

**REPORT
OF
THE STATE AUTONOMY
COMMITTEE**

SRINAGAR
JULY, 2000

Houses of Jammu & Kashmir Legislature on April 16, 1999. It was subsequently, adopted by the state legislative Assembly on June 26, 2000 & by the state Legislative council on June 27, 2000 in a special session convened for this very purpose.

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Published by :-
General Administration Department
Jammu & Kashmir Government
Srinagar / Jammu

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Chapter -1

INTRODUCTION

Centre-State relations have remained on centre stage of Indian political scenario for quite a length of time, before 1950, when the present Republican constitution was adopted and enacted in its entirety on 26-01-1950 and even thereafter. Right from 1919, the future of India was seen as a Federal State. In fact, Simon Commission put it on record unambiguously :

“Apart together from any question of an ultimate Federal Union between the Indian States and British India, there are, we think very strong reasons for the reconstruction of the Indian Constitution on a Federal basis. It is only in a Federal structure that sufficient elasticity can be obtained for the Union of elements of diverse internal conditions and the communities at very different stage of development and culture.”

The developments till enactment of Government of India Act, 1935 ultimately led to constitutional framework for future federal polity of the country. The build up of this federal polity, of necessity, could not follow the pattern of formation of Federation of American States, Australia or Canada but, even so, the federal polity envisaged for India was to consist of Indian Provinces and Indian States, as units. The Joint Parliamentary Committee on Indian Reforms recorded as under :

“Federations have commonly resulted from an agree-

ment between independent or at least autonomous governments surrendering a definite part of their sovereignty to a new Central Organism.....we are faced with the necessity of creating autonomous units and combining them into a Federation by one and the same Act."

The Federation was to consist of all British Provinces, till then centrally administered both in legislative as well as executive wings, and the Indian states which were to accede in respect of some subjects for legislative purposes to Federal/ Union Legislature and to the extent of the surrender of those subjects to accept executive functioning of the Centre as well. States had the option to join or not to join the Federation. The Act of 1935 provided the instrumentality for exercise of this choice by providing for an Instrument of Accession.

The sequence of events after enforcement of 1935 Act in April, 1937, elections in British provinces and formation of governments by Indian Parties, World War 1939-1945, India's insistence on independence, equally shrill cries for partition of India, non-exercise of option by Indian States to join the Constituent Assembly, continued refusal of the Muslim League to sit in the Constituent Assembly, quick developments leading to departure of Lord Wavel and incoming of Lord Mountbatten, preparing of the date of independence from 1948 to 1947 for the country, ultimate passage of the Indian Independence Act, 1947 on 4th July, 1947, declaring 15th August, 1947 as "appointed day" when Dominions of India and Pakistan were to be formed all these developments took place at breath-taking pace. The Indian States had even so the option

to join one or the other Dominion, India or Pakistan.

Indian States, with the lapse of paramountcy on the “appointed day” i.e. 15th August, 1947 as sovereign entities could go the way they chose to exercise the option. Their joining had to be voluntary and at the time of joining they were under no obligation to accept any future constitution except by voluntary acceptance or supplementary agreement. They had the right to accept or not to accept provisions of the constitution that either Dominion would adopt for itself.

Partition in 1947 did effect a slight change in the perception about future constitution that would be adopted for the country. From truly federal polity, it took a turn towards making this federal polity such that Centre retains some extraordinary powers too. This seemingly was to ensure a strong Centre. It was regarded to be an “imperative necessity.” In fact, even the second report of the Union Powers Committee places on record the following :

“Now the partition is a settled fact. We are unanimously of the view that it would be injurious to the interests of the country to provide for a weak central authority which would be incapable of ensuring peace, in coordinating vital matters of common concern and of speaking effectively for the whole country in the international sphere.”

Earlier perception was creation, in a way, of the mandate of Cabinet Mission Plan which had discarded partition but partition having been announced the earlier perception was

held to be non-binding. Indian Federation in the new context was to have a strong Centre, of course, retaining all the necessary features of a federal polity.

This primarily was the kind of difference in treatment which became inevitable in regard to Indian Provinces. Indian States who had to be part of either of the Dominions by their own choice were on a different footing. They constituted the real units choosing to be part of a federal system in that the unit, upon exercise of voluntary choice in favour of either of the two Dominions, would accept federal authority in some fields of governance.

How other Indian States exercised this choice, how they participated in Constitution framing and in what form did they adopt it, is not our concern today. This shall be referred to wherever necessary in the pages to follow. But it is relevant to mention here that whereas other Princely States signed the Instrument of Accession to India and subsequently the instruments of merger, the accession of J & K State was limited only to the areas of Defence, External Affairs and Communication.

Uniquely, Jammu and Kashmir State is the only one to have negotiated the terms of its membership of the Union. Right till the Delhi Agreement of 1952, it did not accept any provisions of the Constitution of India other than those agreed to in the Instrument of Accession and retained its autonomy.

Autonomy has remained, since the days of accession, the heartbeat of the people of the State. Today we find that the

State has lost all resemblance to autonomy. Its erosion is the primary cause for Kashmiri discontent. Keeping this in view, Shri Narasimha Rao, the then Prime Minister of India announced in 1995 that the Union Government would be prepared to consider autonomy "short of independence" for Jammu and Kashmir. Welcoming this on behalf of Jammu and Kashmir National Conference, Dr. Farooq Abdullah asked the Union Government to issue an order under Article 370 to restore the state's autonomy in terms of the Delhi Agreement of 1952. When this did not happen, the National Conference boycotted the Parliamentary poll in 1996.

Mr. Deve Gowda, as Prime Minister, offered Jammu and Kashmir "maximum autonomy" The assurance was incorporated in the C.M.P. (Common Minimum Programme) of the National Front Government, which persuaded Dr. Farooq Abdullah and his party National Conference to participate in the Assembly elections. The party fought these elections on autonomy plank and was returned with a thumping majority. Following the resumption of office as Chief Minister, Dr. Farooq Abdullah with the approval of his Cabinet promptly constituted a Committee to examine and recommend measures for the restoration of autonomy. This was exactly in accordance with the mandate given to him by the people of the State as also the assurances held out by the Union Government.

* * *

Chapter - II

Constitution of the State Autonomy Committee

The State Government set up a Committee to examine the question of restoration of autonomy to the state of Jammu and Kashmir vide Government order No. 1164-GAD of 1996 Dated 29-11-1996 with the following composition :-

1)	Dr. Karan Singh	Chairman
2)	Sh. Mohi-ud-din shah	Member
3)	Sh. Abdul Ahad Vakil	-do-
4)	Sh. Abdul Rahim Rather	-do-
5)	Sh. Piyaaray Lal Handoo	-do-
6)	Sh. Bodh Raj Bali	-do-
7)	Molvi Iftikhar Hussain Ansari	-do-
8)	Kushok Thiksay	-do-
9)	Shri Teja Singh	-do-

By a subsequent government Order No. 263-GAD of 1997 dated 21-02-1997, it was ordered that Shri Teja Singh shall be Member/Convener of the above committee. Dr. Karan Singh resigned as Chairman on July 31, 1997 and vide Government Order No. 1303-GAD of 1997 dated 19-08-1997, Shri Ghulam Mohi-ud-Din Shah, PWD Minister, J&K Government was appointed as Chairman w.e.f. the date Dr. Karan Singh resigned. By another Government Order No. 1413 of 1997 dated 05-09-1997 Mirza Abdul Rashid, former Speaker of J&K Legislative Assembly, was nominated as member of

the Committee.

Terms of Reference :

The terms of reference of the Committee are as follows :-

(i) To examine and recommend measures for the restoration of autonomy to the state of Jammu and Kashmir consistent with the Instrument of Accession, the Constitution Application Order, 1950 and the Delhi Agreement of 1952.

(ii) To examine and recommend safeguards that be regarded necessary for incorporation in the Union/State Constitution to ensure that the Constitutional arrangement that is finally evolved in pursuance of the recommendations of this Committee is inviolable.

(iii) To also examine and recommend measures to ensure a harmonious relationship for the future between the State and the Union.

Four features of these terms of reference deserve particularly to be noted. First, implicit in the exercise is acknowledgment of the fact that the State's autonomy, guaranteed by Article 370 of the Constitution of India, was eroded in breach of its provisions, of those of the Instrument of Accession to which Article 370 gave full recognition, of the Constitution (Application to Jammu and Kashmir) Order, made under Article 370, by the President of India on January 26, 1950, extending to the State specified provisions of the Constitution of India which had come into force on the same day, and of the

Delhi Agreement of July, 1952. It is this erosion which has necessitated "the restoration of autonomy" to the State. As we shall point out, till now, 94 of the 97 entries in the Union list have been applied to the State. 26 entries in the Concurrent list have also been applied, 6 more with modifications. Even in 1954 the Concurrent list did not apply at all. The process did not cease. It was accelerated. The Constitutional relationship that was thus established was contrary to and went far beyond the Delhi Agreement.

