

## CHAPTER – V

# EXTENT OF AUTONOMY ENJOYED BY THE STATE OF JAMMU AND KASHMIR WITHIN INDIAN UNION

### 1 INTRODUCTION

The Constituent Assembly merely put the imprimatur of its approval, on 17<sup>th</sup> October, 1949 to a draft of Article 370 agreed between the Union and the State.<sup>1</sup> Article 370 came into force on 26<sup>th</sup> January, 1950 – the day on which the first Constitution (Application to Jammu and Kashmir) Order, 1950 was issued by the then President of India, in consultation with the government of Jammu and Kashmir, in exercise of the powers conferred by clause (1) of Article 370. On 23<sup>rd</sup> January, 1954, Bakshi Ghulam Mohammad, the then Prime Minister of the State of Jammu and Kashmir declared Jammu and Kashmir as a part of the Indian Union.<sup>2</sup> The Constituent Assembly of the State of Jammu and Kashmir met for the first time on 31<sup>st</sup> October, 1951.<sup>3</sup> In February, 1954 the Constituent Assembly of Jammu and Kashmir ratified the accession of the State of Jammu and Kashmir to India and also the decision arrived at Delhi Agreement as regards the future relationship of the State with India. In pursuance of this, in exercise of the powers conferred by clause (1) of Article 370, the President of India, with the concurrence of the Government of the State of Jammu and Kashmir, made the Constitution (Application to Jammu and Kashmir) Order, 1954.<sup>4</sup> The Order of 1954 implemented the Delhi Agreement as ratified by the Constituent Assembly of Jammu and Kashmir and also superseded the Order of 1950. It has been treated as a parent order as amended from time-to-time. It defines the constitutional position of the State of Jammu and Kashmir *vis-à-vis* Indian Union.

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<sup>1</sup> A.G. Norrani, *Article 370-A Constitutional History of Jammu and Kashmir* 1 (2012)

<sup>2</sup> Hari Ram, *Special Status in Indian Federalism Jammu and Kashmir* 173 (1983).

<sup>3</sup> Government of Jammu and Kashmir, Report of the State Autonomy Committee.

<sup>4</sup> C.O. 48, published with the Ministry of Law Notification No. S.R.O. 1610, dated the 14<sup>th</sup> May, 1954, *Gazette of India* (Extraordinary), Part II, section 3, p. 821.

## 2 THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1954 AND THE AUTONOMY ENJOYED BY JAMMU AND KASHMIR WITHIN INDIAN UNION

The Constitution (Application to Jammu and Kashmir) Order, 1954 brought a remarkable progress in the area of application of Indian Constitution to the State of Jammu and Kashmir. It extended the jurisdiction of the Union Parliament from original three subjects of 'Defence, Foreign Affairs and Communications' to almost all subjects on the Union List<sup>5</sup>, subject to some exceptions and modifications. So, the entries in the Union List in the Seventh Schedule as applied to the State of Jammu and Kashmir by this Order did not conform strictly to the Instrument of Accession and the Delhi Agreement. However, the State List as well as the Concurrent List were entirely excluded<sup>6</sup> by the Order of 1954. The State's right to all residuary subjects other than the ones in the Union List which were conferred on the Union was fully accepted.<sup>7</sup> While the 1950 Order made some parts, besides Articles 1 and 370, applicable, subject to certain exceptions and modifications, to the State of Jammu and Kashmir, the 1954 Order made many more parts applicable with or without modifications.<sup>8</sup>

Nevertheless, the internal autonomy of the State was not interfered with by the Order of 1954 and consequently matters which concerned the internal administration of the State were left to be incorporated in the State's own constitution. The Order of 1954 was first amended, under clause (1) of Article 370, in 1956 and since then it has been amended 45 times till 1994.<sup>9</sup> With the making of the constitution (Application to Jammu and Kashmir) Amendment Order, 1995 (C.O. 160 dated 31.05.1995) and the Constitution (Application to Jammu and Kashmir) Amendment Order (C.O. 162 dated 06.07.1996) the Order of 1954 has been amended 47 times till 1996. All these amendments were like the earlier order of 1954, issued "with the concurrence of the

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<sup>5</sup> See sch. 7, list I, the Constitution of India.

<sup>6</sup> *Supra* note 3 at 65.

<sup>7</sup> *Ibid.*

<sup>8</sup> *Id.* at 66,67.

<sup>9</sup> A.S. Anand, *The Constitution of Jammu and Kashmir Its Developments and Comments* 402-404 (2010).

Government of the State of Jammu and Kashmir.”<sup>10</sup> The effect of all these amendments has been to bring the position prevailing in the State more at par with the rest of the country and further strengthen the bonds of harmonious association of the State with the rest of the country.<sup>11</sup> On the other hand, the report of the State Autonomy Committee states:

It is abundantly clear, therefore that from 1953 onwards, especially in sixties, the process of erosion of the State autonomy was so rapid and on such a massive scale that entire Article 370 of the Constitution of India which was supposed to guarantee and preserve the special status of the State in the Indian Union was emptied of its substantive content with the result that the State’s jurisdiction over the matters as envisaged by the Instrument of Accession of October, 1947 and the Delhi Agreement of 1952 was gradually diminished and systematically transferred to the Union.<sup>12</sup>

As the Constitution of India applies to the State of Jammu and Kashmir, subject to certain exception and modifications, through the Constitution (Application to Jammu and Kashmir) Order, 1954 as amended from time-to-time, the following striking and unique provisions of the Order of 1954 are noteworthy in order to understand the nature and extent of autonomy enjoyed by the State of Jammu and Kashmir vis-à-vis other States of Indian Union:

1. By the Order of 1954, a new proviso was added to Article 3 of the Constitution of India relating to formation of new States and alteration of areas, boundaries or names of existing States. The effect of this new proviso is that no action for changing the area, name or boundary of the State of Jammu and Kashmir can be taken without the consent of the Legislature of the State of Jammu and Kashmir. In this respect, the status of Jammu and Kashmir strikingly differs from other States. In case of other States of Indian Union, President is only obliged to

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<sup>10</sup> Arvind Lavakare, *The Truth about Article 370* 36 (2005).

<sup>11</sup> *Supra* note 9 at 135.

<sup>12</sup> *Supra* note 6 at 87, 88.

ascertain the wishes of the States to be effected before recommending the introduction of the Bill relating to these matters<sup>13</sup> but he is not bound by the wishes of the concerned States

2. By the Constitution (Application to Jammu and Kashmir) Order, 1950<sup>14</sup> Part II of the Constitution of India relating to citizenship was not made applicable. However, by the Order of 1954, Part II of the Constitution of India was applied, in a modified form, to the State of Jammu and Kashmir with retrospective effect, i.e. from 26<sup>th</sup> January, 1950.

As a result of this Order, the people of Jammu and Kashmir are deemed to be citizens of India at the commencement of the Constitution of India. Thus, there is only one common citizenship for the whole of India including Jammu and Kashmir. The Citizenship Act, 1955 extends to the whole of India including the State of Jammu and Kashmir.

Simultaneously, by the Constitution Order of 1954, a proviso was also added to Article 7 of the Constitution of India according to which nothing contained in Article 7 shall apply to a permanent resident of the State of Jammu and Kashmir who migrated to Pakistan after 1<sup>st</sup> March, 1947 and returned to the territory of the State of Jammu and Kashmir under a permit for resettlement in that State or permanent return issued by or under the authority of any law made by Legislature of that State and every such person shall be deemed to be citizen of India. So, by this proviso, special legislative powers were given to Legislative Assembly of the State of Jammu and Kashmir.

