SHOULD JAMMU AND KASHMIR HAVE A SEPARATE CONSTITUTION?
CHAPTER 9: SHOULD JAMMU AND KASHMIR HAVE A SEPARATE CONSTITUTION

9.1 ALTERNATIVES REGARDING THE FUTURE OF KASHMIR

The historical, territorial, geographical, cultural, social, religious, and above all constitutional relations between the State of Jammu and Kashmir and the Union of India have already been dealt with in the preceding chapters.¹ A study of the above Chapters shows how the relation between the State of Jammu and Kashmir and the Union of India developed. The object of the present chapter is to analyze the various alternatives before the State of Jammu and Kashmir and the Union of India, so that the future relationship between the India and Kashmir may be determined.

Some groups in Kashmir are struggling for the re-organization of the State of Jammu and Kashmir, their demand being separate statehood for Jammu and Union Territory status to Ladakh region. According to Prof. K. L. Bhatia* there are four movements pursued by the different sections of the people of the Jammu and Kashmir State. First is the movement of Greater Autonomy by National Conference, the second is azadi by JKLF and third is merger with Pakistan demanded by Hurriyat, a conglomerate of

¹ See – Chapters 2 to 7 above.
26 groups and sub-groups, fourth is for the status of Union Territory by Ladakh Buddhist Association and reorganization of Jammu and Kashmir State by Jammu and Kashmir Nationalist Front. Except the demand of reorganization and Union Territory Status for Ladakh, rest of the demands are secessionist in nature.¹

Besides these movements in the State of Jammu and Kashmir there has been other movements within the State making various demands regarding the future of the State. In 1952, the Praja Parishad was the only other party in opposition in the State of Jammu and Kashmir that protested against the separatist moves of the National Conference. The Praja Parishad emphasized that India was one nation and Jammu and Kashmir State, an integral part of Indian nation, could not be governed by a separate flag and have a separate President.² It launched a Satyagraha demanding withdrawal of the special status granted to Kashmir and its incorporation in the Indian Republic in the terms similar to those under which the other Princely States had acceded.³ In Ladakh, the Ladakh Buddhist Association is the prime organization demanding the separation of the two districts of Ladakh and Kargil of Buddhist Ladakh from the State of Jammu and Kashmir and grant the of Union Territory status. The inhabitants of Ladakh and Kargil make up just 2.25 percent of the Jammu and Kashmir’s total

¹ Organiser – October 14, 2001
² BJP Today – Vol. 9 No. 16 – August 16-31, 2000.
³ Kashmir and the Supreme Sacrifice – Tribute to Bharat Keshari Syama Prasad – Page 19
According to some Ladakhi leaders, "We will be the next target after the Pundits (Kashmiri Hindus, most of whom fled the Kashmir Valley in 1990)." Another demand within the State of Jammu and Kashmir is the statehood demand for the Jammu region voiced by the RSS. This would reduce J & K state to just a Muslim predominant Valley – a development that might ultimately put India on the slippery slope to losing control of the terrorism-wracked region. However, it cannot be said that re-organization of the State would serve any purpose.

It may also be noted that about 3,50,000 Kashmiri Pundits were forced to leave the predominantly Muslim Kashmir Valley in 1990 and are living in inhuman conditions in refugee camps in and around Jammu city. According to Dr. Agnishekher (convener of Panun Kashmir), "these refugee camps are the blisters of Indian secularism". The displaced Kashmiri pundits living in these refugee camps have not been granted Internally Displaced People status. Had they been granted this status then under the Internally Displaced People Act passed by The United Nations in 1994, to which India was also a signatory, they would have been entitled to international humanitarian aid. The Panun Kashmir is the frontline organization of displaced Kashmiri Pundits, which has been fighting for their rights apart from demanding a separate homeland within South

Kashmir for Kashmiri Pundits.¹ The demand of the Kashmiri Pundits for declaring them a religious minority in Kashmir has also been ignored. They seem condemned – to living permanently in temporary camps.²