Secondly, if this exercise is to be worthwhile, it would be necessary to devise appropriate effective constitutional safeguards against any repetition of that unfortunate phase of erosion in future. Any constitutional arrangement that is evolved to this end must have finality and be "inviolable".

Thirdly, the exercise has a definite limit and a clear objective. It seeks in effect the full enforcement of the historic Delhi agreement concluded between the Prime Minister of India, Pt. Jawaharlal Nehru, and the Prime Minister (as he was then called) of the State, Sheikh Mohammed Abdullah, the two foremost architects of the State's accession to the Union of India. Implementing their mutual pledges in that Agreement is, at once, the bottom line and the high ideal we have placed before ourselves.

Lastly, but not least, it follows necessarily from the foregoing that efforts in these directions will "ensure a harmonious relationship for the future between the State and the Union", of which it is a member, by redressing the grievances

of the past and the strains they so needlessly created in the relationship. It will strengthen, not weaken, the relationship. Far from being inconsistent with each other, the autonomy of the State will strengthen the ties that bind it to the Union and, with them, the unity of India.

Our nation is rich in its diversities and we are justly proud of it as we are of the bonds that weld us into one nation. The Constitution of India reflects both the unity and the diversities. Besides the fundamental rights which protect all citizens, there are fundamental rights for the protection specifically of the “language, script or culture” of any section of the citizens (Article 29) and of the right of minorities as such “based on religion or language” to establish or administer educational institutions of their choice (Article 30).

There is a whole part (XVI) containing provisions for reservation of seats for Scheduled Castes, Scheduled Tribes and Anglo-Indians in the Lok Sabha and in public services as well as provisions for the protection of Scheduled Tribes.

Regional diversities are reflected in special provisions with respect to the States of Nagaland (Article 371-A), Sikkim (Article 371-F), Mizoram (Article 371-G) and Arunachal Pradesh (Article 371-H) which confer “special status” on these states. There are other “special provisions” with respect to some states concerning certain areas within those states, for example, Article 371 relating to the States of Maharashtra and Gujrat. In respect of Nagaland and Mizoram, Parliament is barred not only from altering religious or social practices but

also “customary law and procedure”. “administration of civil and criminal justice” according to such law, and ownership and transfer of land.

The State of Jammu and Kashmir is, thus, not the only one to enjoy “a special status” under Article 370. In turn, the State is a mosaic of diversities in its regions, groups and communities. Protection of minorities and regional interests is a prime duty. Mindful of this fact, the Government of the State appointed, simultaneously with this Committee, a Committee on Regional Autonomy.

The Report we submit to the Government, is addressed to the people of the State and, also, to the country. We have been fully alive to the hopes and expectations aroused by our work as well as the misgivings expressed in some quarters. The State has passed through a grim ordeal in the last decade. To any who honestly felt alienated or frustrated, for whatever reason, our Report will provide assurance that the democratic framework does provide avenues of redress.

We have heard a large cross-section of people within and outside the State and received memoranda from many persons and also held discussions with leaders of political parties, eminent jurists, journalists and members of Parliament from Jammu and Kashmir in November, 1997. Their names are listed in Appendix I and II respectively. To all of them we express our deep gratitude. We have consulted pertinent literature on the State’s constitutional history since independence in order to understand why and how things went wrong

after the initial years of promise. It is our firm belief that, that happy phase can yet be recalled and repeated if the mistakes and misjudgments that led to its termination are corrected. Our faith in the future of the State as a willing, content and enthusiastic member of the Union of India remains undiminished. We are beset with problems, misunderstandings and obstacles. We shall overcome them. All must cooperate earnestly in that endeavour.

* * *

Chapter III

Pre-Independence Scenario

Situation as it obtained on 14th and 15th August, 1947 in the State of Jammu and Kashmir was that a movement had been launched by the premier political party (National Conference) in May, 1946 and the slogan of "Quit Kashmir" had been echoed all over India. This slogan asked for transfer of power from the Ruler to the people of Jammu and Kashmir. The movement claimed the right of the people to end discontent and dissatisfaction created by enforcement of the undemocratic J&K Constitution Act of 1939 promulgated by the Maharaja of Jammu and Kashmir on September 7, 1939. It had gone underground after the desperate Ruler chose to ruthlessly suppress it. As in the past, Jenab Sheikh Mohammad Abdullah and other leaders of this movement were imprisoned. On the dawn of independence Jenab Sheikh Sahib was lodged in the State Army Cantonment in Badami Bagh, Srinagar serving the sentence imposed by trial judge for sedition. Other leaders of the movement were either in exile or underground.

India became independent on August 15, 1947. Section 1 of the Indian Independence Act, 1947 said that as from that date, "two independent Dominions shall be set up in India, to be known respectively as India and Pakistan". It proceeded to define their territories. But they were confined to the provinces under direct rule, Section 7(1)(b) declared that the suzerainty of the British Crown over the Indian States lapsed and with it all the treaties and agreements between them and the

Crown. Section 8(2) of the Act provided that until the Constituent Assemblies of both States framed their respective constitution, each of them "shall be governed as nearly as may be in accordance with the Government of India Act, 1935" Section 9(1)(c) empowered the Governor General to make changes in the Act in its application to the separate new States.

Accordingly, on August 14, 1947, the Governor General made the India (Provisional Constitution) order adapting the Government of India Act 1935 as the interim Constitution of India with the changes specified in the Act. Section 6 of the Act provided that "an Indian State shall be deemed to have acceded to the Dominion if the Governor General has signified his acceptance of an Instrument of Accession executed by the Ruler thereof". It proceeded to lay down the minimum essential contents of such an Instrument. Simply put, three matters were to be specified in the Instrument of Accession in order to conform to Section 6. First, acceptance of the functions of the central authorities as laid down in the Act; namely, the Governor General, the Dominion legislature, the Federal Court and any other Dominion authority established by or under the Act. Secondly, the Ruler had to undertake to give effect to the provisions of the Government of India Act, 1935 within his State "so far as they are applicable therein by virtue of the Instrument of Accession". lastly, the Instrument had to "specify the matters" which the Ruler accepted as one with respect to which the Dominion legislature may make laws for the State and correspondingly, the executive authority at the Dominion in the State. In respect of all the three the Instrument could specify the limitations as well.

The Indian Independence Act of 1947 enacted by the British Parliament leading to formation of the Indian Dominion and Dominion of Pakistan had of necessity to recognise that with the surrender of imperial power their paramountcy over Indian States would, in the process, also lapse and with that lapse Indian states' rulers could become sovereign unto themselves. India faced yet another difficult period of history. The sub continent had as many as 554 states known as native Indian states and fear and apprehensions were lurking in all minds keen to have a united India as to how the native rules would behave in the event of freedom. March to Independence saw such fears gradually removed. Quite in good time hundreds of these native states by covenants/agreements got merged with the Indian Union giving up their rights to freedom or to separate constitutions. They agreed to what the constitution would give to them via the Constitution Assembly of the Union

After the adoption of the programme of "New Kashmir" (Naya Kashmir) in September, 1944 and its presentation to the Ruler, yet another experiment was launched by him to ensure popular association with the administration. In pursuance of a notification issued on 2nd October, 1944 a nominee of the National Conference and other member of Praja Sabha were appointed as Ministers in the Cabinet but this experiment did not last long. The experiment failed when the National Conference nominee resigned. It sharpened the struggle for ultimate changes in Kashmir. By the time this farce of hierarchy ended with resignation of National Conference nominee from the Cabinet, the Cabinet Mission was slated to arrive

in India to negotiate transfer of power and the future constitution for the country. The premier political party in the state, All J&K National Congerence, recognised that paramountcy of the British would lapse and that time had come when on such lapse the peoples' right to exercise the sovereign right for governance must take precedence over everything else. The party demanded that the Treaty of Amritsar dated 16th March 1846 signed between Maharaja Gulab Singh and the then British Government in India which was in the nature of a sale deed and was thus an insult to the people of the State must go lock, stock and barrel. This become the theme. The "Quit Kashmir" movement was launched in early 1946(April-May). A memorial was submitted to the Cabinet Mission claiming the right to have sovereignty restored to the people rather than the Ruler.

* * *

Chapter IV

Accession to India

The State of Jammu and Kashmir acceded to the Dominion of India on October 26, 1947 when its Ruler, Maharaja Hari Singh, signed an Instrument of Accession and the Governor General of India, Lord Mountbatten, accepted the Instrument. The texts of the letters exchanged between the Maharaja and Lord Mountbatten and the Instrument of Accession as well as the circumstances in which they were executed are set out in the Government of India's White Paper on Jammu and Kashmir (1948). The three documents, viz. the Maharaja's letter and the Governor General's reply accepting the Instrument of Accession and the Instrument of Accession are appended as Appendix III.