3. The provisions relating to fundamental rights were not applied to the State of Jammu and Kashmir initially in 1950. But, part III was made applicable to Jammu and Kashmir, subject to certain omissions and modifications, in 1954. As the provisions of Part III of the Constitution came into force in the territory of Jammu and Kashmir not with effect from 26<sup>th</sup> January, 1950 but with effect

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<sup>13</sup> The Constitution of India, proviso to art. 3.

<sup>14</sup> C.O. 10 26/01/50, *Gazette of India Extraordinary, on Indian State*, 1950, Appendix LVI.

from 14<sup>th</sup> May, 1954, it follows that the fundamental rights would have no retrospective effect in Jammu and Kashmir so as to affect rights and liabilities accrued before that date. Therefore Article 13 of the Constitution of India was modified by the Order of 1954 to the extent that the reference to the commencement of the Constitution shall be construed as reference to the commencement of this order.

4. In Article 16(3), the reference to the State shall be construed as not including a reference to the State of Jammu and Kashmir which means that Parliament shall have no power to make any law under clause (3) of Article 16 in relation to Jammu and Kashmir requiring residence within its territory as a condition for any employment or appointment in that State. The object of not applying the provisions of Article 16 (3) is to avoid a conflict between the State law and the law of the Parliament.
5. The provisions related to protection against arrest and detention as given under Article 22 of the Constitution of India apply to Jammu and Kashmir with an important difference that in clauses (4) and (7) of Article 22, for the word “Parliament” the words “the Legislature of the State” shall be substituted. It means that power of legislation with respect to preventive detention shall belong to the State Legislature of Jammu and Kashmir instead of Parliament.
6. By this Order, a new clause (c) was added to Article 35 of the Constitution of India in its application to the State of Jammu and Kashmir according to which no law with respect to preventive detention made by the State Legislature, whether before or after the commencement of Order of 1954, shall be void on the ground that it is inconsistent with any of the provisions of Part III of the Constitution of India. The protection given to preventive detention laws made by the State was initially valid for a period of five years from May, 1954. The protection was successively extended for a total period of twenty five years.<sup>15</sup>

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<sup>15</sup> Subs. For “twenty years” vide C.O. 97 of 1974 Previously “ten years” were subs for “five years” by C.O. 59 of 1959, “fifteen years” for “ten years” by C.O. 69 of 1964 and “twenty years” for “fifteen years” by C.O. 86 of 1969.

Thus, at present detention laws in Jammu and Kashmir do not enjoy any special protection.

7. Article 19(1) (f) and Article 31 were omitted from the Constitution of India by Forty-fourth Amendment Act, 1978 with effect from 20<sup>th</sup> June, 1979. As Forty-fourth amendment Act, 1978 does not extend to the State, freedom to acquire, hold and dispose of property under Article 19(1) (f) and the prohibition against compulsory acquisition of property under Article 31 still apply to the State but the latter one applies with certain modifications. Clauses (3), (4) and (6) of Article 31 do not apply to the State of Jammu and Kashmir. The result of these omissions is that there is no question of obtaining the assent of the President for enacting any law of compulsory acquisition of property under clause (2) of Article 31.<sup>16</sup> For clause (5) of Article 31, a new clause has been substituted:

(5) Nothing in clause (2) shall affect:

- (a) the provisions of any existing law; or
- (b) the provisions of any law which the State may hereafter make –
  - (i) for the purpose of imposing or levying any tax or penalty; or
  - (ii) for the promotion of public health or the prevention of danger to life or property; or
  - (iii) with respect to property declared by law to be evacuee property.

The Supreme Court has held<sup>17</sup> that the non-applicability of Article 31 in its entirety to the State was designed to protect the land reforms in Jammu and Kashmir.

8. Article 31-A applies to the State of Jammu and Kashmir with certain modifications. The proviso to clause (1) of Article 31-A is omitted with the result that there is no need for obtaining the assent of the President to a law

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<sup>16</sup> *Supra* note 9 at 182.

<sup>17</sup> *Prem Nath Kaul v. The State of Jammu and Kashmir*, A.I.R 1959 S.C. 749.

coming within the scope of clause (1) of Article 31-A. A new definition of 'estate' was substituted for the existing definition in sub-clause (a) of clause (2) of Article 31-A which increased the scope of clause (1) of Article 31-A in its application to the State of Jammu and Kashmir.

9. Article 31-B saves the laws specified in the IX Schedule of the Constitution from the combined operation of the Fundamental Rights embodied in part III of the Constitution.<sup>18</sup> The Jammu and Kashmir Big Landed Estates Abolition Act (No. XVII of Svt. 2007) stands included in the Schedule Article 31-B extends to Jammu and Kashmir.
10. Article 31-C does not apply to the State of Jammu and Kashmir as Part IV of the Constitution has not been applied to the State of Jammu and Kashmir.
11. Article 32, subject to one omission, applies to the State of Jammu and Kashmir. The Supreme Court and the High Court of Jammu and Kashmir<sup>19</sup> shall have the power to issue directions or orders or writs for the purpose of enforcement of any of the fundamental right. But Article 32 (3) does not apply to the State of Jammu and Kashmir. This implies that Parliament cannot give powers to issue writs in the nature mentioned in Article 32(2) to any subordinate Court in Jammu and Kashmir.
12. By the Constitution (Application to Jammu and Kashmir) Order, 1954<sup>20</sup> a new Article 35A was added which is applicable to the State of Jammu and Kashmir. This is a very important feature of the Constitution, as applied to the State of Jammu and Kashmir. It confers special treatment to the 'permanent residents' of the State of Jammu and Kashmir. The permanent residents are such persons as are declared to be so by any existing law of the State or by any future law enacted by the Legislature of the State.<sup>21</sup>

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<sup>18</sup> *Supra* note 9 at 183.

<sup>19</sup> The Constitution of Jammu and Kashmir, sec. 103.

<sup>20</sup> *Supra* note 4.

<sup>21</sup> *Supra* note at 204.

The Legislature of the State of Jammu and Kashmir is empowered to define the classes of persons who are or shall be permanent residents of the State of Jammu and Kashmir.<sup>22</sup> It is also empowered to confer on such permanent residents any special rights and privileges or can impose upon other persons any restrictions as respects-

- (i) employment under the State Government;
- (ii) acquisition of immovable property in the State;
- (iii) settlement in the State; or
- (iv) right to scholarship and such other forms of aid as the State Government may provide.<sup>23</sup>

Any such law made by State Legislature shall not be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizen of India by any provisions of Part III.<sup>24</sup> The permanent residents of the State of Jammu and Kashmir though Indian citizens are not quite like other citizens of India. They enjoy special right and privileges conferred on them by law.

- 13. The provisions of part IV of Indian Constitution relating to the Directive Principles of State Policy do not apply to the State of Jammu and Kashmir.
- 14. Part IV A<sup>25</sup> of the Constitution of India related to 'fundamental duties' does not extend to the State of Jammu and Kashmir. As a result, 'fundamental duties' do not apply to the permanent residents of Jammu and Kashmir. This is somehow anomalous as the permanent residents of Jammu and Kashmir are citizens of India too.

