111.
73 Ibid.
74 Ministry of Law Order No. C.O. 44, dated 15\textsuperscript{th} November, 1952.
75 Supra note 67 at 321.
specified in the First Schedule. The first schedule mentions the State of Jammu and Kashmir. Thus the State of Jammu and Kashmir is part of territory of India. But it is Article 370 which makes Articles 1 applicable to Jammu and Kashmir State.\textsuperscript{76} This is not without legal significance and consequence.\textsuperscript{77} Mr. G.L. Nanda was, therefore, right in pointing out, as Union Home Minister on 4\textsuperscript{th} December, 1964 in the Lok Sabha that it would be “totally wrong to assume that with the repeal of the Article, all Constitutional provisions would automatically apply to Kashmir”\textsuperscript{78}

\subsection*{4.5 Article 370 Clause (1) (d)}

Clause (1) (d) of Article 370 and the two proviso appended thereto refer to other provisions of the Constitution. Whereas clause (1) (b) of Article 370 refers to the extent of legislative powers of the Union parliament over the State of Jammu and Kashmir, clause (1) (d) of Article 370 refers to such other provisions of the Constitution other than the legislative powers. Article 370 (1) (d) lays down that such of the other provisions of the Constitution of India can be applied to the State, subject to such exceptions and modifications, as the President may by order\textsuperscript{79} specify. Such an order may be issued by the president of India subject to the following conditions:

1. Where the order related to matters specified in the Instrument of Accession, consultation with the Government of Jammu and Kashmir is necessary;

2. Where the order relates to matters not specified in the Instrument of Accession, concurrence of the State Government is necessary.

Thus, the President under Article 370 (1) (d) is empowered to apply such other provisions of the Constitution, with the consultation or concurrence of the State Government as the case may be, to the State of Jammu and Kashmir and subject to such ‘exceptions’ and ‘modifications’ as he may by Order specify. The meaning of the expression ‘exception’

\textsuperscript{76} Supra note 32 at 28.
\textsuperscript{78} Ibid.
\textsuperscript{79} See the Constitution (Application to Jammu and Kashmir) order, 1954 (C.O. 48) as amended from time to time.
implies that than President could provide that a particular provision of the Constitution would not apply in relation to the State of Jammu and Kashmir. Thus, the President had been given power not to apply a particular provision of the Constitution altogether in that State.

The word ‘modification’ in Article 370 (1) (d) is to be given the widest amplitude. Thus, the President has power to vary, amend or modify a Constitutional provision, in any way he deems necessary, while applying it to the State.

The Supreme Court has refused to interpret the word ‘modification’ as used in Article 370 (1) (d) in any “narrow or pedantic sense”. In Puranlal Lakhanpal V. President of India and Others, Supreme Court observed:

We are therefore of opinion that in the context of the Constitution, we must give the widest effect to the meaning of the word “modification” used in Article 370(1) and in that sense, it includes an amendment. There is no reason to limit the word “modifications” as used in Article 370(1) only to such modifications as do not make any “radical transformation”.

Moreover, Article 370 authorises the President to modify a Constitution provision not only when it is applied to the State for the first time, but even subsequently after it has been applied. Article 370 is a special provision for amending the Constitution in its application to the State of Jammu and Kashmir. Article 370 is a special provision for amending the Constitution in its application to the State of Jammu and Kashmir. Article 368 does not curtail the power of the president under Article 370. But it may be noted that any amendment in the Constitution of India made in accordance with Article 368 could have no effect in relation to the State of Jammu and Kashmir unless applied by the

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80 Supra note 13 at 129.
81 See Puran Lal Lakhanpal V. President of India and Others, AIR 1961 S.C. 1519.
82 See Supra note 69.
83 AIR 1961 SC 1519.
85 See Supra note 69.
86 Ibid.
Order of the President under clause (1) of Article 370 with the concurrence of the State Government.\(^{87}\) Thus, Article 370 empowers the President to adapt the Constitutional provisions applied or to be applied to the State of Jammu and Kashmir in the light of the situation existing in the State from time to time.\(^{88}\) This is an flexible arrangement under which the Constitutional position of the State can be defined from time to time.\(^{89}\) Article 370 clearly recognises the special position of the State of Jammu and Kashmir as a Constituent unit of Indian Union.

### 4.6 Article 370 Clause (2)

Clause (2) of Article 370 provides that if the Government of Jammu and Kashmir gives its concurrence for the enlargement of the powers of the Union Parliament on matters which are not covered by schedule attached to Instrument of Accession or for an application of those provisions of the Constitution of India which do not correspond to the matters specified in Schedule attached to Instrument of Accession before the convening of the State Constituent Assembly, it should be placed before such Assembly for such decision as it may take thereon.

While the Jammu and Kashmir Constituent Assembly was on the anvil, there was only an Interim Government functioning in the State.\(^{90}\) Hence, it was a justified stipulation of this clause that concurrence given by the interim government was required to be placed before that Assembly for decision after that Assembly had been convened.\(^{91}\) Thus, in effect the power to extend the scope of the Union power or otherwise change the basis of relationship of Kashmir with India was vested in the Constituent Assembly of the State.\(^{92}\) The arrangement made under Article 370 was to continue until the Constituent Assembly of the State made a decision to the contrary.\(^{93}\) The framers of the Constitution presumed that the temporary provisions envisaged by Article 370 would last only for a


\(^{88}\) Supra note 69 at 786.

\(^{89}\) Ibid.

\(^{90}\) Supra note 32 at 29.

\(^{91}\) Ibid.

\(^{92}\) Supra note 21 at 112.

\(^{93}\) Ibid.
relatively short duration and their operation would hardly extend beyond the time the Constituent Assembly of the State would take to draft the Constitution of the State. In 1957, Constitution Assembly of the State was dissolved. Thus, Article 370 (92) has exhausted itself.

4.7 Article 370 Clause (3)

Clause (3) provides that with the prior recommendations of the Constituent Assembly of Jammu and Kashmir, the President may, by public notification declare that this Article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify. Since the Constituent Assembly of the State exists no more, Article 370(3) is no longer operative. Therefore, if any modification is to be made to Article 370 resource will have to be had to Article 368 regarding amendment of the Constitution.