If all the Indian States were allowed to enjoy the fruits of Article 370, then question of abrogation of Article 370 in the case of the State of Jammu and Kashmir would not arise. Possibly, if offered, all the State would accept the benefits of Article 370. It has already been shown that at various times different States have demanded more autonomy.³ However, it has been argued that the granting of maximum autonomy to all the States would pose a threat to the integrity of India. However, if Kashmir, having a Muslim majority population and common border with Pakistan (1/3rd of its territory being under the occupation of Pakistan and China) and enjoying the benefit of Article 370, does not threaten the integrity of India, then the extension of Article 370 to other Indian States should not pose as a threat to the integrity of India.

It may be noted that though there were three options open before Maharaja Hari Singh at the time of signing the Instrument of Accession, i.e. accession with Pakistan, accession with India and complete

² Grim Realities of Life, Death and Survival in Jammu and Kashmir – Peoples Union for Democratic Rights, Delhi – Page 39
³ See Chapter 6
independence, no public opinion has gathered with regards to accession of Kashmir with Pakistan, because after the signing of the Instrument of Accession the Kashmir issue has become a Indo-Kashmir issue and not an Indo-Pak issue. However, in the public opinion sheet there were columns for giving any other suggestion and also personal comments where issues like, Accession of Kashmir with Pakistan or extension of article 370 to all the States could have been added. The questionnaire used for collecting public opinion both inside and outside the State has been setout and dealt with in the previous chapter\(^1\). The alternatives on which public opinion has been collected and analyzed are:

(a) Abrogation of Article 370 of the Constitution of India

(b) Pre-1953 status and Maximum Autonomy

(c) Trifurcation of Kashmir

(d) Semi-sovereign status with partial control by India and Pakistan

(e) Independence of Kashmir

(f) Any other suggestion

9.2 ABROGATION OF ARTICLE 370 OF THE CONSTITUTION OF INDIA

The State of Jammu and Kashmir enjoys its special status by virtue of Article 370 of the Constitution of India 1950. Article 370 is contained in

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\(^1\) See Chapter 8
Chapter XXI, dealing with Temporary, Transitional and Special Provisions. The very head note of Article 370, which reads, Temporary Provisions with respect to the State of Jammu and Kashmir, and the Heading to Chapter XXI is indicative of the 'temporary' nature of Article 370. It is obvious from the Heading and Head note that the provisions of Article 370 were meant to be temporary and that there is no Constitutional guarantee that the said provisions will continue to be in force indefinitely. On the contrary the Heading and the Head note indicate that the provisions were introduced for a specific purpose and a specific period. Article 370 is a self-contained article and the power to abolish or abrogate Article 370 is contained in Article 370 itself. Article 370(3)\(^1\) states as follows:

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.

It is interesting to note that Justice Sarkaria described as unfortunate and dangerous the demand of the abolition of Article 370 at this stage.\(^2\)

\(^1\) See – Article 370 of the Constitution of India 1950.

However, it has been pointed out that the cause for incorporation of something in the Constitution need not always be the cause for continuation of it.¹ From the opinions gathered in Kashmir it appears that no one has opted for abrogation of Article 370 of the Constitution. However, it may be noted from the opinions gathered from the rest of India that 50% of the people have opted for abrogation of article 370.