By the Instrument of Accession, the Maharaja of Jammu and Kashmir accepted three subjects as ones on which the Dominion Legislature "may make laws for the State". They were: Defence, External Affairs and Communications. A schedule to the Instrument listed precisely 16 topics of legislation that fell under those three heads. There was another section (D) in the Schedule on matters "Ancillary". Four were listed - elections to the Dominion Legislature, offences against laws made under the above subjects, inquiries and statistics concerning them; and "jurisdiction and powers of all courts with respect to any of the aforesaid matters but, except with the consent of the Ruler of the Acceding State, not so as to confer any jurisdiction or powers upon any courts other than courts

ordinarily exercising jurisdiction in or in relation to that State”.

By the Instrument, the Maharaja also accepted, as Section 6 of the Act required, the functions conferred on the Dominion authorities by the Act, namely, the Governor General, the Dominion Legislature and the Federal Court.

For the federal machinery to function properly any document of adherence executed, either before or after the establishment of the federation, must specify the subjects it yields to the federal union and the provisions of the Constitution which it accepts. The Government of India Act, 1935 provided the basics of a federation. It was readily available for adaptation by all concerned. The Constitution of India is a more elaborate document. Article 370 had perforce to empower the President of India to make orders separately in order to specify both the Union subjects and provisions concerning the federal structure. The State was careful to ensure right till the Delhi Agreement that it did not accept all the provisions and retained its own institutions and its autonomy. Significantly, Clause 5 of the Instrument provided against any variation of its terms without the Ruler's consent. Clause 7 read thus: “Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or fetter my discretion to enter into arrangements with the Government of India under any such future Constitution”. Clause 8 said: “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”.

The State of Jammu and Kashmir was then governed by the Jammu and Kashmir Constitution Act, 1939. Justice Dr. A.S. Anand, a distinguished Judge of the Supreme Court, now Chief Justice of India, opined in his book, *The Development of the Constitution of Jammu and Kashmir*: "The Government of Jammu and Kashmir did not accept the Constitution of India as a Constitution for the State. Despite the accession, the State was still to be governed by the old Constitution Act, 1939. This was because the Government of India had given an undertaking that the people of Kashmir could frame their own Constitution. The Government of India could not force the State to accept the constitution (of India), for that would violate the agreed terms of the association of Kashmir with India. 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".¹ (Universal Book Traders, Delhi Third Edition 1994 Page 99)

The Maharaja made an order on October 30, 1947 appointing Sheikh Mohammed Abdullah as "the Head of the Administration with power to deal with the emergency" and appointed a twenty-three member Emergency Council "pending the formation of the Interim Government". By a proclamation issued on March 5, 1948 the Maharaja decided "to replace the Emergency Administration by a popular Interim Government and to provide for its powers, duties and functions, pending the formation of a fully democratic Constitution".

1. Justice A.S. Anand :
The Development of the Constitution of Jammu & Kashmir 3rd Edition.
 1994 page 99

Sheikh Mohammed Abdullah was appointed Prime Minister. The Council of Ministers was to function “on the principle of joint responsibility”. It was enjoined to convene “a National Assembly based upon adult suffrage” to frame a Constitution. The Assembly was to submit the Constitution “through the Council of Ministers for my acceptance”.

This was a reference to a Constitution for the State. Right from the beginning in 1948, there was no doubt in any quarter that, regardless of the arrangements in respect of other former Indian States, the State of Jammu and Kashmir would have its own Constitution as a member of the Indian Union. Uniquely, the State is the only one to have negotiated the terms of its membership of the Union. The negotiations were spread over five months.

Negotiations on the provisions in the proposed Constitution of India that would embody the terms of the State’s membership of the Union began when a conference of the leaders of the National Conference and of the leaders at the Centre was held in Delhi on May 15 and 16, 1949. Pt. Jawahar Lal Nehru recorded the issues discussed in a letter to Sheikh Saheb on 18th May. The State was to have its own Constitution and “*it will be for the Constituent Assembly of the State, when convened, to determine in respect of what other subjects the state may accede*”. On May 27, 1949, a member of its Drafting Committee, Sir N. Gopalaswamy Ayyangar moved an amendment to the Assembly’s Rules empowering “the Ruler of Kashmir on the advice of his Prime Minister” to nominate the State’s four representatives to the Constitution Assembly

Monammed Saeed Masoodi and Mohd Naim Daigra took the pledge and signed the Register of Members of the Constituent Assembly of India.

It must be mentioned at the outset in all fairness that the texts of Sheikh Mohammed Abdullah's letters of October 12 and 15, 1949 are not available, where as those of Mr. Ayyangar and Sardar Vallabhbhai Patel's letters to him and to each other, are. On October 12, Sheikh Saheb complained to Mr. Ayyangar, as he recalled in his letter of 17th October, that the draft Article 306-A (with modifications, the present Article 370) which he had given to Mr. M.A. Beg "failed to implement the pledges given to us" and was, therefore, unacceptable. Two meetings followed on October 15. After the first, Mr. Ayyangar wrote to Sardar Patel enclosing his draft of the Article. It did not provide a finality to further acquisition of power by the Centre by stipulating that the concurrence of the State Government to such acquisition shall be ratified by the Constituent Assembly.

Mr. Ayyangar presented another draft latter on October 15, which drew a protest from Patel and rejection by Sheikh Saheb, both, on 16th October. Mr. Ayyangar prepared yet another draft in consultation with Kashmir's representatives. It was finalized on the afternoon of October 16, 1949. On the assurance that the agreed draft would be moved, Mr. Beg with-

drew his own amendment. Sheikh Mohammed Abdullah recorded the agreement in another letter of 16th October and thanked Ayyangar for his pains.

On October 16, 1949 a "Final Draft" of Article 306-A was settled between Mr. N. Gopalaswamy Ayyangar and Mirza Mohammed Afzal Beg and Mr. M.A. Shahmiri. It read thus :

FINAL DRAFT OF ARTICLE 306-A [JAMMU & KASHMIR] AS SETTLED BETWEEN THE HON'BLE SHRI N. GOPALSWAMY AYYANGAR ON THE ONE SIDE AND MESSERS BEG AND SHAHMIRI ON THE OTHER ON OCTOBER 16, 1949.

"306-A (1) Notwithstanding anything contained in this Constitution,

(a) The provisions of article 211-A of this Constitution shall not apply in relation to the State of Jammu and Kashmir,

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

(i) those matters in the Union list and the Concurrent list which, in consultation with the Government of 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

(ii) such other matters in the said lists as, with the concurrence of the Government of the State, the President may by order specify;

Explanation :-

For the purposes of this article, the Government of the State means the person for the time being recognized by the Union as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers appointed under the Maharaja's Proclamation dated the 5th March 1948.

(c) the provisions of Article 1 of this Constitution shall apply in relation to the State ;

(d) such of the other provisions of this Constitution and subject to such exceptions and modifications shall apply in relation to the State as the President may by order specify :

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State afore-said 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 to in the preceding proviso shall be issued except with the concurrence of that Government;

(2) If the concurrence of the Government of the State referred to in sub-clause (b) (ii) or in the second proviso

of sub-clause (d) of clause (1) was 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 preceding clauses 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 that State shall be necessary before the President issues such a notification."

This draft was finally agreed on October 16, 1949. What happened next day, October 17, 1949 in the Constituent Assembly was recorded immediately thereafter that very day by Sheikh Saheb in a letter to Mr. Gopalaswamy Ayyangar.

"This morning when we expected the final draft, which had appeared in the List of Amendments circulated by the Secretary of the Constituent Assembly, to come up before the Assembly, you and Maulana (Azad) Saheb came to me and asked me if I could accept an important change in the Explanation to Sub-clause (b) of Clause (1) of the draft Article 306-A, as appearing in the list of Amendments. After careful consideration of the proposed amendment in the Explanation, my colleagues and I told you both in the lobby that it was not possible for us to accept this change in the final draft and you and

Maulana Sahib left us while we were still discussing the matter in the lobby amongst ourselves, the draft Article 306-A was moved by you in the Constituent Assembly, and when part of your speech was over, we were told by someone that the draft Article had been taken up by the Assembly, and therefore, we took our seats in the Assembly Hall. We could not conceive that any amendment in the final draft, as circulated in the list of Amendments, would be made by you without conveying your final decision in the matter to us, and so we took it for granted that the final draft Article 306-A was presented before the Assembly in the form in which it had our consent; and therefor, when it was passed by the Assembly, we did not take part in the debate. While Maulana Sahib and you came to us to discuss the matter with us in the lobby, I clearly told you that in the event of any change in the finalized draft Article 306-A we should be at liberty to move the amendment, of which notice had been given by Mr. Beg and his two other colleagues and which had been withdrawn on the express assurance given by you yesterday. In these circumstances, it was not possible for us to move any amendment and we did not get an occasion to express our views on the matter before the open House."