The first para of clause (3) of Article 370 permits a mere executive notification to cease the operation of an Article of the Constitution or to restrict its operation in the country. Clause (3) of Article 370 is thus a revolutionary provision in a parliamentary democracy.

The continued application of article 370 was questioned in Sampat Prakash V. State of Jammu and Kashmir. In this case, it was argued the Article 370 could only have been intended to remain effective until the Constitution of the State was framed and thereafter it must be held to have become in effective with the result that any modification made by the President subsequent to the enforcement of the Constitution would be without the authority of law. This argument was rejected by the Supreme Court relaying basically on clause (3) of Articles 370. The court held that Article 370 can still be used to make orders thereunder despite the fact that the State’s Constituent Assembly has ceased to exist. It was found that since the Assembly had made no recommendation that Article

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94 Supra note 63 at 77.
95 Supra note 69 at 789.
96 Ibid.
97 Supra note 32 at 29
98 Ibid.
370 be abrogated, it should be held to be continuing in force because the situation that existed when this article was incorporated in the Constitution had not materially altered, and the purpose of introducing this Article was to empower the President to exercise his discretion in apply the Indian Constitution while that situation remained unchanged. It was held by supreme court in this case that Article 370 is a special provision for amending the Constitution in its application to the State of Jammu and Kashmir and Article 368 does not curtail the power of the president under Article 370.

In the light of the above supreme court verdict, one can say that perpetuating the wish of a political authority long after it was dissolved and leaving no other mechanism for change is an impossible proposition to accept for any Constitution in any democracy and where in the world.100

It follows from the above discussion of Article 370 that the State though an integral part of India, has a unique position in the Indian Union. The State of Jammu and Kashmir is the only State in the Union of India which negotiated the terms of its membership with the Union. With the incorporation of Article 370 the basis of the Constitutional relations of the State of Jammu and Kashmir with India changed from those created by the Instrument of Accession to the position under Article 370 of the Constitution of India.

5 THE CONSTITUTION (APPLICATION) TO JAMMU AND KASHMIR ORDER, 1950

The Constitutional position of the State has not remained static since it became a Constituent unit of Indian Union.101 It has been growing with time towards a closer association of the State with the Indian Union. The draft Article 306-A, which was renumbered as Article 370, was approved by the Constituent Assembly on 17th October, 1949. It was done just 40 days before the draft of the Constitution was given a final touch, by the signature of its President Dr. Rajendra Prasad on November 26, 1949.102 At the time of the commencement of the Constitution of India, only articles which applied to the

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100 Supra note 32 to 30.
101 Supra note 69 at 784.
State of Jammu and Kashmir on its own force were Article 1 and Article 370 of the Constitution of India. The application of the other Articles of the Constitution was to be determined by the President by issuing orders under the provisions of Article 370 of the Constitution.

In 1950, a need was felt to accommodate the State of Jammu and Kashmir in the newly formed Union so that the people of Jammu and Kashmir could decide their own destiny and future and fulfill their long awaited desire and legitimate aspirations.103

So, after adoption of the Constitution of India and its application to the State of Jammu and Kashmir pursuant to proclamation dated 25th November, 1949 and enforcement of the Constitution on 26th January, 1950,104 the first step towards the application of provisions of the Indian Constitution to the State of Jammu and Kashmir took place in 1950, when in exercise of the power conferred by clause (1) of Article 370, the President made the Constitution (Application to Jammu and Kashmir) order, 1950105 in consultation with the Government of the State of Jammu and Kashmir and specified the matters with respect to which the Union Parliament would be competent to make laws for the said State. The subject-matter of the Order related mainly to the elaboration of the subjects already specified in the ‘Investment of Accession’, but certain additions were also made.106 Two schedules also formed part of this order. The first schedule related to the jurisdiction of the Union Parliament over the State and enumerated the appropriate items in the Union list of the Seventh Schedule to the Indian Constitution.107 The power of Parliament to make laws for the State was limited to the matters specified in this schedule.108 Both the concurrent list and State list were not made applicable to Jammu and Kashmir. Moreover, anything not contained in the First Schedule was within the exclusive powers of the State of Jammu and Kashmir. As a result, the residuary powers of legislation which in the case of other States of India were vested in the Union, in the case

103 See Supra note 50.
105 C.O.10 dated 26th January, 1950. This order has been replaced by the President’s order of 1954, C.O. 48, dated 14th May, 1954.
106 Supra note 21 at 114.
107 Ibid.
108 Ibid.
of Jammu and Kashmir was to belong to the State.

The second schedule contained the provisions of the Constitution which in addition to Article 1 and Article 370 were to apply in relation to Jammu and Kashmir. As it was then only 10 of the 22 parts of the Constitution were shown as applicable to the State with significant exceptions and modifications. 109

The Constitutional relationship of the State in the Union immediately after the inauguration of the Constitution of India was to be governed by the Order of 1950. 110 Evidently, this arrangement left a lot of autonomy with the State Government of Jammu and Kashmir. Later on, this order was superseded by the Constitution (Application to Jammu and Kashmir) Order, 1954. 111

6 CONVENING OF THE CONSTITUENT ASSEMBLY FOR THE STATE OF JAMMU AND KASHMIR

The ‘New Kashmir Programme’ of the National Conference, which spearheaded the freedom movement against the authority of Maharaja, envisaged a National Assembly for the State of Jammu and Kashmir and attachment of the people with the perception was so will recognized that even in the declaration of 5th March, 1948 112, which was proclaimed by Maharaja of Jammu and Kashmir, there was reference to the future democratic Constitution of Jammu and Kashmir. The above-mentioned proclamation contained the following paragraph:

“My Council of Ministers shall take appropriate steps, as soon as restoration of normal conditions have been completed, to convene a National Assembly based upon adult suffrage, having due regard to the principle that the number of representatives from each voting area should, as far as practicable, be proportionate to the population of that area.”

109 Supra note 22 at 168.
110 Supra note 21 at 121.
111 C.O. 48, published with the Ministry of Law Notification.
112 Supra note 104 at 41.
The Convening of Constituent Assembly for the State of Jammu and Kashmir was also essential for the following reasons:

(1) To frame the Constitution of Jammu and Kashmir for the internal administration of the State as Article 238 was not made applicable to the State of Jammu and Kashmir.