9.3 PRE-1953 STATUS AND MAXIMUM AUTONOMY

For quite sometime the State of Jammu and Kashmir has been demanding Pre-1953 status and maximum autonomy. This resulted in the passing of the latest and very controversial report on State Autonomy.² The Farooq Abdullah Government “endorsed” the report of the State Autonomy Committee, recommending pre-1953 status for the State.³ However, on 4th July 2000, the Central Government outright rejected the State Autonomy Report. The object of the autonomy report was to restore pre-1953 status to the State as was guaranteed by the Delhi Agreement of 1952.⁴ The autonomy report also suggested certain amendments to the Constitution of India in order to increase the autonomy of the State. Reversion of Pre-1953 status would mean abrogation of over 300 Central Laws duly ratified by the State Assembly. Supreme Court would lose its

¹ Article 370 of the Constitution – Its Past and Present – Bimal Kumar Chatterjee.
power to review the verdict of the High Court of Jammu and Kashmir. Article 356 and 357 of the Indian Constitution would no longer be applicable to the State of Jammu and Kashmir, without which Presidential intervention is impossible. This would render the people of Kashmir defenseless against any arbitrary or oppressive acts of the State.¹ Prof. K. L. Bhatia describes the decision to revert back to Pre-1953 status as 'an insane step'.² The opinions show that 10% of the people have opted for Maximum Autonomy. However, it is interesting to note that out of the 85% that opted for independence of Kashmir, 35% (of that 85%) opted for Maximum Autonomy as a second option. This added to the 10% that opted for Maximum Autonomy, comes to 40% of the total.

9.4 TRIFURCATION OF KASHMIR

There is also a demand for Trifurcation of the State of Jammu and Kashmir. Trifurcation of the State of Jammu and Kashmir means re-organization of the State by dividing it into three parts, by giving Ladakh Union Territory status and Jammu a separate Statehood. The Ladakh Buddhist Association is the prime organization demanding the separation of the two districts of Ladakh and Kargil of Buddhist Ladakh from the State of Jammu and Kashmir and grant the of Union Territory status. The

Jammu and Kashmir Nationalist Front is the prime organization demanding statehood for Jammu. This division would reduce the State to just a Muslim predominant Valley. By this the original State of Jammu and Kashmir would be broken down into the State of Kashmir, the State of Jammu, the Union Territory of Ladakh, the areas known as Pakistan Occupied Kashmir and the areas under the occupation of China. The opinions gathered from the rest of India show that 27% of the people have opted for trifurcation as a reasonable solution to the Kashmir issue.

9.5 SEMI-SOVEREIGN STATUS WITH PARTIAL CONTROL BY INDIA AND PAKISTAN

One of the suggestions or a pragmatic solution rather that an ideal one of azadi was that both segments of Kashmir could be unified territory. However, external affairs and defence in the segments would remain in the hands of Pakistan and India according to the territories under their present control.¹ This theory is similar to the theory of semi-sovereign status, with partial control over the State by both India and Pakistan. The exponent of the theory of semi-sovereign status for the State with partial control by India and Pakistan is Qureshi, negotiator of the Hizbul and leader of the P.P.F. Implementing this theory is not only remote but also impossible. In

¹ Grim Realities of Life, Death and Survival in Jammu and Kashmir – Peoples Union for Democratic Rights, Delhi – Page 46
the opinions collected in Kashmir 5% have opted for semi-sovereign status while in the opinions collected from the rest of India 4% have opted for semi-sovereign status. It may be noted that in the public opinions collected in the frontier States about 7% have spoken of Provisional independence as an alternative solution to the Kashmir issue, which too would be similar to semi-sovereign status.

9.6 INDEPENDENCE OF KASHMIR

The independence of Kashmir is the most vocal demand within the valley. It is quite clear that under the provisions of the Constitution of India 1950, read with the Constitution of Jammu and Kashmir 1957, independence of the State of Jammu and Kashmir is an impossibility. However, under the accepted principles of international law the right of self-determination may be exercised for making the State of Jammu and Kashmir independent. Whether this right of self-determination is to be exercised by war or by peaceful means shall depend upon the people of the State. There are numerous examples where this right has been successfully exercised. In our own sub-continent Bangladesh has successfully ceded from Pakistan and has existed as an independent nation for over a quarter of a century. The opinions collected show that 85% of the people in the State of Jammu and Kashmir are in favour of independence of the State.
9.7 OTHER ALTERNATIVES