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<sup>22</sup> *Supra* note 19, sec. 8.

<sup>23</sup> Art. 35 A as added by constitution (Application to Jammu and Kashmir) Order, 1954 to the Constitution of India in its application to the State of Jammu and Kashmir.

<sup>24</sup> *Ibid.*

<sup>25</sup> Part IV a was inserted by the Constitution (Forty-Second Amendment) Act, 1976, sec. 11 (w.e.f. 03/01/1997).

15. The Supreme Court of India exercises original and appellate jurisdiction in relation to the State of Jammu and Kashmir with a slight difference in so far as the appellate jurisdiction of the Supreme Court in criminal matters is concerned. Whereas, in the rest of India, the Union Parliament may by law confer on the Supreme Court any further powers to entertain and hear appeals from any judgment, final order or sentence in a criminal proceeding of a High Court in the territory of India at its discretion<sup>26</sup>, in the case of Jammu and Kashmir, the Union Parliament can only confer such additional powers to the Supreme Court “on the request of the Legislature of the State.”<sup>27</sup>

Moreover, Articles 134 A, 135, 139 and 139A do not apply to Jammu and Kashmir.

16. The right of appeal by special leave under Article 136 of the Constitution of India has been extended to the State of Jammu and Kashmir with effect from 20<sup>th</sup> January, 1960.<sup>28</sup>
17. Initially, the jurisdiction of the Comptroller and Auditor-General was limited to the accounts of the Union. The powers of Comptroller and Auditor-General of India did not extend to the State Accounts. In 1958, the functions of the Comptroller and Auditor-General of India were extended to the State of Jammu and Kashmir.<sup>29</sup> Article 150 of the Constitution of India as it existed before Forty-second amendment, applies to the State of Jammu and Kashmir and therefore, in the case of Jammu and Kashmir, the accounts shall be kept in such form as the Comptroller and Auditor-General of India may, with the approval of the President, prescribe. In the case of other States, the form of accounts shall be such as the President may, on the advice of Comptroller and Auditor-General of India, prescribe.

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<sup>26</sup> *Supra* note 13, and 34 (2).

<sup>27</sup> *Supra* note 4.

<sup>28</sup> The Constitution (Application to Jammu and Kashmir) Amendment Order, 1960 (C.O. 60 dated 20/01/1960).

<sup>29</sup> The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1958 (C.O. 56 dated 26/02/1958).

18. Part VI of the Indian Constitution does not apply to the State of Jammu and Kashmir. The government of Jammu and Kashmir is not organized in accordance with the provisions of part VI of the Constitution of India as it has a Constitution of its own. Only exceptions are Articles 152, 218, 220, 222 and 226. Article 222 applies to the State with a modification that every such transfer from the High Court of Jammu and Kashmir or to that High Court shall be made after consultation with the Governor.<sup>30</sup>
19. Part VII<sup>31</sup> of the Constitution does not apply to the State of Jammu and Kashmir.
20. Part VIII<sup>32</sup> of the Constitution of India has no application to the State of Jammu and Kashmir.
21. The present part IX<sup>33</sup> related to Panchayats does not extend to the State of Jammu and Kashmir as seventy-third amendment has not been applied to the State of Jammu and Kashmir.
22. Part IX A, inserted by the Constitution (Seventy-fourth Amendment) Act, 1992,<sup>34</sup> related to Municipalities does not apply to the State of Jammu and Kashmir.
23. Part X<sup>35</sup> of the Constitution of India dealing with the schedules and Tribal Areas has not been applied to the State of Jammu and Kashmir.
24. Part XI-Relations between the Union and the State.

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<sup>30</sup> Subs. by The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 14965

<sup>31</sup> Part VII of the Constitution was repealed by the Constitution (seventh Amendment) Act, 1956, sec. 29 and Sch. (w.e.f. 01/11/1956). Moreover, Part VII contained only one article i.e. article 238 which was made non-applicable to the State of Jammu and Kashmir by Article 370 (1) (a).

<sup>32</sup> Part VIII deals with the union territories.

<sup>33</sup> Part IX (containing articles 243, 243A to 243-0) inserted by the Constitution (Seventy-third Amendment) Act, 1992, sec. 2 (w.e.f. 24/04/1993). Earlier Part IX dealing with territories in Part D of the First Schedule was repealed by the Constitution (seventh Amendment) Act, 1956, sec. 29 and Sch. (w.e.f. 01/11/1956).

<sup>34</sup> Part IX A (containing articles 243P to 243Z, 243 ZA to 243ZG) inserted by the Constitution (Seventy-Fourth Amendment) Act, 1992, sec. 2 (w.e.f. 01/06/1993).

<sup>35</sup> Part X contains only two articles i.e. 244 and 244-A Article 244A was inserted by the Constitution (Twenty-Second Amendment) Act, 1969, sec.-2 (w.e.f. 25/09/1969).

## Legislative Relations

- (i) Article 246 was applied to Jammu and Kashmir in 1954<sup>36</sup> but subject to a modification that the words, brackets and figures ‘Notwithstanding anything in clauses (2) and (3)’ occurring in clause (1), and clauses (2), (3) and (4) shall be omitted. In 1963, Article 246 in its application to Jammu and Kashmir was again modified to the effect that for the words, brackets and figures “clauses (2) and (3)” occurring in clause (1), the words, brackets and figure “clause (2)” shall be substituted, and the words, brackets and figures “Notwithstanding anything in clause 3” occurring in clause (2) and the whole of clauses (3) and (4) shall be omitted.<sup>37</sup> The reason for this modification is the application of Concurrent List to the State of Jammu and Kashmir in 1963 which was not applied to it in 1954. Moreover, State List does not apply to the State of Jammu and Kashmir as it has a Constitution of its own.
- (ii) By the Constitution (Application to Jammu and Kashmir) Order, 1954, Article 248 dealing with residuary powers of legislation, was not extended to the State of Jammu and Kashmir. In 1972, Article 248 was applied to Jammu and Kashmir in a modified form.<sup>38</sup> In 1985, Article 248 was again modified in its application to the State of Jammu and Kashmir.<sup>39</sup> The present form in which Article 248 is applicable to Jammu and Kashmir is as follows:

Parliament has exclusive power to make any law with respect to

- (a) Prevention of activities involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people or any section of the people or alienating any

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<sup>36</sup> *Supra* note 4.

<sup>37</sup> Substituted by the Constitution (Application to Jammu and Kashmir) Amendment Order, 1963 (C.O. 66 dated (25/09/1963)

<sup>38</sup> The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1972 (C.O. 93 dated 06/058/1972).

<sup>39</sup> The Constitution (Application to Jammu and Kashmir) Amendment Order, 1985 (C.O. 122 dated 04/06/1985).

section of the people or adversely affecting the harmony amongst different section of the people;

(aa) Prevention of other activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory 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 this Constitution; and

(b) Taxes on –

- (i) Foreign travel by sea or air,
- (ii) Inland air travel;
- (iii) Postal articles, including money orders, phonograms and telegrams. Explanation – In this article, ‘terrorist act’ means any act or thing by using bombs, dynamite or other explosive substances or inflammable substances or firearms or other lethal weapons or poisons or noxious gases or other chemicals or any other substances (whether biological or otherwise) of a hazardous nature.