(2) Article 370 (2) also envisages the convening of the Constituent Assembly and prescribes that if the concurrence of the Government of the State required by the relevant sub-clauses of clause (1) has been given before the Constituent Assembly for the purpose if framing the Constitution of the State in convened such concurrence shall be placed before such Assembly for such decision as it may take thereon. So, it was made essential by Article 370 (2) that such of the legislative powers of parliament and such of the other provisions of the Constitution of India which do not fall within the terms of the instrument of Accession shall not apply in relation to Jammu and Kashmir expect with the final concurrence of the Jammu and Kashmir Constitutional Assembly.

(3) Article 370 provides an interim and temporary arrangement between Indian Union and State of Jammu and Kashmir. As already discussed, clause (3) of Article 370 provides that with the prior recommendation of the Constituent Assembly of Jammu and Kashmir, the President may, by public notification, declare that this Article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify. It makes it clear that power to finalize the relationship was given to Constituent Assembly of the State which could decide whether to remain a part of Republic of India or opt to go out of it. The need to convene a Constituent Assembly was not only a necessity for the State Jammu and Kashmir but also essential so as to finalise the relationship of Indian Union with the State of Jammu and Kashmir.

The General Council of the All Jammu and Kashmir National Conference passed a resolution on 27th October, 1950 asking for the convening of a Constituent Assembly for the State.113 So, keeping in mind the public sentiment for the creation of the Constituent Assembly...

113 Supra not 21 at 121.
Assembly for the State, realizing the fact that the convening of the Assembly could no longer be delayed without detriment to the future well being of the State, Yuvraj Karan Singh issued the proclamation for convening of the Constituent Assembly for the State on 1st May, 1951. The elections the Assembly were completed by August of the same year and on 31st October, 1951, the first meeting of the Assembly was held in Kashmir. In his inaugural speech in the State Constituent Assembly on 5th November, 1951, Janab Sheikh Mohammad Abdullah, the then Prime Minister of Jammu and Kashmir listed the main objects and functions of the Constituent Assembly as follows:

(a) Devising the Constituent for the future governance of the country.

(b) To decide about the future of the Royal dynasty since on the decision depended the future form and the character of the State.

(c) To decide whether compensation should be paid to the land owners for the expropriation of the Big Landed Estates under the Big Landed Estates Abolition Act which was enacted on 17th October, 1950;

(d) To declare its reasoned conclusions regarding accession and the future of the State. He enumerated these alternatives: accession to India; accession to Pakistan or complete independence.

The various committees were formed and the Assembly turned to its tasks. It took the following major decisions:

(a) On the recommendations of the ‘Land Compensation Committee’, no compensation should be paid for the expropriation of the Big Landed Estates.

(b) The resolution on the State’s Flag was adopted on 7th June, 1952.

(c) The Constituent Assembly adopted the Interim Report of the basic Principles
Committee and accepted the recommendations contained therein on 12th June, 1952. It contained the following recommendations:


(2) The Institution of hereditary Rulership shall be terminated.

(3) The office of the Head of the State shall be elective with these decisions, two functions of the Assembly were complete, the future of the Royal dynasty and compensation to the landowners. In 1956, the Drafting Committee presented the Draft Constitution which after discussion, was finally adopted on November 17, 1956 and given effect to from 26th January, 1957. The State of Jammu and Kashmir thus acquired the distiction of having a separate Constitution for the administration of the State, in place of the provisions of Part VI of the Constitution of India which govern all other States of the Union.

Significantly, the State Constituent Assembly made no recommendation for abrogating Article 370. Therefore, the operation of Article 370 still exists and assumed a permanent character. The Constituent Assembly of Jammu and Kashmir did not decide to remain as an independent and sovereign State. The Constitution of Jammu and Kashmir therefore, explicitly laid down under section 3 that “the State of Jammu and Kashmir is and shall be an integral part of the Union of India”. This suggests that the State became a part and parcel of the Indian Union in spite of the fact that the executive and legislative powers of the State extended to all matters except those with respect to which Parliament had power to make laws.....

The new Constitution of Jammu and Kashmir marked a complete change from the past monarchial form of government to a parliamentary, removable and elected executive.

121 Supra note 21 at 123.
122 Supra note 50 at 26.
123 Ibid.
124 Supra note 13 at 133.
With the installation of popular interim government by virtue of the proclamation dated 5th March, 1948, issued by Maharaja Hari Singh, a need was felt to carry out certain amendments in the Jammu and Kashmir’s Constitution Act, 1939\textsuperscript{125} which was the Constitution for the State even after the State’s accession with the Indian Union till the commencement of the Constitutions of Jammu and Kashmir, 1957. In order to make Government of the State more democratic and people oriented and to nut the changed scenario, certain amendments were carried out in the Jammu and Kashmir Constitution Act, 1939. The first amendment was carried out by Yuvraj Karan Singh by enacting Jammu and Kashmir Constitution (Amendment) Act, 2008 \textsuperscript{[Act XVIII of 2008 (A.D.1951)]}. Some of the important changes brought about by the Jammu and Kashmir Constitution (Amendment) Act, 2008 (A.D. 1951) were;

(a) It delegated the power of legislation to the Constituent Assembly of the State.

(b) Section 5 of the Jammu and Kashmir Constitution Act, 1939 related with the inherent powers of His Highness was omitted. So, there were no longer any inherent power of legislation vested in Yuvraj Karan Singh, who was acting as the Ruler of the State in the absence of his father Maharaja Hari Singh.\textsuperscript{126}

(c) A new section 7 was substituted in place of earlier section 7 which made Council of Ministers collectively responsible to the Legislative Assembly of the State in place of His Highness. This amendment was of great importance as it converted an absolute monarch into a Constitutional head.

(d) The power of the Council of Ministers to make rules for the procedure in the Praja Sabha as given under section 12 of the Act of 1939 was omitted and the power to make rules and standing orders was transferred to the Legislative Assembly.\textsuperscript{127}

(e) With the application of the Constitution of India vide the Constitution (Application to Jammu and Kashmir) Order, 1950; there was a need to redefine the Legislative

\textsuperscript{125} Act XIV of Samwat 1996 (A.D.1939).
\textsuperscript{126} Supra note 21 at 130.
\textsuperscript{127} Act XVIII of 2008 (A.D. 19510), section 11(3).
Assembly of the State as given in the Jammu and Kashmir Constitution Act, 1939. So, the amendment redefined it as:

Subject to the provisions of this act, the Legislative Assembly may make laws for the whole or any part of the State and for the State Subjects, whenever they may be, except in regard to those matters enumerated in list I in the Seventh Schedule to the Constitution of India with respect to which the Parliament of India has power to make laws for the State.