This section has been included for dealing with suggestions coming from the public that fall outside the five proposed options discussed above, such as extension of Article 370 to all the States or accession of Kashmir with Pakistan, etc. It is interesting note few have given any opinion under this heading and have been satisfied by giving their opinions from within the other five alternatives. However it should be mentioned that while collecting opinions from the State of Jammu and Kashmir many did ask why there was no option for voting for accession of Kashmir with Pakistan. It was explained to them that they could vote for accession of Kashmir with Pakistan under this heading if they so desired. Accession of Kashmir with Pakistan as a separate head had been excluded because the Kashmir issue is an issue to be solved between India and Kashmir and has nothing to do with Pakistan. However, there was no bar to giving opinion for the States’ accession with Pakistan. While giving opinion it appears that no body actually recommended accession of the State with Pakistan. This should be accepted as a positive vote of the people of Kashmir against the State’s accession with Pakistan.

9.8 RETENTION OF ARTICLE 370 OF THE CONSTITUTION OF INDIA

To find a solution to the Kashmir issue, which would not only satisfy the people but would also be legally acceptable, is not an easy task.
Kashmir enjoys a special status compared to the other states of the Union of India. The unequal treatment of the States is one of the primary reasons behind the Kashmir issue. Article 370, which was a temporary provision, could have been abrogated long ago. Several provisions under the said Article 370 were also passed in subsequent years for Assam, Nagaland, Mizoram and some other States including Sikkim which having their short life have been omitted. But the provisions relating to Kashmir are still retained. Although Article 370 was incorporated only as a temporary measure, successive governments have found it necessary to keep it going to serve their own partisan interest. Of course, the sudden abrogation of Article 370 of the Constitution of India 1950 would cause a huge amount of social and political unrest.

On the other the right to be independent is not derived from the special status enjoyed by the State of Jammu and Kashmir or from any promise made to the people of the State at the time of accession or soon thereafter. The right to hold a plebiscite to determine the future of the State is not derived from what Lord Mountbatton had written in his letter addressed to the Maharaja or because the Indian representatives agreed to a plebiscite before the United Nations. The right to be independent is not void simply because such an act would be repugnant to the Indian

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1 Tribute to Bharat Keshari Syama Prasad – Preface.
2 The Dilemma of Article 370 – 96 CWN 93
Constitution. To refuse Kashmir independence, or at least the right to have a free and peaceful plebiscite is contrary to the doctrines of international law regarding the formation of new states and recognition of States.

The question that is then how can India prevent Kashmir from opting for independence? For the answer to this question let us take a look at the public opinion once more. Out of the opinions collected in the State of Jammu and Kashmir 85% opted for independence of Kashmir. Out of these, 35% opted for pre-1953 status or maximum autonomy as a second option. This shows that the people of Kashmir are ready to compromise with their demand for independence, subject to the grant of further rights and liberties. It already been discussed that at this point it would be totally impossible and impractical to blindly revert back to pre-1953 status. In the changed circumstances India is to find out what form and amount of autonomy would satisfy the people of Jammu and Kashmir. However, to implement this new form of autonomy, if at all, possibly the retention of Article 370 would be necessary.

The relationship between the Union and the State of Jammu and Kashmir is very similar to the Federal System of Government wherein the State has a separate Constitution, a separate citizenship, a separate flag and the State enjoys maximum internal autonomy. The system of Federal Government has been accepted by many of the advanced countries of the
world. The Federal form of Government was chosen by the framers of many of the advanced nations of the world including the U.S.A. After over fifty years of the Indian independence many critics are of the view that the present form of government in India has failed and many recommend that pure federal form would have been more effective. The Constitution Review Commission was also appointed to investigate into the working of the present Constitution and make appropriate recommendations. According to Justice B.L. Hansaria, 'the Constitution is after all meant for the people and if they be of the view that the one at hand has failed to deliver goods, they have the undoubted right to give them another Constitution. There is no legal impediment, no moral prohibition.'

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