Except these exclusive powers of Parliament to make laws for the State of Jammu and Kashmir, all other residuary powers of legislation reside with the State Legislature of Jammu and Kashmir. In case of other States of Indian Union, residuary powers of legislation reside with the Union Parliament and not with the respective state legislatures.

(iii) Article 249 dealing with power of Parliament to legislate with respect to a matter in the State List in the national interest was not applied to the State of Jammu and Kashmir in 1954 by the Constitution (Application to Jammu and

Kashmir) Order, 1954. Later on, in 1986,<sup>40</sup> Article 249 was applied to the State of Jammu and Kashmir but in a modified form which is as under:

- (bb) In Article 249, in clause (1), for the words “any matter enumerated in the State List specified in the resolution”, the words “any matter specified in the resolution, being a matter which is not enumerated in the Union List or in the Concurrent List” shall be substituted.

This modification is mere technical as State List does not apply to the State of Jammu and Kashmir. The views expressed by the State Autonomy Committee Report on the application of Article 249 to the State of Jammu and Kashmir are that “empowering Union Parliament to legislate on a matter which is not enumerated in the Union List or in the Concurrent List on the strength of Rajya Sabha resolution is an erosion of autonomy of Jammu and Kashmir”. According to the State Autonomy Committee Report:

This was made (extending to the State Article 249) “with the concurrence of the Government of the State of Jammu and Kashmir” when the State was under Governor’s rule and no popular Government existed. This is a clear nullity.<sup>41</sup>

- (iv) Article 250 was applied to the State of Jammu and Kashmir in 1954<sup>42</sup> itself subject to a modification that for the words “to any of the matters enumerated in the State List”, the words “also to matters not enumerated in the Union List” shall be substituted. The Union Parliament, while a Proclamation of Emergency is in operation, have power to make laws for the State of Jammu and Kashmir in respect to matters not enumerated in the Union List.
- (v) The Parliament’s power to make laws for implementing any treaty, agreement or convention with any foreign country or countries or any decision made at any

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<sup>40</sup> The Constitution (Application to Jammu and Kashmir Amendment Order, 1986 (C.O. 129 dated 30/07/1986).

<sup>41</sup> *Supra* note 3 at 89 (Emphasis mine).

<sup>42</sup> *Supra* note 4.

international conference, association or other body as given under Article 253 of the Indian Constitution is in relation to Jammu and Kashmir restricted by the following proviso:

Provided that after the commencement of the constitution (Application to Jammu and Kashmir) Order, 1954, no decision affecting the disposition of the State of Jammu and Kashmir shall be made by the Government of India without the consent of the Government of that State.<sup>43</sup>

It is clear from the proviso that no part of the State of Jammu and Kashmir can be disposed of as result of international agreement without the prior consent of the State Government and subsequent consent, if taken, will not validate the agreement.

- (vi) Article 255 does not apply to the State of Jammu and Kashmir with the result that Bills which require previous sanction or recommendation under the Constitution of India can only be introduced when such sanction or recommendation has been granted failure to comply with this provision will invalidate the law in so far as the State of Jammu and Kashmir is concerned and subsequent assent of the President will not help.
- (vii) Out of the three Lists mentioned in Seventh Schedule to the Constitution of India, the State List (List II) does not apply to the State of Jammu and Kashmir. A number of entries in the Union List and the Concurrent List have been applied to Jammu and Kashmir either with or without modifications though some of the entries in each of the Union List and Concurrent List have not been extended to the State at all.

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<sup>43</sup> *Ibid.*

## **Union List**

The Union List has 101 entries<sup>44</sup> of these ninety-one entries have been applied to Jammu and Kashmir in full, four entries have been applied in modified form and six entries do not apply to the State at all.

### **Union List Entries Applicable with Modification.**

(3) Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such area.

This entry was applied in full in 1950. The Constitution (Application to Jammu and Kashmir) Order, 1954<sup>45</sup> modified the entry in its application to the State of Jammu and Kashmir as follows:

### **Administration of Cantonments.**

(72) Elections to Parliament, to the Legislatures of States and to the offices of President and Vice-President; the Election Commission.

By the Constitution (Application to Jammu and Kashmir) Order, 1950<sup>46</sup>, this entry was applied in the following restricted form:

‘Elections to Parliament and the offices of President and Vice-President; the Election Commission’.

But in 1968<sup>47</sup>, the full entry was applied to the Jammu and Kashmir with the following modification: in entry 72, the reference to the States shall be construed –

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<sup>44</sup> In Union List, last entry is entry 97. But if one take into account later additions of entry 2A, entry 92A, entry 92B and entry 92C, the total number of entries in the present Union List come to 101.

<sup>45</sup> *Supra* note 4.

<sup>46</sup> *Supra* note 14.

<sup>47</sup> The Constitution (Application to Jammu and Kashmir) Amendment Order, 1968 (C.O. 83 dated 09/02/1968) 108).

- (a) In relation to appeals to the Supreme Court from any decision or order of the High Court of the State of Jammu and Kashmir made in an election petition whereby an election to either House of the Legislature of that State has been called in question, as including a reference to the State of Jammu and Kashmir;
- (b) In relation to other matters as not including reference to that State.

(81) Inter-State migration; inter-State quarantine.

This entry was not applied to the State in 1950. Later on, in 1954, this entry was applied to Jammu and Kashmir after omitting 'Inter-State migration'.

(97) Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists.

Entry 97 relates to the residuary powers of legislation of Parliament. This entry was not applied to the State of Jammu and Kashmir by the Constitution (Application to Jammu and Kashmir) Order, 1954. But in 1985,<sup>48</sup> the following entry was substituted in its place, namely:

97. Prevention of activities

- (a) Involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people or any section of the people or alienating any section of the people or adversely affecting harmony amongst different sections of the people;
- (b) Directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory 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 this Constitution; taxes on foreign travel by sea or air, on inland air travel and on postal articles, including money orders, phonograms and telegrams.

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<sup>48</sup> The Constitution (Application to Jammu and Kashmir) Amendment Order, 1985 (C.O. 122 dated 04/06/1985).

Explanation – In this entry, “terrorist act” has the same meaning as in the Explanation to article 248.

This entry must be read with Article 248 as applicable to the State of Jammu and Kashmir. The power of Parliament to make laws for Jammu and Kashmir under its residuary powers of legislation is limited to above mentioned subject matters and all other residuary powers of legislation reside with the State Legislature of Jammu and Kashmir. These changes enabled the extension of Terrorists and Disruptive Activities (Prevention) Act, 1985<sup>49</sup> to the State of Jammu and Kashmir.

### **Union List entries not applicable to the State**

The following entries in the Union List do not apply to the State of Jammu and Kashmir:

(2A) Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.

This entry was inserted in the Union List by the Constitution (Forty-second Amendment) Act, 1976 with effect from 3<sup>rd</sup> January, 1977. As forty-second amendment has not been extended to Jammu and Kashmir, so entry 2A does not apply to the State.

(8) Central Bureau of Intelligence and Investigation.

This entry 8 of the Union List which deals with the Central bureau of Intelligence and Investigation is not applicable to Jammu and Kashmir.

(9) Preventive detention for reasons connected with defence, foreign affairs, or the security of India; persons subjected to such detention.

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<sup>49</sup> This Act was replaced by the Act of 1987 which lapsed in 1995.