Thus, the Legislative Assembly was now given the power to legislate on all matters including reserved matters also as mentioned in section 24 of the Jammu and Kashmir Constitution Act, 1939 subject only to the restrictions imposed in it by the Constitution of India. Henceforth, section 24 was omitted by the Amendment Act of 1951.

8 DOGRA DYNASTY ABOLISHED

In 1952, the next Amendment Act was passed by the Constituent Assembly acting of Jammu and Kashmir and was styled as The Jammu and Kashmir Constitution (Amendment) Act, 2009 [Act XV of 2009 (A.D. 1952)]. The basic reason for the passing of this Act was the historic decision of the Constituent Assembly\footnote{As already discussed, the Constituted Assembly of Jammu and Kashmir adopted the Interim Report of the Basic Principles Committee on 12th June, 1952 which contained the recommendation for the termination of the institution of hereditary rulership.} to abolish the Dogra dynasty, which has ruled the State of Jammu and Kashmir for about 100 years since 1846.\footnote{Supra note 21 at 132.} By this Amendment Act, Schedule I of the Constitution Act, 1939, was replaced by another Schedule containing the provisions with regard to the Head of the State.\footnote{Ibid.} It provided that the Head of the State which was now designated as Sadar-i-Riyasat shall be elected by the State Legislature and recognized by the President of India. He shall hold office for a term of five years from the date he enter upon his office.\footnote{Ibid.}

The Government of India accepted this position by making a declaration of the
President under Article 370 (3) of the Constitution of India on 15th November, 1952\textsuperscript{132} to the effect that for the purposes of Article 370, Government of the State of Jammu and Kashmir means “the person for time being recognized by the President on the recommendation of Legislative Assembly of the State as the Sadar-i-Rayasat\textsuperscript{133} of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office”

9 JAMMU AND KASHMIR CONSTITUTION (AMENDMENT) ACT, 2011 [ACT XLVII OF 2011 (A.D. 1954)]

Jammu and Kashmir Constitution Act, 1939 was again subjected to amendment in 1954 by the Jammu and Kashmir Constitution (Amendment) Act, 2011.\textsuperscript{134} This was the amendment Act to Constitution of 1939. The Amendment Act came into force on 17th May, 1954, the same day on which the Constitution (Application to Jammu and Kashmir) Order, 1954 was issued by the President of India.\textsuperscript{135} Some of the important changes introduced by this Amendment Act were;

(1) Section 75 of the Jammu and Kashmir Constitution Act, 1939 which made the Council of Ministers the final interpreter of the Constitution was deleted from the Constitution.\textsuperscript{136}

(2) His Highness’s Board of Judicial Advisers\textsuperscript{137} was abolished and all appeals and proceedings pending before the Board were transferred to the Supreme Court of India\textsuperscript{138}

(3) New provisions with regard to the ‘permanent residents’ were introduced and the term ‘State Subject’ was omitted.\textsuperscript{139}


\textsuperscript{133} New “Governor” by the Constitution (Application to Jammu and Kashmir) Second Amendment Order 1965 (C.O. 74 dated 24.11.1965).

\textsuperscript{134} Act XLVII of 2011 (A.D. 1954).

\textsuperscript{135} Supra note 21 at 133.

\textsuperscript{136} Ibid.

\textsuperscript{137} See, section 71 of the Jammu and Kashmir Constitution Act, 1939.

\textsuperscript{138} Supra note 21 at 133.

\textsuperscript{139} Ibid.
The Amendments Acts as referred to above were passed so as to meet the needs of changed conditions in the State of Jammu and Kashmir. Some of the amendments were carried to achieve the objectives enunciated in the ‘New Kashmir’ plan and some of the amendments were carried keeping in view the changing Constitutional relationship of the State of Jammu and Kashmir with Indian Union. The Constitution Act, 1939 with these various amendments served as the ‘Interim Constitution’ of the Jammu and Kashmir State till, it was repealed by the section 157 of the Constitution of Jammu and Kashmir in 1957.

10 THE DELHI AGREEMENT 1952

Between the 1952 to 1957 when the Constituent Assembly of Jammu and Kashmir was busy in making the Constitution for the State, certain important matters relating to the relationship of the State with the Union were addressed simultaneously. As discussed already the acceptance of the Basic Principles Committee report on 12th June, 1952 by the Constituent Assembly of Jammu and Kashmir which recommended that hereditary Rulership shall be terminated and office of the Head of the State shall be elective, made it necessary to make corresponding adjustments in the Constitution of India also. Moreover, the fact that the State of Jammu and Kashmir was the Constituent unit of the Union of India led to the necessity to finalize the position of the State in regard to certain important issues like Residuary powers, Citizenship, Fundamental rights, National Flag, Emergency provisions etc. It was in this background, discussions were held between the representatives from the State and their Union Government which ended in an historic agreement between Pt. Jawahar Lal Nehru and Sheikh Abdullah known as ‘Delhi Agreement’. Its terms were announced by Pt. Jawahar Lal Nehru in Lok Sabha on 24th July, 1952140 and in the Rajya Sabha on 5th August, 1952.141 The terms of the agreement were explained to the Constituent Assembly of Jammu and Kashmir by the State’s Prime Minister Sheikh Mohammad Abdullah on August 11, 1952.142 The main features of this agreement were;

142 Supra note 104 at 200-219.
(1) It was agreed that while the residuary powers of Legislation vested in the Centre in relating to all other States but of Jammu and Kashmir these vested in the State itself and should continue as such.

(2) In accordance with Article 5 of the Constitution of India, persons who have their domicile in Jammu and Kashmir shall be regarded as citizens of India. It was further agreed that the State Legislature shall have power to make laws for conferring special rights and privileges on the ‘State Subjects’ in view of the State Subject Notifications of 1927 and 1932.\textsuperscript{143}

(3) The fundamental rights, which are contained in the Constitution of India could not be conferred on the residents of Jammu and Kashmir State in their entirety. The need for providing suitable modifications, amendments and exceptions as the case may be in the Fundamental Rights Chapter of the Constitution of India in its application to the State was admitted. The question which remained undermined was whether the Chapter of Fundamental Rights should form part of the Constitution of Jammu and Kashmir or that of Union Constitution.\textsuperscript{144}

(4) It was agreed that the Supreme Court of India should have original Jurisdiction in respect of dispute mentioned in Article 131 of the Constitution of India in regard to fundamental rights which would be agreed to by the State.