Sheikh Saheb threatened to resign from the Constituent Assembly. Mr. Ayyangar replied on October 18. He did not deny that the draft had been unilaterally changed. "It is true that after having unsuccessfully attempted, alongwith Maulana Azad, to persuade you to agree willingly to the substitution of the words 'for the time being in office' for the word 'appointed', I did move the article with that amendment after obtaining the permission of the President to do so.' He argued that it was "a

trivial change" in response to the desire expressed by a large number of the leading Members of the House. The Prime Minister Pt. Nehru was abroad then. Mr. Ayyangar himself recorded that "the words in the Explanation as agreed to between us are Council of Ministers appointed under the Maharaja's Proclamation dated March 5, 1948." The words appearing in the Article as passed yesterday are "the Council of Ministers for the time being in office under the Maharaja's Proclamation dated March 5, 1948." His plea that "the change of words does not constitute the slightest change in sense or substance" was wrong. Under the agreed Explanation, Sheikh Saheb's dismissal in 1953 would have been a Constitutional impossibility.

In his letter to the Prime Minister Pt. Jawaharlal Nehru on November 3, 1949 on his return from the United States of America, Sardar Patel also admitted that the draft "was modified to cover not merely the first Ministry so appointed but any subsequent Ministries which may be appointed under that proclamation".

The Constituent Assembly adopted the Constitution of India on November 26, 1949. (C.A.D. ; Vol 12, P. 995). It repealed the Government of India Act, 1935. Article 394 provided that most of its provisions would come into force from January 26, 1950. On November 25, 1949 the Maharaja of Jammu and Kashmir made a proclamation declaring that "the Constitution of India shortly to be adopted by the Constituent Assembly of India shall in so far as it is applicable to the State of Jammu and Kashmir, govern the Con-

stitutional relationship between this State and the contemplated Union of India..."¹ On January 26, 1950 the President of India made the first Constitution (Application to Jammu and Kashmir) Order, 1950² under Article 370 of the Constitution of India. It conformed strictly to the Instrument of Accession.

* * *

1 (White paper on Indian States: Government of India, Ministry of States, New Delhi 1950; P.371).

2 See Appendix IV.

CHAPTER - V

Article 370 of the Constitution of India

Article 370 of the Constitution reads thus :

370. Temporary Provisions with respect to the State of Jammu and Kashmir (1) Notwithstanding anything in this Constitution.

(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 ;

(i) 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 that State ;

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

Explanation :- For the purpose of this article, the Gov-

ernment of the State means the person for the time being recognised by the Presidents the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

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

(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 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 to in the last preceding proviso shall be issued except with the concurrence 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 the 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.

A careful study of the text reveals six special provisions for Jammu and Kashmir. First, it exempted the State totally from the provisions of the Constitution of India providing for the governance of the states. It was allowed to have its own constitution within the Indian Union.

Second, Parliament's legislative power over the State was restricted to three subjects defence, external affairs and communications. The President could extend to it other provisions of the Constitution to provide a constitutional framework if they related to the matters specified in the Instrument of Accession. For all this, only "consultation" with the State Government was required since the State had already accepted them in 1947 by the Instrument of Accession.

Third, if other "constitutional" provisions and other Union powers are to be extended to the State of Jammu and Kashmir the prior "concurrence" of the State Government was required.

The fourth feature is that even that concurrence alone did not suffice. It had to be ratified by the State's Constituent Assembly. This is often overlooked. Article 370 (2) says clearly : "If the concurrence of the Government of the State 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."

The fifth feature is that the State Government's authority to give the "concurrence" lasts only the State's Constituent Assembly is "convened". It is an "interim" power. Once the Constituent Assembly met, the State Government cannot give its own "concurrence". Still less, after the Assembly met and dispersed. Moreover, the President cannot exercise his power to extend the Indian Constitution to Jammu and Kashmir indefinitely. The power has to stop at the point the State's Constituent Assembly drafted the State's Constitution and decided finally what additional subjects to confer on the Union and what other provisions of the Constitution of India it should get extended to the State rather than having their counterparts embodied in the State Constitution itself. Once the State's Constituent Assembly has finalized the scheme and dispersed, the President's extending powers ended completely.

The sixth special feature the last step in the process, is that Article 370(3) empowers the President to make an order abrogating or amending it. But for this, also "the recommendation" of the State's Constituent Assembly "shall be necessary before the President issues such a notification".

Article 370 cannot be abrogated or amended by recourse to the amending provisions of the Constitution which apply to all the other states because Article 368 has a proviso which says that no constitutional amendment “shall have effect in relation to the State of Jammu and Kashmir” unless applied by order of the President under Article 370. That requires first the concurrence of the State government and subsequent ratification by its Constituent Assembly.

Article 1(1) of the Constitution of India says that India shall be a Union of States. Sub-clause (2) adds that the states shall be specified in the First schedule, this schedule mentions the State of Jammu and Kashmir. But, it is extended to the State only through Article 370 (1) (c) which says: “The provisions of Article 1 and of this Article shall apply in relation to that State.” This is not without legal significance and consequence. Mr. G.L.Nanda was, therefore, right in pointing out, as Union Home Minister, on 4th 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”. Mr. S.B.Chavan made similar comments on March 1, 1993.

Article 370 was authoritatively explained by its mover in the Constituent Assembly. Mr. N.Gopalaswamy Ayyangar, contemporaneously and in 1952 by the President of the Assembly, who became the first President of India, Dr. Rajendra Prasad.

Mr. Ayyangar said in the Constituent Assembly on Oc-

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tober 17, 1949. "We have also agreed that the will of the people particularly to matters which are not mentioned in the instrument of Accession, and it is one of our commitments to the people and Government of Kashmir *that no such additions should be made except with the consent of the Constituent Assembly which may be called in the State for the purpose of framing its Constitution. In other words, what we are committed to is that these additions are matters for the determination of the Constituent Assembly of the State*".

Mr. Ayyangar explained that, "the provision is made that when the Constituent Assembly of the State has met and taken its decision both on the Constitution for the State and on the range of federal jurisdiction over the State, the President may on the recommendation of that Constituent Assembly, issue an order that this Article 306 A shall either cease to be operative or shall be operative, only subject to such exceptions and modifications as may be specified by him. But before he issued any order of that kind, the recommendation of the Constituent Assembly will be a condition precedent".

This unique process of Presidential orders altering Constitutional provisions by an executive order ends with the final decision of the State's Constituent Assembly, "When it has come to a decision on the different matters, it will make a

recommendation to the President who will either abrogate Article 306A or direct that it shall apply with such modifications and exceptions as the Constituent Assembly may recommend.” Mr. Ayyangar repeatedly said that the Government’s concurrence alone will not do. “That concurrence should be placed before the Constituent Assembly when it meets and the Constituent Assembly may take whatever decisions it likes on those matters.”¹

The White paper on Indian States made an important exposition of the Constitutional changes in para 221 at page 113 in chapter XI entitled “Indian States under the New Constitution”. Referring to Article 370 it said “Steps will be taken for the purpose of convening a Constituent Assembly which will go into these matters in detail and when it comes to a decision on them, it will make a recommendation to the President who will either abrogate Article 370 or direct that it shall apply with such modifications and exceptions as he may specify.” Thus, the State’s Constituent Assembly’s decision was to mark a finality to the exercise of the President’s powers under Article 370.

On July 29, 1952, Sheikh Saheb wrote to Pt. Nehru to inform him that the Constituent Assembly proposed to elect the State’s Head of the State on August 16, 1952 and he wished that the necessary Order under Article 370 should be issued by the President in time to make it possible. Pt. Nehru replied immediately that very day. His letter of July 29, 1952 is very

1. (C.A.D., Vol.8, Pages 424-427)

instructive. It is reproduced below:

New Delhi
July 29, 1952

My dear Shaikh Saheb,

I have just received your letter of the 29th July about the Head of the State. I do not see how we can go through all the various processes about this matter before the 16th August. It is not a perfectly clear matter from the legal point of view how far the President can issue notifications under Article 370 several times. In any event, it would be desirable to include in one notification such present changes that we have decided to make. To have repeated notifications following one another in fairly quick succession would be odd, apart from the possible difficulty about their legality. We are having this matter examined.

There is also the question of how the present Maharaja should be dealt with. The obviously easy and decorous course is for him to abdicate. I hope he will do so. If not, then it may become necessary for the President to take some step. All this has to be thought out.

In this matter you will appreciate that we have to proceed with the concurrence of the President. The final decision, no doubt, is that of the Government. But we cannot hustle the President.

I am sending your letter to Dr. Katju and Gopalaswami Ayyangar.

*Yours sincerely,
Jawaharal Nehru*

Evidently, the President. Dr. Rajendra Prasad, one of the leaders of the Patna Bar, had expressed his doubts about the legality of successive orders under Article 370. This impression, which Pt. Nehru's letter conveys, is fully borne out by Dr. Prasad's note to Pt. Nehru sent under a covering letter dated September 6, 1952. It was first published only in 1991.¹ In view of its high relevance we reproduce this authoritative document in full as Appendix VII.