Entry 9 of the Union List was applied to the State of Jammu and Kashmir by the Constitution (Application to Jammu and Kashmir) Order, 1950 in the following form:

9. Preventive detention for reasons connected with defence, foreign affairs or the security of India.

But by the Parent Order of 1954, entry 9 of the Union List was not made applicable to the State of Jammu and Kashmir.

- (34) Courts of wards for the estates of Rulers of Indian States.

Entry 34 is not extended to the State of Jammu and Kashmir.

- (79) Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union territory.

Entry 79 is also not made applicable to the State of Jammu and Kashmir.

- (92B) Taxes on the consignment of goods (whether the consignment is to the person making it or to any other person), where such consignment takes place in the course of inter-State trade or commerce.

This entry was inserted in the Union List by the Constitution (Forty-sixth Amendment) Act, 1982<sup>50</sup> but it is not extended to the State of Jammu and Kashmir.

## **State List – List II**

The State List (List II) does not apply to Jammu and Kashmir as whole of State List has been omitted in its application to Jammu and Kashmir. By not applying State List, internal autonomy of the State is maintained. There is a separate State Constitution in Jammu and Kashmir on the basis of which internal administration of the State is carried out.

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<sup>50</sup> Ins. By the Constitution (Forty-sixth Amendment) Act, 1982, sec. 5 (w.e.f. 2-2-1983).

### **Concurrent List – List III**

The Concurrent List (List III) contains 52<sup>51</sup> entries. The entries in this List were initially not made applicable either by the Constitution (Application to Jammu and Kashmir) Order, 1950 or by the Constitution (Application to Jammu and Kashmir) Order, 1954. They were progressively applied from 1963<sup>52</sup> onwards. Out of the fifty-two entries in the Concurrent List, nineteen entries apply in full eight entries are applicable in modified form and twenty-five entries have not been applied at all to the State of Jammu and Kashmir. According to the State Autonomy Committee Report:

It is abundantly clear, therefore, that from 1953 onwards, especially in sixties the process of erosion of the State autonomy was so rapid and on such a massive scale that entire Article 370 of the Constitution of India which was supposed to guarantee and preserve the special status of the State in the Indian Union was emptied of its substantive content with the result that the State's jurisdiction over the matters as envisaged by the Instrument of Accession of October, 1947 and the Delhi Agreement of 1952 was gradually diminished and systematically transferred to the Union.<sup>53</sup>

So, the extension of the entries of Concurrent List to the State of Jammu and Kashmir is considered by some as erosion of State autonomy and by some, strengthening of the ties of harmonious association of the State with the Indian Union.

### **Concurrent List Entries Applied With Modification**

- (1) Criminal law, including all matters included in the Indian Penal Code at the commencement of this Constitution but excluding offences against laws with respect to any of the matters specified in List I or list II and excluding the use of

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<sup>51</sup> The last entry in the concurrent list is numbered as entry 47. By the Constitution (Forty – second Amendment) Act, 1976, five more entries were included in the concurrent list which increased the total number of entries to 52.

<sup>52</sup> The Constitution (Application to Jammu and Kashmir) Amendment Order, 1963 (C.O. 66 dated 25/09/1963)

<sup>53</sup> *Supra* note 3 at 87, 88.

Naval, Military or Air Forces or any other armed forces of the Union in aid of the civil power.

This entry was applied to Jammu and Kashmir in a modified form in 1964.<sup>54</sup> It was further modified in October 1964.<sup>55</sup> At present, it applies to the State of Jammu and Kashmir in the following form:

1. Criminal law (excluding offences against laws with respect to any of the matters specified in list I and excluding the use of Naval, Military or Air Forces or any other armed forces of the Union in aid of the Civil power) in so far as such criminal law related to offences against laws with respect to any of the matters specified in this list.
2. Criminal procedure, including all matters included in the code of Criminal Procedure at the commencement of this Constitution.

This entry was applied to Jammu and Kashmir in a modified form in 1972<sup>56</sup>. It was again modified in 1985<sup>57</sup> and applies to the State of Jammu and Kashmir in the following form:

Criminal Procedure (including Prevention of offences and constitution and organisation of Criminal Courts, except the Supreme Court and the High Court) in so far as it relates to -

- (i) Offences against laws with respect to any matters being matters with respect to which Parliament has power to make laws; and
- (ii) Administration of oaths and taking of affidavits by diplomatic and consular officers in any foreign country.

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<sup>54</sup> The Constitution (Application to Jammu and Kashmir) Amendment Order, 1964 (C.P. 69 dated 06/03/1964).

<sup>55</sup> The Constitution (Application to Jammu and Kashmir) second Amendment Order, 1964 (C.O. 70 dated 02/10/1964).

<sup>56</sup> The Constitution (Application to Jammu and Kashmir) Third Amendment Order, 1972 (C.O. 94 dated 01/08/1972).

<sup>57</sup> The Constitution (Application to Jammu and Kashmir) Amendment Order, 1985 (C.O.122 dates 04/06/1985).

12. Evidence and Oaths; recognition of laws, public acts and records, and judicial proceedings.

This entry was applied to Jammu and Kashmir in a modified form in 1972.<sup>58</sup> It was further modified in 1985<sup>59</sup> and applies to Jammu and Kashmir in the following form:

Evidence and oaths in so far as they relate to -

- (i) Administration of oaths and taking of affidavits by diplomatic and consular officers in any foreign country; and
- (ii) Any other matters being matters with respect to which Parliament has power to make laws.

13. Civil procedure including all matters included in the code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.

This entry was applied to Jammu and Kashmir in a modified form in 1972<sup>60</sup> in the following form:

Civil Procedure in so far as it relates to administration of oaths and taking of affidavits by diplomatic and consular officer in any foreign country.

25. Education, including technical education, medical education and universities, subject to the provision of entries 63, 64, 65 and 66 of List I; vocational and technical training of labour.

Entry 25 in its present form as mentioned above, came into existence by the Constitution (Forty-second Amendment) Act, 1976.<sup>61</sup> The unamended original entry is as follows:

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<sup>58</sup> The Constitution (Application to Jammu and Kashmir) Third Amendment Order, 1972 (C.O. 94 dated 01/08/1972).

<sup>59</sup> The Constitution (Application to Jammu and Kashmir) Amendment Order, 1985 (C.O. 122 dated 04/06/1985).

<sup>60</sup> The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1964 (C.O. 70 dated 02/10/1964)

“Vocational and technical training of labour”

This unamended entry was applied to Jammu and Kashmir in 1964<sup>62</sup> and it still applies in its unamended form.

30 Vital statistics including registration of birth and deaths.

This entry was applied to Jammu and Kashmir in 1964<sup>63</sup> but in a modified form.

Vital statistics in so far as they relate to births and deaths including registration of births and deaths.

42. Acquisition and requisitioning of property.

This entry applies to Jammu and Kashmir in a modified form in the following manner -

Acquisition and requisitioning of property, so far as regards acquisition of any property covered by entry 67 of List I or entry 40 of List III or of any human work of art which has artistic or aesthetic value.

45. Inquiries and statistics for the purposes of any of the matter specified in List II or List III. This entry was applied to the State of Jammu and Kashmir in 1963 with the modification that for the words and figures “List II or List III”, the words “this List” shall be substituted. The reason for this modification is that State List (List II) does not apply to Jammu and Kashmir.

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<sup>61</sup> Subs. By the Constitution (Forty-second Amendment) Act 1976, sec. 57 (c) (iv), for entry 25 (w.e.f. 03/01/1977).