(5) For historical and other reasons connected with the freedom struggle in the State, the need for the continuance of the State Flag was recognized. It was also recognized the flag would occupy supremely distinctive place in the State of Jammu and Kashmir as in the rest of India.

(6) The power to grant reprieves, pardons and remission of sentences etc should also vest in the President of India.

(7) The Government of India appreciated the principle proposed by the Basic Principles Committee as adopted by the Constituent Assembly of the State in regard to the

\textsuperscript{143} Notification No. 1-L/84, dated 20\textsuperscript{th} April, 1927 read with State Notification No. 13/L, dated 27\textsuperscript{th} June, 1932.

\textsuperscript{144} It was later on determined in 1954.
abolition of the hereditary rulership of the State. It was mutually agreed upon that the Head of the State should be the person recognized by the President of India on the recommendation of the Legislature of the State and should hold office during the pleasure of the President of India.

(8) Article 352 empowering the President to proclaim a general emergency in the State would apply to the State of Jammu and Kashmir with the condition that in regard to internal disturbance, it would apply to the State at the request or with the concurrence of the Government of the State.

(9) In regard to financial integration it was agreed that it would be necessary to evolve some sort of financial arrangement between the State and the Indian Union. The arrangements had to be gradually worked out.

(10) It was agreed that Article 324 which already applied to State in so far as it relates to elections to Parliament and to through the Constitution (Application to Jammu and Kashmir) Order, 1950 would continue to be applicable to the State. The Jammu and Kashmir Constituent Assembly discussed this arrangement and finally adopted a motion of approach on August 21\textsuperscript{st}, 1952\textsuperscript{145}

The agreement was discussed in the Union Parliament on August 7, 1952 and accepted.\textsuperscript{146} After the perusal of the main features of the Delhi Agreement It is clear that the State of Jammu and Kashmir enjoyed a special position vis-à-vis Indian Union. The Delhi Agreement symbol a mutual recognition of imperative of Nation cohesion and of the ‘essential interest of the State of Jammu and Kashmir.\textsuperscript{147} By this agreement certain subjects were transforming to the Union with reservations considered necessary in the interest of the security of the State, of unhindered implements of their programme for land reforms and of protecting the State from economic exploitation by people who were not permanent residents of Jammu and Kashmir.

In the words of Sheikh Abdullah, the then Prime Minister of Jammu and Kashmir:

\textsuperscript{146} Lok Sabha Debates, August, 1952.
\textsuperscript{147} Supra note 22 at 169.
In arriving at this arrangement, the main consideration before our Government was to secure a position for the State which would be consistent with the requirements of maximum autonomy for the local organs of State Power which are the ultimate source of authority in the State while discharging obligations as a unit of the Federation.148

11 REMOVAL OF SHEIKH MOHAMMAD ABDULLAH

The Delhi Agreement, which gave special status to Jammu and Kashmir State, came under attack by the agitation launched by the Praja Parishad. On 23rd November, 1952 the Praja Parishad launched a Satyagrah campaign in Jammu Province and demanded complete accession of the State of Jammu and Kashmir to Indian Union.149 The agitation opposed the special status given to the State of Jammu and Kashmir by Delhi Agreement with the slogan “EK Pradhan, EK Vidhan, EK Nishan” (one President, one Constitution, one Flag). On the other hand, implementation of Delhi Agreement was no forthcoming and Sheikh Abdullah was accused of ignoring those sections of Delhi Agreement which confirm Kashmir’s ties with India.150 The difference of opinion in regard to implantation of the Delhi agreement among the members of the Cabinet reached a peak when Sheikh Abdullah instead of implementing the agreement, started advocating secession, which would make Kashmir an ‘independent State’.151 The situation reached an unprecedented crisis when three member of the Cabinet submitted a memorandum to Sheikh Abdullah expressing their complete dissatisfaction with his action and policies.152 As per conflict within the cabinet, headed by Sheik Abdullah, had reached proportions in which stability and unity of the State was gravely jeopardized and was causing great confusion and apprehension in the minds of the people of the State,153 the then Sadar-i-Riyasat taking cognizance of the situation, on August 8, 1953, dismissed Sheikh Abdullah from the post of Prime Minister of Kashmir and dissolved the Government of Jammu and Kashmir, India and Kashmir—Constitutional Aspect, p. 18


150 Supra note 22 at 171.


152 Supra note 21 at 126.

153 Current Affairs Publication, Kashmir, August 7-September 17, New Delhi, 1953, p.9.

On 9th August, 1953, Sheikh Abdullah was arrested under the State Preventive Detention Act. The same day, Bakshi Ghulam Mohammed, the Deputy Prime Minister in the disbanded ministry, was appointed the Prime Minister of the State. The State Legislature met on October 5, 1953, and passed a unanimous vote of confidence in the new Cabinet.

Why Bakshi Ghulam Mohammad came into power, the formulation of Constitution relations between the State Jammu and Kashmir and India entered a new phase. The work of the Constituent Assembly of Jammu and Kashmir started afresh with new vigor and energy. The Advisory Committee on Fundamental Rights and Citizenship was reconstituted by the Constituent Assembly by, its resolution dated the 20th October, 1953. The Basic Principles Committee presented its report in the State Constituent Assembly on 3rd February, 1954. The reports of the Basic Principles Committee and the Advisory Committee on Fundamental Rights and Citizenship were adopted by State, Constituent Assembly on 6th February, 1954.

On February 11, 1954 Mr. Mir Qasim presented to the Constituent Assembly the report of the Drafting Committee. The task which the Drafting Committee of the State Constituent Assembly had to discharge required action in the following directions:

(a) Preparation of the Draft Committee of the State.

(b) Defining the sphere of Union Jurisdiction in the State and

(c) Consequential amendments in the Jammu and Kashmir Constitution Act, 1939.

As for the preparation of the Draft Constitution for the State the Drafting Committee felt that in view of the importance and magnitude of the work involved adequate time would be needed for the completion of this task and accordingly recommended that the same
may be allowed.