The President pointed out the uniqueness as well as the incongruity of amending a Constitution by mere executive order. *"Nowhere else, as far as I can see is there any provision authorizing the executive government to make amendments in the Constitution..."* The crucial issue was whether the President's power to make such orders under Article 370 "is exercisable from time to time or is exhausted by a single exercise therefore. *Judging by the language employed and by the very exceptional nature of the power conferred, I have little doubt myself that the intention is that the power is to be exercised only once, for then alone would it be possible to determine with precision which particular provisions should be excepted and which modified. The fact that the President is also required to specify the date from which the notification is to take effect also tends to confirm this view.*"

¹ Dr. Rajender Prasad: Correspondence and Select Documents Edited by Valmiki Choudhary, Allied Publishers Ltd. New Delhi, Volume 15, pages 104-108.

Elaborating on his reasoning the President concluded:

“The correct view appears to be that recourse is to be had to this clause ((cl.3) of Article 370) only when the constituent Assembly of the state (sic. he meant clearly the constitution) has been fully framed.”

This interpretation accords with the terms of the provision, Article 370, with its author Mr. N. Gopalaswamy Ayyengar’s exposition in the constituent Assembly, with Prime Minister Jawaharlal Nehru’s letter of July 29, 1952 and his other pronouncement, with Sheikh Mohammad Abdullah’s understanding of Article 370, and indeed, with the entire process before and after the adoption of Article 370. On the other hand, not one contemporaneous document contradicts this interpretation or supports the unconstitutional practice that later came in to vogue. Pt. Nehru’s letter to Sheikh Saheb on August 1, 1952 mentioned the aspect of propriety besides legality. “As I have written to you, there is doubt here as to whether we can issue a succession of President’s orders dealing with these questions piecemeal. Apart from the legality, there is also the question of propriety”.

Sheikh Saheb told the State’s Constituent Assembly on August 11, 1952 that “the fact that Article 370 has been men-

tioned as temporary provision in the Constitution does not mean that it is capable of being abrogated, modified or replaced unilaterally. In actual fact, the temporary nature of this Article arises merely from the fact that *the power to finalise the Constitution relationship between the State and the Union has been specifically vested in the Jammu and Kashmir Constituent Assembly*". This power ceases to be one of imparting finality if, even after the Assembly's dispersal, modifications to the Constitution and amusement of power by the Centre can take place with the concurrence of another executive body, the State Government. Later, orders under Article 370 were passed even with the concurrence of the Governor alone, who is removable from office by the Centre at any moment. He, thus, accorded "concurrence" to the centre at its bidding as, indeed, did some Chief Ministers of the State.

Sheikh Saheb continued: *"It follows that whatever modifications, amendments or exceptions that may become necessary either to Article 370, or any other Article in the Constitution of India in their application to the Jammu and Kashmir State, are subject to the decisions of this sovereign body"*. Obviously, once this body disperses after completion of its task, no amendments to the Constitution of India could be made in their application to the State for the simple reason that the sovereign and appointed ratifying body no longer existed. Any other interpretation would reduce the terms of Article 370 to a naught and the entire exercise to a farce by making permanent what was meant to be a transitory arrangement till the Constituent Assembly of Jammu and Kashmir finalised (a) The State's Constitution and (b) its corresponding recom-

mendation to the President, as envisaged by Article 370.

Sheikh Saheb warned: "I would like to make it clear that any suggestions of altering arbitrarily this basis of our relationship with India would not only constitute breach of the spirit and letter of the Constitution, but it may invite serious consequences for a harmonious association of our State with India."

At its fourth session on August 20, 1952 the State's Constituent Assembly passed a detailed Resolution in implementation of its Resolution of June 10, 1952 on the Head of the State.

The president of India persisted with his objections till as late as November 7, 1952 insisting that the Constituent Assembly "should come to a decision on all matters relating to the State's Constitution....."¹. The Prime minister of India was in bind. He had agreed with the President's views on the legality but termination of the royal dynasty was also part of the Delhi Agreement. He was under pressure from Sheikh Saheb and his colleagues. Pt. Nehru, therefore, wrote to the President on the same day, November 7, 1952 : "I can only repeat what I have said above that we have considered every aspect of this question and come to certain conclusion which have to be given effect to now. We cannot reopen six month's discussions".

Accordingly, on November 15, 1952 Constitution or-

¹ V.Choudhary, Vol. 20, P.395, footnote 3

der No. 44 was made by the President under Article 370: "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 clause (1) thereof, the following explanation is substituted namely :-

"Explanation for the purposes 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 of the state for the time being in office."¹

* * *

1. Ministry of Law Order No. C.O 44, dated the 15th November, 1952.

Chapter VI

Convening of the J&K Constituent Assembly

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 of January, 1950, the constitutional relationship of the state with the Union of India was shaped by the Constitution (Application to Jammu and Kashmir) order of 1950. This order specified matters corresponding to those in respect of which the State had acceded to the Indian union according to the terms of the Instrument of Accession. These are given in the 1st Schedule to the aforesaid Order.

This Order further mentioned that in addition to the provisions of Article I and Article 370 of the Constitution the only other provisions of the Constitution shall apply in relation to the state of Jammu and Kashmir, shall be those specified in the Second Schedule to this Order and shall so apply subject to the exceptions and modifications specified in the Second Schedule.

The jurisdiction of the Union Parliament to legislate with respect to our State was thus clearly defined consistently with the position that emerged as a result of having ceded the powers pursuant to Instrument of Accession. The rest of it was left for the state to take care of in its own Constitution.

While this was so, the need for a constitution for the state of Jammu and Kashmir was also very intensely felt not

only for the reason of defining the state's legislative power but also for other reasons. Total uncertainty on the political horizon was eating into the vitals of the social fabric. The future of the ruling dynasty also required to be settled. Rightly had the Article 370 of Constitution of India Consistent with the National Conference stand throughout in respect of the right of the Jammu and Kashmir state to frame its own constitution envisaged a Constituent Assembly. Kashmir has its own history of freedom movement and as we have seen above, New Kashmir programme had envisaged a National Assembly for the State of Jammu and Kashmir and attachment of the people with the perception was so well recognised that even in the declaration of 5th March 1948, the Maharaja of Jammu and Kashmir had proclaimed as under:-

“I have already appointed the popular leader of my people Sheikh Mohammad Abdullah as the Head of the emergency Administration.

It is now my desire to replace the emergency administration by a popular interim Government and to provide for its power, duties and functions, pending the formation of a fully democratic constitution.

My council of Ministers shall take appropriate steps, as soon as restoration of normal conditions has been completed, to convince 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 the area:

The constitution to be framed by the National Assembly shall provide adequate safeguards of the minorities and contain appropriate provisions guaranteeing freedom of conscience, freedom of speech and freedom of assembly”.

Yuvraj Karan Singh functioning as Regent, therefore, issued a proclamation of 20th April, 1951 setting the ball rolling for the convening of the constituent Assembly for the state of Jammu and Kashmir to decide the future constitution of the State. The Proclamation directed the constituent Assembly consisting of representatives of people elected on the basis of adult franchise shall be constituted for the purpose.

Elections were thus held in terms of the proclamation hopes rose high. Constituent Assembly met on 31st October, 1951.

In his inaugural speech in the State Constituent Assembly on 5th November 1951, Janab Sheikh Mohanmad Abdullah, the then Prime Minister of Jammu and Kashmir State, echoing the aspirations of the people made the following observations:

“We must remember that our struggle for power has now reached its successful climax in the convening of this Constituent Assembly. It is for you to translate the vision of New Kashmir into reality and I would remind you of its opening words which will inspire our labours:

We, the people of Jammu Kashmir, Ladakh and Fron-

tier regions, including Poonch and Chenani illaqas commonly known as Jammu and Kashmir State in order to perfect our union in the fullest equality and self determination to raise ourselves and our children for ever from the abyss of oppression and poverty, degradation and suppression from medieval darkness and ignorance; into the sunlit valleys of plenty ruled by freedom science and honest toil in worthy participation of the historic resurgence of the people of the East, and the working masses of world, and in determination to make this our country a dazzling gem of the snowy bosom of Asia, do propose and propound the following Constitution of our State”,

You are the sovereign authority in this State of Jammu and Kashmir, What you decide has the irrevocable force of law. The basic democratic principle of sovereignty of the nation, embodied ably in the American and French constitutions is once again given the Shape in our midst. I shall quote the famous words of Article 3 of the French Constitution of 1791.

‘The source of all sovereignty resides fundamentally in the nation..... Sovereignty is one and indivisible, inalienable and imprescriptible. It belongs to the nation;’

We should be clear about the responsibilities that this power invests us with. In front of us lie decisions of the highest national importance which we shall be called upon to take. Upon the correctness of our decisions depends not only the happiness of our land and people now, but the fate as well of generations to come”¹

1. for full text of Sheikh Saheb's speech see Appendix. V

He set the following four tasks before the Constituent Assembly for deliberation;

- i Devising Constitution for the future government of the country which he called very difficult and a detailed once.
- ii The future of the royal dynasty, the decision he said had to be taken with urgency and wisdom since on that decision depended the future form and the character of the state
- iii The third major issue which awaited deliberations of members of the Constituent Assembly arose out of the land Reforms which the Govt. carried out with vigour and determination. A decision had also to be given by the members on the land owner's demand for compensation.
- iv Fourth and what he called the final matter was to be reasoned conclusion of the Constituent Assembly regarding accession after full consideration of the three alternatives he would State later in the Assembly.