<sup>62</sup> The Constitution (Application to Jammu and Kashmir Second Amendment Order, 1964 (C.O. 70 dated 02/10/1964).

<sup>63</sup> The Constitution (Application to Jammu and Kashmir) second Amendment Order, 1964 (C.O. 10 dated 02/10/64).

**Entries of the Concurrent List not Applicable to the State of Jammu and Kashmir.**

Entries 3, 5, 6, 7, 8, 9, 10, 11A, 14, 15, 17, 17A, 17B, 20, 20A, 21, 27, 28, 29, 31, 32, 33A, 37, 38, 41 and 44 have not been applied to Jammu and Kashmir. They read as follows:

3. Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.

It means that Union Parliament cannot make laws in relation to preventive detention for the State of Jammu and Kashmir.

5. Marriage and divorce; infants and minors; adoption; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this constitution subject to their personal law.
6. Transfer of property other than agricultural land; registration of deeds and documents.
7. Contracts, including partnership, agency, contracts of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.
8. Actionable wrongs.
9. Bankruptcy and insolvency.
10. Trust and Trustees.

<sup>64</sup>[11A. Administration of justice; constitution and organization of all courts except the Supreme Court and the High Courts.]

14. Contempt of court, but not including contempt of the Supreme Court.

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<sup>64</sup> Inserted by the Constitution (Forty-Second Amendment Act, 1976, sec. 57 (c) (i) (w.e.f. 03/01/1977).

15. Vagrancy; nomadic and migratory tribes.

17. Prevention of Cruelty to animals

<sup>65</sup>[17A Forests

17B Protection of wild animals and birds.]

20 Economic and social planning.

<sup>66</sup>[20A. Population control and family planning].

21. Commercial and industrial monopolies, combines and trusts.

27. Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.

28. Charities and Charitable institution, charitable and religious endowments and religious institutions.

29. Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plant.

31 Ports other than those declared by or under law made by Parliament or existing law to be major ports.

32. Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways.

<sup>67</sup>[33A Weights and measures except establishment of standards.]

37 Boilers.

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<sup>65</sup> *Id.* S. 57 (c) (ii).

<sup>66</sup> *Id.* S. 57 (c) (iii).

<sup>67</sup> *Id.* s. 57 (c) (v).

- 38 Electricity.
- 41 Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property.
- 44 Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.
- 25) **Administrative Relations between Indian Union and the State of Jammu and Kashmir.**

i) Article 256 regarding obligation of every State to exercise its executive power so as to ensure compliance with the laws made by Parliament and power of the Union to issue directions to a State applies to Jammu and Kashmir, by the Constitution (Application to Jammu and Kashmir) Order, 1954,<sup>68</sup> with the addition of a new clause which imposes following further obligations on the State:

- a. The state shall so exercise its executive power as to facilitate the discharge by the Union of its duties and responsibilities under the Constitution in relation to that State. This implies something positive, viz., active co-operation with the Government of India and
- b. In particular, the State of Jammu and Kashmir shall, if so required by the Union, acquire or requisition property on behalf and at the expense of the Union, or
- c. If the property belongs to the State of Jammu and Kashmir, the State shall have the obligation to transfer it to Union on such terms as may be agreed, or in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India.

The Jammu and Kashmir Government has an express duty to acquire or requisition property for Union purposes if so desired by the Union. So far as other states of Indian Union are concerned, it is not necessary to impose a duty to requisition property for Union purposes because

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<sup>68</sup> *Supra* note 4.

Parliament can provide for it by a law made under entry 42 of Concurrent List. But it cannot do so in relation to Jammu and Kashmir.<sup>69</sup>

Except in accordance with Article 256 a made applicable to the State.

- ii) Article 261 applies to Jammu and Kashmir subject to a modification<sup>70</sup> that in clause (2) of Article 261, the words “made by Parliament” shall be omitted. It means full faith and credit shall be given in Jammu and Kashmir to public acts, records and judicial proceedings of the Union and of every State but it is the State Legislature instead of Parliament which shall have the power to lay down the manner in which and the conditions under which the public acts, records an proceedings of the Union or of any other State shall be proved in Jammu and Kashmir and the effect thereof.

## 26) Part XII Finance, Property, Contracts and suits.

This part applies to Jammu and Kashmir with certain omissions and modifications. Under the Constitution (Application to Jammu and Kashmir) Order, 1950, Articles 264 and 265, clause (2) of Article 267, clause (2) of Article 283, Articles 286, 287, 288, 289, 290, 291, 293, 295, 296 and 297 were not extended to the State of Jammu and Kashmir and Articles 266, 282, 284, 298, 299 and 300 were made applicable to the State of Jammu and Kashmir in a modified form.

The 1954 Order radically changed the situation and except in regard to residuary powers of taxation, the financial relationship as well as allocation of taxing powers between the Centre and State of Jammu and Kashmir were brought on same lines as those existing between the Central Government and the other States. By the Order of 1954:

- i) The clause (2) of Article 267 related to the contingency fund of the State, Article 273 related to grants in lieu of export duty on jute and jute products, clause (2) of Article 283 related to custody, payment of moneys, withdrawal

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<sup>69</sup> Entry 42 of Concurrent List applies to Jammu and Kashmir in a modified form which limits the power of Union to acquire property through law and is not wide as in case of other states of Indian Union.

<sup>70</sup> *Supra* note 4.

of moneys in the Consolidated Fund of a State, the Contingency Fund of a State and Public account of the State and Article 290 related to adjustment in respect of certain expenses and pensions were not made applicable to the State of Jammu and Kashmir.

- ii) The provisions of Articles 266, 282, 284, 298, 299 and 300 were made applicable to the State of Jammu and Kashmir subject to the condition that references to the State or States shall be construed as not including references to the State of Jammu and Kashmir.
- iii) The Articles 277 and 295 were made applicable to the State of Jammu and Kashmir subject to a modification that references to the commencement of the Constitution shall be construed as references to the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954.

Thus, the federal financial integration, which took place in 1950 for other erstwhile Part B States, was achieved in relation to the State of Jammu and Kashmir in 1954 as a result of the Constitution (Application to Jammu and Kashmir) Order, 1954. As a consequence, Union departments like the Customs, Central Excise, Posts and Telegraphs, Civil Aviation and All India Radio extend their operations to Jammu and Kashmir. In regard to financial integration, State Autonomy Committee Report states that the financial relations between the State and the Union were determined by the Order of 1954 and this despite the fact that Delhi Agreement had not recorded any conclusions regarding financial relationship between the State and the Union and the matter had been deferred for final solution.<sup>71</sup>

27) Right to property under Article 300-A which was inserted by the Constitution (Forty-fourth Amendment) Act, 1978<sup>72</sup> does not apply to the State of Jammu and Kashmir as Article 19(1) (f) and Article 31 of the Indian Constitution have been retained in relation to Jammu and Kashmir.

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<sup>71</sup> *Supra* note 3 at 71.

<sup>72</sup> Chapter IV (containing art. 300A) ins. By the constitution (Forty-Fourth Amendment) Act, 1978, sec. 34 (w.e.f. 20/06/1979).