Taking into consideration the reports of the Basic Principles Committee and the Advisory Committee on Fundamental Rights and Citizenship, the Drafting Committee provided in the annexure to its report, those provisions of the Constitution of India which generally correspond to Defence, Foreign Affairs and Communications and such other matters as were considered essential concomitants of the fact of accession.

The Constituent Assembly of State adopted the above-mentioned the Drafting Committee on 15th Feb., 1954 and gave its concurrence to the application of the Constitution of India in the manner indicated in the Annexure to the report. The resolution was adopted unanimously in the following word:

Resolved that having adopted the Report of the Drafting Committee this day, the 15th February, 1954 and having this given its concurrence to the application of the provisions of the Constitution of India in the manner indicated in the Annexure to the aforesaid report this Assembly authorize as the Government of the State to forward a copy of said Annexure to the Government of India for appropriate action.

The adoption of the Drafting Committee report embodied the ratification of the State Accession to India.

12 THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER 1954

The Constituent Assembly of Jammu and Kashmir ratified the Accession to India and also the decision arrived at by the Delhi Agreement as regards the future relationship of the State with India, early in 1954. As a corollary of Delhi Agreement and adoption of the report of the Drafting Committee by State Constituent Assembly, there was a need to redefine the Constitutional relationship of the State of Jammu and Kashmir.

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162 Id at 873-874.
163 Ibid.
164 According to the Stateman, Calcutta February 17, 1954, of the 75 members, 64 were present and voted unanimously. Of the it abs member, six were under detention.
166 Supra not 3 at 257.
vis-à-vis Indian Union and the extent of jurisdiction of the Indian Constitution over the State. So, in exercise of the powers conferred by clause (1) of Article 370 of the Constitution of India the President, with the concurrence of the Government of the State of Jammu and Kashmir made the Constitution (Application to Jammu and Kashmir) Order, 1954 which came into the force on the fourteenth day of May, 1954. The bulk of this order related to the implementation of the ‘Delhi Agreement’ of 1952.\textsuperscript{167} This order superseded the Constitution (Application to Jammu and Kashmir) Order, 1950. The order of 1954 extended the jurisdiction of the Union Parliament from the original three subjects of ‘Defence, Foreign Affairs and Communications’ to most of the subjects on the Union list\textsuperscript{168} Though some of the entries in the Union list were not at all applied to the State and a few entries were made applicable in a modified form\textsuperscript{169} However, the application of the State list\textsuperscript{170} and the Concurrent List\textsuperscript{171} was entirely excluded.\textsuperscript{172} This Order also specified the provisions of the Constitutions of India which, in addition to Article I and Article 370, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modification subject to which they shall so apply. This is the basic Order which, as amended and modified from time to time, regulates the Constitutional status of the State.\textsuperscript{173} The Constitution (Application to Jammu and Kashmir) order, 1954 was first amended in 1956.\textsuperscript{174} After it, it has been amended several times. It was last amendment in 1994 by the Constitution (Application to Jammu and Kashmir) Amendment Order, 1994.\textsuperscript{175} It is considered as a parent order, as amended from time to time by the President of India under Article 370, defining the Constitution of India in its application to the State of Jammu and Kashmir.

The aforesaid order, which settled the Constitutional relationship of the State of Jammu and Kashmir, did not disturb the previous assurances as regards the framing of the

\textsuperscript{167} Supra note 21 of 134.
\textsuperscript{168} The Constitution of India, Seventh Schedule, List I
\textsuperscript{170} The Constitution of India, Seventh Schedule, List II.
\textsuperscript{171} The Constitution of India, Seventh Schedule, List II.
\textsuperscript{172} C.O. 154 dated 19.02.1994.
\textsuperscript{173} Supra note 69 at 786.
\textsuperscript{174} C.O. 51 dated 11.02.1956.
\textsuperscript{175} C.O. 154 dated 19.02.1994.
internal Constitution of the State by its own people.\textsuperscript{176} While the Constitution of the other Part B, State was laid down in Part VII of the Constitution of India (as promulgated in 1950)\textsuperscript{177}, the State Constitution of Jammu and Kashmir was to be framed by the Constituent Assembly of that State.\textsuperscript{178} Thus, the Order of 1954 did not interfere with the internal administration of the State and provisions regarding the Executive, Legislature and Judiciary of the State had to be incorporated in the Constitution which would be drawn by the people of the State. Constituent Assembly of Jammu and Kashmir which was convened in 1951, made the Constitution for the State of Jammu and Kashmir, which came into force on 26\textsuperscript{th} January, 1957.\textsuperscript{179} Thus, the State of Jammu and Kashmir became the only State of Indian Union which have acquired the distinction of having a separate Constitution for its administration in place of the provisions of Part VI of the Constitution of India which at present govern all the other States of the Indian Union.

Whereas Constitutionally the steps taken after August 1953 bound Jammu and Kashmir more closely to India without abrogating its ‘special status’ under Article 370, the political life in the State manifested on accentuation of uncertainties and tension.\textsuperscript{180} High incidence of communalism in politics, emergence of forces demanded self-determination and secession highly coercive and authoritarian administration and extra-constitution outlets of protest, subversive activities espionage and infiltration form across the ceasefire line –each reinforced the others.\textsuperscript{181}

Sheikh Abdullah’s arrest on August 9, 1953 when he was enjoining majority in the house, under the State Preventive Detention Act and in his absence quick further extension of Constitutional provisions to the State Constitution (Applications to Jammu and Kashmir) Order, 1954 as amended from time to time was considered by Sheikh and his followers as erosion of State autonomy. They were dissatisfied with post-1953 developments as according to them, after 1953, State’s jurisdiction over the matters as