On each of these tasks he set the parameters in the inaugural speech itself.

He indicated that the future political set up to be base on the highest principles of the democratic Constitutions of the world and therefore the Assembly has to base its work on principles of equality, Liberty, social justice; these being regarded as integral features of progressive constitutions. Rule of Law as in the rest of democratic world had to be the corner

stone of the political mechanism for governance of the State. Equality before law and independence of judiciary were vital to the whole fabric. Besides, freedom of the individual in the matter of speech, movement and association should be guaranteed. "Freedom of the press and opinion would also be features of our constitution", he said. Basis was provided in the outline embodied in "New Kashmir" programme. He described democracy as an "apparatus of social organisation wherein people govern through their own chosen representatives and are themselves guaranteed political and civil liberties".

In this regard we may place on record the following in relation to the then constitutional ties between the State and the Union of India:-

"The Constitution of India has provided for a federal union and in the distribution of sovereign powers has treated us differently from other constitutional units. With the exception of the items grouped under Defence, Foreign Affairs and Communications in the Instrument of Accession, we have complete freedom to frame our Constitution in the manner we like. In order to live and prosper as good partners in a common endeavour for the advancement of our peoples, I would advise that, while safeguarding our autonomy to the fullest extent so as to enable us to have the liberty to build our country according to the best traditions and genius of our people, we may also by suitable constitutional arrangements with the Union, establish our right to seek and compel federal cooperation and assistance in this great task, as well as offer our fullest cooperation and assistance to the Union".

After describing the essential background that required to be taken into consideration in order to facilitate taking of final decision on the issues referred to above, Sheikh Saheb reminded the Hon'ble members of what he had said in the course of his trial for sedition at Badamibagh cantonment in the following words:

'The future constitutional set up in the State of Jammu and Kashmir cannot derive authority from the old source of relationship, which was expiring and was bound to end soon. The set up could only rest on the active will of the people of the state, conferring on the head of the State the title and authority drawn from the true and abiding source of sovereignty that is the people'.

From the above description of the task before the Constituent Assembly it is abundantly clear that Sheikh Saheb envisaged State Union relationship as "one of partners in common endeavour for the advancement of the people" and therefore, regarded "safeguarding of our autonomy to the fullest extent" and suitable "constitutional arrangement with the Union" as two corner stones to ensure fullest cooperation and assistance between partners.

* * *

Chapter VII

Delhi Agreement of July, 1952

The Constituent Assembly, convened on 31st October, 1951, thus was not only to frame the Constitution for the State but was to give certain more important decisions regarding the future relationship of the State with the Union. It started its work in the right earnest and as days passed by, need for a decision on certain important matters relating to framing of the Constitution and any further application of the Union Constitution to the State was felt. Besides, questions arising out of the need to settle the future of the ruling dynasty and of arriving at a concrete solution about the fundamentals of the Constitution of the State as an integral part of India had also to be considered.

1952 proved a very important year in the State's constitutional evolution. It witnessed the conclusion of the historic Agreement between Pt. Jawahar Lal Nehru and Sheikh Saheb which was announced at a press conference in Delhi on July 24, 1952. It culminated in the President's second Order under Article 370 on November 15, 1952 but the first made on the recommendation of the Constituent Assembly of Jammu and Kashmir. Its constitutional significance emerges clearly if its background is borne in mind.

The National conference led by Sheikh Saheb was pledged to radical programme covering a wide range of subjects such as land reforms. It included termination of heredi-

tary rulership in the State. By 1952 it had ended in the other former princely States. Maharaja Hari Singh had virtually abdicated as ruler in favour of his son Yuvraj Karan Singh although the proclamation of June 9, 1949 merely said that since he was leaving the State for reasons of health his powers and functions shall be “exercisable” by the Yuvaraj, thus making him Regent. Sheikh Saheb mentioned in his address to the Assembly that “another issue of vital import to the nation involves the future of the Royal Dynasty”.

Events picked up speed in June. On June 10, 1952 the Basic principles Committee submitted its Report to the State’s Constituent Assembly. It provided inter alia that the “institution” of hereditary Rulership shall be terminated” and that the office of the Head of the State shall be elective.” The Constituent Assembly accepted the Report on June 12, 1952.

It is against this background that the Delhi agreement was concluded after prolonged discussions; first, from June 14 to 20, 1952 and ,next form July 20 to 24, 1952¹. Its terms were announced by Pt. Jawaharlal Nehru in Lok Sabha on July 24, 1952² and in the Rajya Sabha on August 5, 1952³.

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, 1952⁴.

1 S.Gopal (Editor). Selected work of Jawaharlal Nehru: vol. 19 p. 211

2 Parliamentary Debates; Lok Sabha: Official Report Part 11, vol.III No. 16 cols. 4501-4521

3 Rajya Sabha Debates; vol. 1, Nos. 24 - 31 (July 28- August 5, 1952) Cols. 2970-2995

4 For full text of Sheikh Saheb’s speech see Appendix VI

Both leaders provided the background and highlighted the significance of the agreement. Pt. Nehru told the Lok Sabha:

“The position since the constitution was framed is thus contained in the Article 370 and in the President’s Order following it. Article 370 was obviously of a transitional nature and it allowed the President to make any additions to it, any variations to it, later on, the object being that if any change or addition was required, we need not have to go through the cumbersome process of amending our Constitution, but the President was given the authority to amend it in the sense of adding a subject, part of a subject, whatever, *it was to the other subjects, in regard to Kashmir. But in Article 370 the old principle was repeated and emphasized that all these changes or any change, required the approval of the Constituent Assembly of the Jammu and Kashmir State.*

When this was put down in our Constitution, there was no Constituent Assembly of Jammu and Kashmir State, but we envisaged it. We had envisaged it for a long time. *And if the Constituent Assembly was not there, then it required the consent of the Jammu and Kashmir Government. So that was the position.*”¹

The implication is plain. Additional subject could be acquired by the Centre only with the approval of the State’s Constituent Assembly.

1. For relevant extracts from Pt. Jawahar Lal Nehru’s speech in the Lok Sabha on July 24, 1952 see Appendix VII.

Briefly the Delhi Agreement covered ten points. It was agreed that residuary powers would continue to vest in the State as provided in Article 370; within the ambit of Indian citizenship, the State legislature would have the power to regulate the rights and privileges of permanent residents or "State Subjects" as defined in a 1927 State Order, the Fundamental Rights chapter of the Indian Constitution be applied to the State with modifications and exceptions such as enabling transfer of land to the tiller without payment of compensation; the jurisdiction of the Supreme Court would extend to the State; the State flag would not be a rival to the national tricolour which would occupy a supremely distinctive place in the State, the power to grant reprieve and commute sentences would vest in the President of India; with the abolition of hereditary rulership, the Head of the State of Jammu and Kashmir shall be recognized by the President on the recommendations of the Legislative Assembly of the State; a financial arrangement between the State and the Union be evolved; with regard to emergency powers, Article 352 be modified to provide for its promulgation in case of external aggression but in case of internal disturbance only at the request of or with the concurrence of the State Government; and the election Commission will conduct elections to Parliament and to the offices of President and Vice-President.

During the course of negotiations as had become necessary after the presentation of the interim report of the Basic Principles Committee in the circumstances referred to hereinbefore, certain agreements were arrived at, details of which were placed before the House by Jenab Sheikh Sahib on 11th

of August, 1952. He said:-

“The Government of India held the view that the fact that J&K State was the Constituent Unit of the Union of India led inevitably to certain consequences in regard to certain matters, namely (a) Residuary Powers (b) Citizenship (c) Fundamental Rights (d) Supreme Court (e) National Flag (f) The President of India (g) The Headship of the State (h) Financial Integration (i) Emergency Provisions and (j) conduct of Election to Houses of Parliament”. Sheikh Saheb informed the House about the agreement arrived at in respect of each of them as follows:-

Residuary Powers:

It was agreed that while under the present Indian Constitution the Residuary Powers vested with the Centre in respect of all States other than Jammu and Kashmir, in the case of our State they vested in the State itself and should continue as such. In this regard, Sheikh Sahib observed as follows:-

“We have always held that the ultimate source of sovereignty resides in the people. *It is, therefore, from the people that all powers can flow. Under these circumstances, it is upto the people of Kashmir through this Assembly to transfer more powers for mutual advantage to the custody of the Union/Centre*”.

Citizenship:

In this connection, Sheikh Sahib informed the Assembly:

“It was agreed that in accordance with Article 5 of the Indian Constitution, persons who have their domicile in the Jammu and Kashmir State shall be the citizens of India. It was further agreed that the State Legislature shall have power to define and regulate the rights and privileges of the permanent residents of the State, more especially in regard to acquisition of immovable property, appointment to service and like matters. Till then the existing state law would apply.”