28) Part XIII related to trade, commerce and intercourse within the territory of India was not made applicable to Jammu and Kashmir in 1950. By the Constitution (Application to Jammu and Kashmir) Order, 1954, this part was applied in full subject to a change that in clause (1) of the Article 303, the words “by virtue of any entry relating to trade and commerce in any of the lists in the Seventh Schedule” shall be omitted. This modification is purely technical as State List does not apply to Jammu and Kashmir. As a result of the extension of Part XIII, there is no trade barrier between the state and other parts of India.

29) Part XIV of the Constitution of India, related with services under the Union and the States, was not made applicable to the State of Jammu and Kashmir by the Constitution (Application to Jammu and Kashmir) Order, 1950. The provisions of Part XIV was made applicable in 1954 only in regard to Union services as the term ‘State’ used in this part does not include the State of Jammu and Kashmir.<sup>73</sup> In 1958, the State of Jammu and Kashmir accepted the scheme of recruitment to All India Services and Article 312 was made applicable subject to a modification that in Article 312, after the words “the States”, the brackets and words”(including the State of Jammu and Kashmir)” shall be inserted. So, the provisions in Article 312 relating to the creation of All India Services apply to the State also.

30) Part XIV A related to tribunals (Articles 323A and 323 B) was inserted in the Constitution of India by the Constitution (Forty-second Amendment) Act, 1976. This part has not been extended to the State of Jammu and Kashmir.

31) By the Order of 1954, only Article 324 of Part XV was applied, in restricted way, to the State of Jammu and Kashmir. It confined the powers of Election Commission in relation to the State of Jammu and Kashmir to Parliamentary elections and election to the offices of President and Vice-President. In 1960<sup>74</sup>, Article 324 was modified in its application to the State of Jammu and Kashmir with the result that elections to either House of the State Legislature were placed

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<sup>73</sup> Supra note 13, Article, 308.

<sup>74</sup> The Constitution (Application to Jammu and Kashmir) Amendment Order, 1960 (C.O. 60 dated 20.01.1960)

under the supervision of the Election Commission of India with the modification that the reference to the Constitution shall, in relation to elections to either House of the Legislature of Jammu and Kashmir, be construed as a reference to the Constitution of Jammu and Kashmir. Thus, the elections to the State Legislature of Jammu and Kashmir are conducted by the Election Commission of India according to the Constitution of Jammu and Kashmir and the electoral laws made by the State Legislature. This is in contrast with the position existing in other State of Indian Union where the elections to the State Assemblies are held in consonance with the laws made by the Union Parliament.

- 32) Part XVI of the Indian Constitution related with special provisions relating to the certain classes has been applied to State subject to certain omissions and modifications. Article 331, 332, 333, 336 and 337 have not been extended to the State of Jammu and Kashmir. Article 334 [reservation of seats and special representation to cease after <sup>75</sup>(seventy years)] applies in so far as it relates to the House of the people. In Article 335, related to claims of Scheduled Castes and Scheduled Tribes to services and post, a modification has been made in its application to State to the effect that references to the State or States shall be construed as not including references to the State of Jammu and Kashmir. In other words, any reservation under the provisions of Article 335 applies only to the services and posts in connection with the affairs of the Union.
- 33) Part XVII of the Constitution of India which deals with official language applies to the State of Jammu and Kashmir in so far as it relates to:
- i. The official language of the Union;
  - ii. The official language for communication between one State and another, or between State and the Union; and
  - iii. The language of the proceedings in the Supreme Court.

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<sup>75</sup> Subs. by the Constitution (Ninety-fifth Amendment) Act, 2009, sec. 2, for “sixty years” (w.e.f. 25.01.2010).

The directive for development of the Hindi language<sup>76</sup> does not extend to the State of Jammu and Kashmir. The official language of the State of Jammu and Kashmir is Urdu<sup>77</sup>.

34) Part XVIII (Emergency Provisions) Articles 352 to 360.

- i. The effects of a proclamation of emergency under Article 352 would be same in Jammu and Kashmir State as, in the rest of India but the grounds for issuing a proclamation of emergency in Jammu and Kashmir are restricted by following modification:

(6) No Proclamation of Emergency made on grounds only of internal disturbance or imminent danger thereof shall have effect in relation to the State of Jammu and Kashmir (except as respects article 354) unless-

- a. It is made at the request or with the concurrence of The Government of that State; or
- b. Where it has not been so made it is applied subsequently by the President to the State at the request or with the concurrence of the Government of that State<sup>78</sup>.

The Constitution (Forty-fourth Amendment) Act, 1978 has substituted the term 'armed rebellion' in the place of 'internal disturbance' in clause (1) of Article 352 as one of the grounds of issuing Proclamation of emergency.

Articles 352 to 360, as they existed before the Constitution (Forty-fourth Amendment) Act, 1978 apply to the State of Jammu and Kashmir, with certain omissions and modifications.

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<sup>76</sup> *Supra* note 13, Article, 351.

<sup>77</sup> *Supra* note 19, sec. 145.

<sup>78</sup> The Constitution (Application to Jammu and Kashmir) Amendment Order, 1975 (C.O. 100 dated 29.06.1975)

- ii. An article 356 was not applied to Jammu and Kashmir either in 1950 nor in 1954. It was extended to the State of Jammu and Kashmir in 1964<sup>79</sup> subject to a modification that in clause (1) of Article 356, references to provisions or provision of this Constitution shall, in relation to the State of Jammu and Kashmir, be construed as including references to provisions or provision of the Constitution of Jammu and Kashmir. The effect of the application of Article 356, in its altered form to the State of Jammu and Kashmir is that not only Proclamation imposing President's Rule could be imposed in the State of Jammu and Kashmir as in respect of any other State of Indian Union but such a Proclamation can also be imposed by the President of India if he is satisfied that the State Government of Jammu and Kashmir could not be carried on in accordance with the State Constitution. Article 356 in its application to Jammu and Kashmir has been amended in 1993<sup>80</sup>, 1994<sup>81</sup>, 1995<sup>82</sup> and 1996<sup>83</sup> extending the duration of President's Rule issued on 18<sup>th</sup> July, 1990 in the State from a maximum of three years to a maximum of seven years. According to State Autonomy Committee Report<sup>84</sup>:

Far from enjoying a special status as Article 370 envisaged, the State was put in a status inferior to that of other States. One illustration suffices to demonstrate that. Parliament had to amend the Constitution four times, by the 59<sup>th</sup>, 64<sup>th</sup>, 67<sup>th</sup> and 68<sup>th</sup> Constitution Amendments to extend President's rule imposed in Punjab on May 11, 1987. For the State of Jammu and Kashmir, the same result was accomplished by executive orders under Article 370.

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<sup>79</sup> The Constitution (Application to Jammu and Kashmir) Third Amendment Order, 1964 (C.O. 71 dated 21.12.1964)

<sup>80</sup> The Constitution (Application to Jammu and Kashmir) Amendment Order, 1993(C.O. 151 dated 24.02.1993)

<sup>81</sup> The Constitution (Application to Jammu and Kashmir) Amendment Order, 1994(C.O. 154 dated 19.02.1993)

<sup>82</sup> C.O. 160 dated 31.05.1995

<sup>83</sup> C.O. 162 dated 06.07.1996

<sup>84</sup> Supra note 3 at 88

Moreover, for the State of Jammu and Kashmir, there is another provision for 'Governor's Rule' under Section 92 of the Constitution of Jammu and Kashmir, 1957.