\textsuperscript{176} Supra note 3 at 257.
\textsuperscript{177} Part VII of the Constitution of India as promulgated in 1950 contained only Article 238 which was not made a applicable to State of Jammu and Kashmir by article 370.
\textsuperscript{178} Supra not 3 at 257-258.
\textsuperscript{180} Supra note 22 at 173.
\textsuperscript{181} Ibid.
envisaged by the Instrument of ascension of October, 1947 and the Delhi Agreement of 1952 was gradually diminished and systematically transferred to the Union. During Sheikh Abdullah’s detention M.A. Beg alongwith, six setting members of the State Legislature and one member of Parliament from the State left the All Jammu and Kashmir National Conference and founder the all Jammu and Kashmir Plebiscite Front on 9th August 1955 i.e. two years after the crisis of August 1953\(^{182}\) and the All Jammu and Kashmir Plebiscite Front remained the main political vehicle of the Sheikh since then, although he himself remained outside its fold.\(^{183}\) Sheikh Abdullah was released in January 1958, but rearrested in April, 1958, for allegedly making inflammatory speeches and on a charge of “Conspiracy to overthrow the Kashmir Accord of 1975 Government. Sheikh was released on 8\(^{th}\) April, 1964 and Kashmir conspiracy case was withdrawn from the court by the Government.\(^{184}\) But Sheikh Abdullah was again arrested in May 1965 on his return to India from Mecca on account of his meeting with the Chinese Prime Minister at Algeries.\(^{185}\) On 26\(^{th}\) January, 1965 the National Conference was formally replaced by the National Congress.\(^{186}\) Though the Government withdraw restrictions on him in January 1968 and allowed him to move about anywhere in the country including the State\(^{187}\) but he was externed from the State on 8\(^{th}\) January, 1971.\(^{188}\)

13 KASHMIR ACCORD OF 1975

The developments in the Indian Sub-Continent during 1971 resulting in the emergence of Bangladesh as a separate Nation had a sobering effect on the secessionist elements in the Kashmir Valley. The then Government of India headed by Shrimati Indira Gandhi wanted bring about a greater degree of finality in the relationship between the Union and the State of Jammu and Kashmir and was keen to find out some workable solution with the Sheikh to achieve political harmony in the State of Jammu and Kashmir.\(^{189}\) On June 5\(^{th}\), 1972, Jammu and Kashmir Government lifted the restriction on

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\(^{182}\) Supra note 151 at 243.
\(^{184}\) Supra note 149 at 178.
\(^{185}\) Available at : [http://www.indiatogether.org/peace/kashmir/intro.htm](http://www.indiatogether.org/peace/kashmir/intro.htm) (visited on Nov. 19, 2011).
\(^{186}\) Supra note 149 at 179.
\(^{187}\) Id at 181.
\(^{188}\) Id at 182.
Sheikh’s entry into the State.\textsuperscript{190} Moreover there was a hope that the Shimla Accord\textsuperscript{191} would lead to settlement of the related outstanding issues with Pakistan so, discussions were initiated by Union Government with Sheikh Abdullah to understand the nature of Sheikh Abdullah’s proposal regarding the Constitutional position of the State within the India Union especially in regard to his main area of concern, i.e. fresh review of all the provisions of the Constitution and Union laws extended to the State after August 1953, which, according to him eroded the autonomy of the State. A detailed discussion between G. Parthasarthi and Mirza Mohaammad Afzal Beg was initiated on the instance of the then Union Government headed by Shrimati Indira Gandhi and Sheikh Abdullah respectively and culminated in the understanding in the understanding which is popularly known as the Beg – Parthasarathy Accord dated November 13, 1974. On the basis of the agreed conclusions which constituted Beg – Parthasarathy Accord further deliberations took place between Shrimati Indira Gandhi and Sheikh Abdullah. In his letter dated 29\textsuperscript{th} December, 1974\textsuperscript{192} which was addressed to then Prime Minister of India Shrimati Indira Gandhi, he again reiterated his demand for restoration of Pre-1953 status in the State of Jammu and Kashmir. He wrote:

\begin{quote}
I made it clear to you and to the public at large that my differences with India were not over the issue of the accession of the State but on the quantum of accession. In my opinion accession and autonomy are interdependent. I had agreed to throw in my lot with India on the basis of the Instrument of Accession signed by the Maharaja which guaranteed complete internal autonomy to the State. If this autonomy is taken away, then the very foundation of the relationship is destroyed. I, therefore, pleaded the view that in case you wished me to help in rebuilding the faith and confidence that the majority community in the State has lost in India, I can only start from the point where I felt off in August, 1953. For me to take even this position is not going to be without difficulties, and I shall be faced with many a
\end{quote}

\textsuperscript{190} Supra note 149 at 183.
\textsuperscript{191} Shimla Agreement on Bilateral Relations between India and Pakistan was signed by the Prime Minister of India Mrs. Indira Gandhi and the then President of Pakistan, Mr. Z.a. Bhutto, in Shimla on July 3, 1972.
\textsuperscript{192} For full text of the letter see Supra note 159 at 409-412.
doubting mind. But I would nevertheless give it a try.

But it was clearly explained to Sheikh Abdullah that the clock cannot be put back and ultimately he expressed his agreement with the terms of the agreed conclusions as contained in the Beg-Pathasarathy Accord. On 24th Feb. 1975, the then Prime Minister Indira Gandhi placed before the Lok Sabha the terms of an agreement which appeared to end the uncertainties continuing for 22 years.\textsuperscript{193} The Beg-Pathasarathy Accord which is also popularly known as Kashmir Accord is an agreement of great political significance in the history of the State of Jammu and Kashmir. The following is the crux of the agreement reached on 13th November, 1974\textsuperscript{194}

(a) It was reaffirmed that access’s of the State of Jammu and Kashmir to the Indian Union is final.

(b) The special status of the State Jammu and Kashmir was maintained and it was agreed that the Constitutional relationship between the State of Jammu and Kashmir and the Union shall continue to be governed by Article 370.

(c) The residuary powers of Legislation shall remain with the State of Jammu and Kashmir. The Union Parliament shall, however, continue to have power to make laws relating to the prevention of activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and the Constitution.

(d) The provisions of the Constitution of India which already applied to the State without adaptation or modification are unalterable. But where any provisions of the Constitution of India has been applied to the State of Jammu and Kashmir with adaptations and modifications, such adaptations and modifications can be altered or repealed by an order of the President under Article 370. Each provided in this behalf would be considered by the Central Government on merits. It was an important achievement for Sheikh Abdullah as he had been insisting that all the provisions of

\textsuperscript{193} Supra note 22 at 178.
\textsuperscript{194} For the original text of the agreement See Supra note 159 at 403-405.
the Constitution of India which had been made applicable to the State ever since his exit from office in 1953 should be withdrawn.