“It was also agreed that special provisions will be made in the laws governing citizenship to provide for the return of those permanent residents of J&K State who went to Pakistan in connection with the disturbances of 1947 or in fear of them as well as of those who have left for Pakistan earlier but could not return. If they return, they should be entitled to the rights, privileges and obligations of citizenship”.

Indicating the special reasons for the protection of State Subjects, he said as follows:-

“Hon’ble Members are perhaps aware that in the late twenties peoples of J&K agitated for the protection of their bonafide rights against superior competing interests of the non-residents of the State. It was in response to this popular demand that the Government of the day promulgated a Notification in 1927 by which a strict definition of the term “State Subject” was provided. I am glad to say that Government of

India appreciated the need for such a safeguard”.

Fundamental Rights:

In this regard, Sheikh Sahib observed as follows:-

“It is obvious that while our Constitution is being framed the fundamental rights and duties of a citizen have necessarily got to be defined. It was agreed, however, that the Fundamental Rights, which are contained in the Constitution of India could not be conferred on the residents of J&K State in their entirety taking into account the economic, social and political character of our movement as enunciated in the New Kashmir Plan. The need for providing suitable modifications, amendments and exceptions as the case may be in the Fundamental Rights Chapter of the Indian Constitution in order to harmonize those provisions with the pattern of our principles was admitted”.

The main point. Sheikh Sahib indicated, that remained to be determined was whether the Chapter of Fundamental Rights should form part of the Constitution of Jammu and Kashmir or that of the Union Constitution. On this aspect there was no agreement.

Supreme Court

It was agreed that Supreme Court should have original jurisdiction in respect of disputes mentioned in Article 131 of the Constitution of India. It was further agreed that Supreme Court should have jurisdiction in regard to Fundamental Rights which are agreed to by the State. It was recommended on be-

half of the Government of India that the Advisory Board in the State, designated as "His Highness's Board of Judicial Advisors" should be abolished and the jurisdiction exercised by it should be vested in the Supreme Court of India, The State Government felt that this would need a detailed examination and consequently it was agreed that it should have time to consider it further.

National Flag:

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 agreed that the Union Flag to which all owed allegiance as part of the Union, will occupy supremely distinctive place in the State.

President of India:

It was decided that powers to grant reprieve and commute death sentences etc. should also belong to the President of the Union.

Headship of the State:

The Government of India appreciated the principle proposed by the Basic Principles Committee as adopted by the Assembly in regard to the abolition of the hereditary rulership of the State. The following arrangement was mutually agreed upon in this regard:-

- (i) "The Head of the State shall be the person recognized by the President of the Union on the recommendation of the Legislature of the State
- (ii) He shall hold office during the pleasure of the president.
- (iii) He may, by writing under his hand addressed to the President, resign his office.
- (iv) Subject to the foregoing provisions, the Head of the State shall hold office for a term of five years from the date he enters upon his office".

Financial Integration:

It was recognized that while it would be necessary to evolve some sort of financial arrangement between the State and the Union, in view of the far-reaching consequences involved therein, it was agreed that a detailed examination of the subject would be necessary before doing that.

Emergency Powers:

On behalf of the Government of India, it was stated that Article 352 of the Constitution was necessary as it related to vital matters affecting the security of the State. The Government of India did not press for application of Article 356 or even Article 360. Item 1 in the Seventh Schedule relating to the defence of India applied and the Government of India would have full authority to take any steps in connection with defence etc. The State representatives indicated that they were averse to internal disturbance being referred to in this con-

nection as even petty internal disorder might be considered sufficient for application of Article 352. To meet the State's point of view it was therefore decided that Article 352 might be accepted with addition of the following words at the end of the first paragraph:-

“But in regard to internal disturbance at the request or with the concurrence of the Government of the State.”

It was also agreed that the whole matter of application of Article 353, 354, 358 and 359 will be further examined.

Conduct of Elections to Houses of Parliament:

Article 324 of the Indian Constitution was already applicable so far as it relates to elections to Parliament and to the offices of the President and the Vice-President of India.

This is how the leader of the Constituent Assembly, Sheikh Mohammad Abdullah, introduced the Delhi Agreement to the Assembly which was adopted unanimously on 19th August, 1952.

Consequent thereupon, the Drafting Committee of the State Constituent Assembly formed to work out and prepare proposals regarding termination of the hereditary rulership in the State presented its report.

Resolution for adoption by the house was introduced in the following words:-

“Now, therefore , in pursuance of the resolution dated the 12th June, 1952, and having considered the report of the Drafting Committee, the Assembly resolves:

1. (I) that the Head of the State shall be the person recognized by the President of the Union on the recommendations of the Legislative Assembly of the State;
- (ii) he shall hold office during the pleasure of the President;
- (iii) he may, by writing in his hand, addressed to the President, resign his office;
- (iv) subject to the foregoing provisions, the Head of the State shall hold office for a term of five years from the date he enters upon his office;

Provided that he shall, notwithstanding the expiration of his term, continue to hold the office until his successor enters upon his office;

2. that the recommendation of Legislative Assembly of the State in respect of the recognition of the Head of the State specified in sub-para (I) of paragraph 1, shall be made by election;

(3) that the method of election to, qualifications for and all other matters pertaining to the office of the Head of the State shall be prescribed in the constitution, and until these are so prescribed, shall be as set out in the rules contained in the schedule annexed to this resolution:

(4) That the Head of the state shall be designated as Sader-i-Riyasat;

(5) that the sadar-i-Riyast shall be entitled to such emoluments, allowances and privileges as may be prescribed in the constitution and pending the framing of the constitution. to such emoluments, allowances and privileges as may be decided by this Assembly by separate resolution;

(6) That the Sadar-i-Riyasat shall exercise such powers and perform such functions as may be prescribed in the Constitution to be framed by this Constituent Assembly, and until such Constitution is framed, he shall exercise such powers and perform such function as have hitherto been by His Highness under the Jammu and Kashmir Constitution Act 1996 as amended by Act No XVII of 2008;

(7) That in the event of the occurrence of a casual vacancy in the office of the Sadar-i-Riyasat by reason of his death, resignation or otherwise, the power and function exercisable by the Sadar-i-Riyasat shall, until the assumption of office by the newly elected Sadar-i-Riyast in accordance with the procedure laid down in this resolution, be exercised and performed by the person recommended by the State Government for recognition as officiating Sadar-i-Riyasat to the President of India; and

(8) That this Assembly shall due incourse provide a suitable remedy in respect of violation of the constitution or gross misconduct by the person for the time being holding the office of the Sadar-i-Riyasat.

The Assembly further resolves:-

That the Prime Minister of Jammu and Kashmir State is authorized to communicate a copy of this resolution to “the Government of India for favour of appropriate action to enable its being given effect to”

This resolution was unanimously adopted after a formal amendment of changing the words, President of Union in sub clause (1) of para 1 of the Resolution to President of India. Bill effecting the change based on this Resolution was introduced and passed on 10th November 1952. This Act became Jammu and Kashmir Constitution Amendment Act of 2009.

* * *

Chapter VIII

Dismissal of Sheikh Mohammad Abdullah and its Aftermath

Then Came the unfortunate and unconstitutional dismissal of Sheikh Mohammad Abdullah, then duly elected Prime Minister of the State on August 8, 1953 and his imprisonment simultaneously. This was without reference to the Legislature of the State that had exercised its right to elect its Sadar-i-Riyasat only a short time ago in pursuance of agreed proposition of Government of Jammu and Kashmir and Government of India. It is again grievously tragic in that dismissal was not only of the Prime Minister without reference to the Legislature but also of the leader of the constituent Assembly having sovereign task of framing the Constitution of the State as also of shaping the future relationship of Jammu and Kashmir State with the Indian Union. This happened at the hands of those in whom the people had reposed their trust and faith and while the Constitution making process was still under way. This traumatic experience was the first major shock received by the people of the state after the new relationship. It justified the fears Sheikh Shaheb had entertained on October 17, 1949 when an agreed draft was unilaterally altered by the leaders at the Center. It also proved true, as later events showed, the warning he had delivered on August 11, 1952 against unilateral changes to Article 370. Sheikh Mohammad Abdullah was unconstitutionally dismissed from office as Prime Minister of the State of Jammu and Kashmir and put in prison along with

his colleagues. A reign of terror was let loose. An era of corruption began. So did a phase of unconstitutionality.

The situation that followed this unfortunate event was neither in the national interest nor that of the State. During this period, besides what happened to the constitutional relationship between the Union and the State India faced 1965 war followed by 1971 war and signed the Tashkent Agreement of 1966 and the Simla Agreement of 1972. Yet peace and development eluded it.