(iii)The President of India shall have no power to make a Proclamation of financial emergency in relation to the State of Jammu and Kashmir as Article 360 has not been extended to State till date. Excluding Jammu and Kashmir from the application of Article 360 means the Union Government cannot give directions to that State to observe canons of financial propriety and such other measures deemed necessary when a Proclamation of financial emergency is issued under that Article<sup>85</sup>.

35) The Union Government can give directions to the Government of Jammu and Kashmir but it has no power to enforce compliance by exercise of the powers as given under Article 365 as it does not extend to the State of Jammu and Kashmir. If the State Government refuses to carry out the directions received, no direct sanction is enjoyed by the Central Government and for the most part the Union will have depend on the goodwill of the Kashmir Government.<sup>86</sup>

36) The power of Parliament to amend the Constitution and procedure therefore has been given under Article 368 of the Constitution of India. In 1954, Article 368 was applied to the State of Jammu and Kashmir subject to the proviso 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 (1) of Article 370.<sup>87</sup> It means that amendments made to the Indian Constitution would apply to Jammu and Kashmir only if the State Government agrees to it.

In 1975, Article 368 was further modified in its application to the State of Jammu and Kashmir.<sup>88</sup> As a result, clause (4) was added after clause (3) of Article 368 which says:

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<sup>85</sup> Supra note 10 at 42.

<sup>86</sup> Supra note 9 at 150.

<sup>87</sup> Supra not 4.

<sup>88</sup> The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1975 (C.O. 101 dated 23/07/1975).

(4) 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 Jammu and Kashmir relating to-

- a. Appointment, powers, functions, duties, emoluments, allowances, privileges or immunities of the Governor; or
- b. Superintendence, direction and control of elections by the Election Commission of India, eligibility for inclusion in the electoral rolls without discrimination, adult suffrage and composition of the Legislative Council, being matters specified in sections 138, 139, 140 and 50 of the Constitution of Jammu and Kashmir, shall have any effect unless such law has, after having been reserved for the consideration of the President, received his assent.

This amendment was the outcome of the Kashmir Accord of 1975. The proviso and new clause (4) added to Article 368 in its application to the State is in conformity with the Constitutional position of the State of Jammu and Kashmir within the framework of the India Union and is designed to protect that position.

37) Part XXI of the Constitution of India applies to the State of Jammu and Kashmir subject to certain omissions and modifications. Article 370 which defines the Constitutional relationship of the State with Indian Union is placed under this part of the Indian Constitution.

38) Articles 394 and 395 as occurring in Part XXII of the Constitution of India were not made applicable to the State of Jammu and Kashmir by the Constitution (Application to Jammu and Kashmir) Order, 1954.<sup>89</sup> These Articles till date do not apply to Jammu and Kashmir. Article 394 which deals with commencement of the Constitution of India does not apply to the State as the date of commencement of the Constitution of India for the State of Jammu and Kashmir is date of commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954 which is May 14, 1954.

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<sup>89</sup> Supra note 4.

## 39 SCHEDULES

a) The First Schedule applies to the State of Jammu and Kashmir in which Jammu and Kashmir comes at fifteenth place and its territory has been defined as the territory which immediately before the commencement of this Constitution was comprised in the India State of Jammu and Kashmir.

b) The Second Schedule applies to State of Jammu and Kashmir.

c) The Forms V, VI, VII and VIII as mentioned in Third Schedule are not applicable to the State of Jammu and Kashmir. As per the Third Schedule mentioned in Article 188 of the Indian Constitution, the oath sworn by every member of the State Legislature before assuming office requires the member to “bear true faith and allegiance to the Constitution of India.”<sup>90</sup> This is true of the affirmation by every High Court and Supreme Court judge as well.<sup>91</sup> In Jammu and Kashmir State, however, every legislator and every judge, including the Chief Minister and The Chief Justice is required to swear only by the ‘Constitution of the State’ as mandated in the Fifth Schedule referred to in Sections 64 and 97 of the Jammu and Kashmir State Constitution.<sup>92</sup>

d) The Fourth Schedule related to allocation of seats in the Council of States was applied to State even in 1950 and is still applicable to the State of Jammu and Kashmir.

e) The Fifth Schedule [Provisions as to the administration and control of scheduled areas and scheduled tribes] and Sixth Schedule [Provisions as to the administration of tribal areas in<sup>93</sup> (the States of Assam, Meghalaya, Tripura and Mizoram)] have no application to Jammu and Kashmir.

f) The Seventh Schedule as already discussed applies to the State subject to certain omissions and exceptions though State List has no application to the State of Jammu and Kashmir.

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<sup>90</sup> *Supra* note 10 at 43.

<sup>91</sup> *Ibid.*

<sup>92</sup> *Ibid.*

<sup>93</sup> Sub. by the State of Mizoram Act, 1986 (34 of 1986), sec. 39 (f), for “the State of Assam, Meghalaya and Tripura and in the Union Territory of Mizoram (w.e.f. 20.02.1987)

g) The Eighth Schedule related to languages applies to the State of Jammu and Kashmir.

h) The Ninth Schedule applies to the State with the addition of certain State laws in land reforms, tenancy, restitution of mortgaged properties, peasant indebtedness etc. The Jammu and Kashmir Big Landed Estates Abolition Act [No. XVII of <sup>94</sup>[Svt] 2007] and <sup>95</sup>[the Jammu and Kashmir Restitution of Mortgaged Properties Act, (No. XIV of 1976)] are the examples of the Act included in the Ninth Schedule.

i) The Tenth Schedule of the Constitution related to the provisions as to disqualification on ground of defections applies to the State of Jammu and Kashmir in so far as members to be elected to the Parliament are concerned. As regards the members of the State Legislature are concerned, Jammu and Kashmir has its own anti defection law incorporated in its State Constitution.<sup>96</sup>

j) The Eleventh<sup>97</sup> and Twelfth<sup>98</sup> Schedule do not apply to Jammu and Kashmir as the Constitution (Seventy-third Amendment) Act, 1992 and the Constitution (Seventy-fourth Amendment) Act, 1992 have not been extended to the State of Jammu and Kashmir.

### **3 CONCLUSION**

The Constitutional relationship of the State has not remained static since its integration with the Indian Union. It has been strengthening with time towards closer proximity of the State with the Indian Union. As a natural consequence, it has decreased the autonomy of State than what was enjoyed by it under Instrument of Accession. But still the State of Jammu and Kashmir constitutes a special category with regard to much greater measure of autonomy enjoyed by it than enjoyed by other constituent units of Indian Union. As Hari Ram has rightly remarked:

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<sup>94</sup> Samvat Bikermi

<sup>95</sup> Ins. by C.O. 106 of 1976.

<sup>96</sup> The Constitution of Jammu and Kashmir, sub- sec. (3) of s. 69 read with the Seventh Schedule of the Constitution Jammu and Kashmir which was inserted by the Constitution of Jammu and Kashmir (Eighteenth Amendment) Act, 1987.

<sup>97</sup> Added by the Constitution (seventy-third Amendment) Act, 1992, sec. 4 (w.e.f. 24.04.1993)

<sup>98</sup> Ins. by the Constitution (seventy-fourth Amendment) Act, 1992, sec. 4 (w.e.f. 1.6.1993)

The maximum flexibility of the Indian federal system in this behalf is to be seen in the special status enjoyed by Jammu and Kashmir State, which is constitutionally temporary but has almost assumed a permanence to the point of becoming one of the stable features of the Indian Federal system.

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