(e) It was agreed that the State Government can review the laws made by Parliament or extended to the State after 1953 on any matter relatable to the Concurrent list and may decide which of them, in its opinion, needs amendment or repeal.

(f) Thereafter, appropriate steps may be taken under Article 254 of the Constitution of India and the grant of President’s assent to such legislation would be sympathetically considered by the Centre. The same approach would be adopted in regard to laws to be made by the Parliament in future under the Provision to clause 2 of the Article.

As already mentioned, Sheikh Abdullah before this Accord was insisting that all the Central laws which were extended to the State of Jammu and Kashmir after 1953 should be withdrawn. So, ultimately, the concession was given to the effect that the State Government could review only such laws as are relatable to the subjects in the Concurrent list, enacted by Parliament or extended to the State after 1953.

(g) As an arrangement reciprocal to what has been provided under Article 368, as applied to the State of Jammu and Kashmir, it was agreed that a suitable modification of Article 368 of the Constitution of India as applied to the State should be made by a Presidential order to the effect that no law made by the Legislature of the State of Jammu and Kashmir, seeking to make any change in or in the effect of any provision of the Constitution of the State Jammu and Kashmir relating to any of the under mentioned matter’s shall take effect unless the Bill having been reserved for the consideration of the President receives his assent. The matters are:

(a) The appointment, powers, functions, duties, privileges and immunities of the Governor and

(b) The following matters relating to Elections, namely, the superintendence direction

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195 The following provision has been added to clause (2) of Article 368 in it application to the State of Jammu and Kashmir by the Constitution (Application to Jammu and Kashmir) order 1954. Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under clause (2) of Article 370.

(c) As a follow-up of this, Article 368 of the Constitution of India was modified in its application to the State Jammu and Kashmir in 1975.\(^\text{196}\) Henceforth, no law made by the State Legislature seeking to make any change in, or in the effect of, any provision of the State Constitution to matters concerning the Governor and Elections as aforesaid, shall take effect unless the Bill, having been reserved for the consideration of the President, receives his assent.

Though no agreement was reached on the question of nomenclature of the Governor and the Chief Minister between Mirza Mohammad Afzal Beg and G. Parthasarthi, the then Prime Minister of India in the course of her Statement made in the Parliament on February 24, 1975 Stated…. So, far as the Chief Minister is concerned, there should be no objections to the adoptions of the designation “Wazir-e-Azam” in the State if the Legislature of Jammu and Kashmir amends its Constitution accordingly.\(^\text{197}\)

It is, however, significant to note that the State Legislative has not made any amendment of the State Constitution changing the designation of the Chief Ministers to “Wazir-e-Azam”. Before the conclusion of the Kashmir Accord, in the course of negotiation between the Mirza Mohammad Afzal Beg and G. Parthasarthi, Mohammad Afzal Beg made proposals regarding the following matters also.\(^\text{198}\)

(e) The provisions relating to the fundamental rights to be incorporated in the State Constitution.

(f) The superintendence, direction and control over elections to the State Legislature by the Election Commission should be removed.


\(^{197}\) Supra note 21 at 81.

\(^{198}\) Supra note 159 at 406.
(g) Article 356 should be modified to require the consent of the State before an order is issued there view or some similar safeguard should be provided. After prolonged discussions it was not found, feasible to agree to any of these proposals. So, G. Pathasarthy, acting on the behalf of Central Government, did not agree to the proposals of Mirza Afzal Beg. The Kashmir Accord was presented to the Indian Parliament alongwith all relevant correspondence on February 24, 1975 with a Statement by the Prime Minister and it was approved by Indian Paliamnet on 13th March 1975.

Thus, the Kashmir Accord is an agreement great political significance in the history of the State Jammu and Kashmir. The Accord gave certain concessions to the State of Jammu and Kashmir and paved the way to more harmonious and constructive association of the State with the Union of India. It also affected the course of the events taking place in the State by bring back ti power Sheikha the Congress Ministry headed Syed Mir Qasim eventually stepped down. Syed Mir Qasim submitted 22nd February, 1975. The State premiership was assumed the office on 25th February, 1975. In July, 1975, delegate’s session of Jammu and Kashmir Plebiscite front unanimously decided to dissolve the Front and to revive National Conference. The National Conference was revived following the decision to wind up the Plebiscite front and Sheikh Abdullah was formally elected as President of the National Conference on 13th April, 1976. In 1977, Congress Party Abdullah was still regarded as undisputed leader of the Valley and his influence in the political circles still regarded as paramount.

199 Supra note at 448.
200 Supra note 149 at 185.
201 Id at 184.
202 Id at 185.
203 Id at 186.
204 Supra Note 151 at 441.
Withdraw its support from the Sheikh Abdullah’s Government and Governor’s Rule followed in the State. In the elections which were later on held in 1977. The National Conference returned to power with a ‘brutal’ majority and once again Sheikh Mohammad Abdullah formed the Government in the State.205

14 CONCLUSION

The State of Jammu and Kashmir in the only State of the Indian Union which negotiated the terms of its membership with the Union. At the time of making of the Constitution of Indian Constitution as a whole and merged themselves in the national mainstream, the State of Jammu and Kashmir refused to accept Constitution of India as a Constitution for the State and showed its inability to extend the jurisdiction of Union Government from what has been provided in the Instrument of Accession till the Constituent Assembly of the State of Jammu and Kashmir had taken a decision in the matter. Moreover, the special circumstances at the time of the framing of the Constitution of India. Part of the State was under the illegal occupation of Pakistan, entanglement of Government of India over Kashmir with United Nations. Government of India’s commitment to the people of the State to decide for themselves whether they would remain with the Republic of India or wish to go out of it forced the Constituent Assembly of India to make an interim and special arrangement for the State of Jammu and Kashmir. The State of Jammu and Kashmir had voluntarily surrendered jurisdiction to Union Government in External Affairs and Common relation t Defence and Government of India could not enlarge the sphere of its it would virlate agreed terms of the association of the State with India. Thus Article 370 was incorporated in the Constitution of India which confers special status to the State of Jammu and Kashmir. It contains temporary provisions with respect to State and empowers the President to define the Constitutional position of the State from time to time in the light of the situations existing therein. It is the parent order of 1954, as amended time to time, which defines the constitution position and extent of autonomy enjoyed by State within Indian Union

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205 Supra note 21 at 83.