Highly controversial elections to the State Legislative Assembly were held. Each election deepened the distress among the people and dislike for the managers of the election. Elections of 1957, the first held after the unfortunate incident of 1953, were internationally decried; 1962 election were again on a similar pattern; rarely did these two so called general election see anyone contesting or in any way being allowed to raise fundamental questions of why and how of developments of 1953. Elections of 1967 saw an additional change that had come about in Kashmir in that official National Conference had for the first time become a branch of the Indian National Congress in the State. In these elections, the people of the State tasted the first fruit and how bitter it was of the Congress entering into State politics as a substitute for the official National Conference. A dissident section of National Conference had by 1966 refused to continue to be part of the National Congress and constituted itself into Jammu and Kashmir National Conference over again. It sought to challenge the Indian National Congress in the battle for electoral

confidence and having realized that the situation might become serious, a fraudulent drama of so-called scrutiny of papers was ensured on the table of the Returning officer. Nomination papers of 22 contestants from as many Constituencies contesting against Indian National Congress candidates were rejected and Indian National Congress Candidates declared elected without having to ask for vote from these Constituencies. Curiously enough in Kashmir Valley in constituencies where contest was allowed, Congress cut a very sorry figure whether it was in the parliamentary Constituency of Srinagar or Assembly Constituencies of Safakadal, Zadibal, Budgam, Banihal, Shopian and Tral. Of all the fifteen seats in Anantnag district only two seats were allowed to be contested not by National Conference but two young independent political activists and these were dismally lost by the Indian National Congress. This arbitrary and undemocratic manner of conduct of elections gravely shook the faith of the people.

The 1972 election after Pakistan's debacle in Bangladesh had started assuming great importance because of widespread feeling that the erstwhile Jammu and Kashmir National Conference under the leadership of Jenab Sheikh Mohammad Abdullah was seriously considering that the public loss of faith in democratic process needs to be checked. But before this self-examination of various political options could be allowed to crystallize into a course of action decisively in favour of the people for regeneration of their faith, the Congress Government in the State inflicted a blow to this process of reappraisal by thoughtlessly enacting a law which banned participation in election by anyone who had at any time

in the past been a number of a political party declared an unlawful association under the said law. In this way, they prevented the mass of the people from entering into the electoral process.

1972 election was over but it set in a realization that the situation in Kashmir will not improve on any front whatsoever Sheikh Saheb and all his loyal followers who spent most of the period from 1953 to 1975 in prisons did not become part of the national mainstream. Efforts to ensure this were set in motion. Negotiations continued for long. During the negotiations an agonizing reappraisal of the sordid events of 1953 and onwards upto 1975- a long period of 22 years was undertaken. There were people who said the clock cannot be turned back but there were also people who advocated that not only must the clock be turned back but it might be necessary to replace it if the purpose was to stem the rot that had set in after the arrest of Sheikh Saheb.

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Chapter IX
Constitution (Application to Jammu and
Kashmir) Order 1954
And
Beginning Of Erosion of the State Autonomy

On February 11, 1954 Syed Mir Qasim presented to the Constituent Assembly the report of the Drafting Committee. The annexure to the Report indicated "in detail provisions of the Constitution of India which generally correspond to Defence, Foreign Affairs and Communications and such other matters as are considered essential concomitants of the fact of accession."

On February 15, 1954 the Constituent Assembly adopted the following resolution unanimously: Resolved that "(a) having adopted the report of the drafting committee this day, the 15th February, 1954 and (b) having thus given its concurrence to the application of the provisions for the Constitution of India in the manner indicated in the Annexure to the aforesaid report this Assembly authorize the Government of the State to forward a copy of the said Annexure to the Government of India for appropriate action".

This resolution was defective in form. It was not addressed to the President, as it should have been. But was a substantial compliance with the requirement of a recommendation to him under Article 370. On May 14, 1954 the President made thereunder C.O. 48 the constitution (Application to Jammu and Kashmir) Order, 1954. Its preamble says that it

was made "with the concurrence of the Government of the State of Jammu and Kashmir". Once the Constituent Assembly was Convened, the State government lost the power to accord any such concurrence. However, the order may be said to be valid in so as it conforms to the Annexure to the report of the Constituent Assembly's Drafting Committee only, and, no further. The Order of 1954 does conform to the Annexure the Report. This order superseded the Order of 1950 and has been treated as the parent order to which subsequently amendments were made by Orders by the President under Article 370.

In view of its importance, the Order of May 14, 1954 is reproduced in full as Appenix VIII. The entries in the Union List- 1 in the Seventh Schedule as applied to the State by this Order did not, unfortunately, conform strictly to the Instrument of Accession and the Delhi Agreement. However, the State List as well as the Concurrent List were entirely excluded. 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. For the rest, certain provisions of the Constitution of India were applied in full; some with modifications, while the rest were omitted.

Before we proceed further and see how to evolve a consensus for action consistent with earnest desire to win back people solidly for participation in the national mainstream politics, it will be necessary to see how things had been allowed to go adrift after August 1953 till 1965 and after 1965 till 1975. It will be interesting to note that after inauguration of the Indian National Congress in the State when it substi-

tuted the National Conference and made it a branch of the National party with Sheikh Saheb and his Colleagues still in Jail and later facing alleged cases of conspiracy and treason, how maximum assault was launched upon Kashmir's special position, its autonomous character, its sovereign character and all this only to realise in 1975 that things had gone out of gear and people had lost whatever faith and confidence they had in the democratic relationship. Issues deferred at the time of Delhi Agreement could not be negotiated any further till the Constituent Assembly itself was flawed by Putting the real leadership of the people behind the bars arbitrarily and unconstitutionally. Even casual examination of the first Constitution (Application to Jammu and Kashmir) Order, 1954 that came into existence after these traumatic changes of 1953 will show that a path different from the one aspired to be chosen by the people of Kashmir state under the leadership of Sheikh Mohammad Abdullah was far different from the one envisaged by the Instrument of Accession and all that had gone with it. Jurisdiction of Union Parliament was extended from three subjects Defence, External Affairs and Communications, to almost all the subjects in the Union List. This constituted a first encroachment on the powers of the legislation of the State by widening of those of the Union. We have seen the entries of the list 1 of seventh Schedule which were made applicable by the Constitution Application Order of 1950 and also the entries which were not applicable to the State of Jammu and Kashmir. The Constitution Application Order of 1954 reversed the order and made Union Parliament capable of legislating in respect of almost all the entries in the List. Of course, with some exceptions and modifications. While the 1950 Order

made some parts besides Articles 1 and 370 applicable making exceptions and modifications also, 1954 Order made many more parts applicable with or without modifications. The important Article made thus applicable was Article 3 in which a proviso has been added for its modified application. The proviso required that "no bill for increasing or diminishing the area of Jammu and Kashmir or of altering the name of boundaries of the State shall be introduced in parliament without the consent of the legislature of the State." Part II of the constitution of India now became applicable as a result of 1954 Order, with some modifications based upon letter and spirit of Delhi Agreement. Part III of the Constitution relating to fundamental Rights was made applicable by 1954 Order. The question that remained to be determined was whether the chapter on the fundamental Right of the Indian Constitution Should form a part of the State Constitution or of the Constitution of India as applicable to the State. As it happened, a new Committees on fundamental Rights was constituted after 9th August, 1953. The reconstituted committee both on basic principle as also on Citizenship and fundamental Rights submitted their report to the constituent Assembly on 3rd February, 1954. The report of the Drafting Committee appointed by the Constituent Assembly in conformity with the recommendations of the two aforesaid committees was presented to the Assembly on 11th February, 1954. The annexure to that report indicated details of the provisions in the Constitution of India to be made applicable to the State. In accordance with the directions contained in the two reports, the sphere of Union jurisdiction was determined / refixed keeping intact all along the residuary powers of the State. It is this annexure to the report, which

ultimately formed the Constitution (Application to J&K) Order of 1954 and made applicable parts of the Constitution of India to our State.

Part V dealing with Union had already been made applicable with some exceptions and modifications and additionally, Articles 54, 55, 73, 134, 139, and 150 were applied with modifications. Thereafter, from part XI Article 246, 250, 251, 253, 254, 256, 261, were made applicable with modifications. Since this chapter deals with legislative powers of Parliament and residuary powers of legislation it may be worthwhile to notice changes brought about in the chapter in its application to the State of Jammu and Kashmir by 1954 Order.

Whereas under the 1950 Order, Parliament could make laws for the state in respect of only such matters in the Union list which correspond to the matters specified in the Instrument of Accession, by the 1954 Order, as a consequence of omission of the words "Subject to the provisions of paragraph 2", occurring in the 1950 Order, the Parliament could thereafter make laws in respect of all matters specified in the Union list. As if that was not enough, the Article was further modified in its application to the State vide C.O. No. 66 dated 28th September, 1963, enabling Parliament to make laws for the State in respect of matters in the Concurrent List also. Most important thing in the Seventh Schedule according to the order of 1954 was continuance of what had been the feature of the earlier Order of 1950 that the State List and the concurrent List in their application to the State of Jammu and Kashmir were excluded. Regarding rest of the Articles from the important chapter dealing with legislative relations of the

Union and the State it has been noted that Articles 248 and 249 dealing with the residuary powers of the legislation and also power of parliament to legislate in respect of matters in the State List the National interest were not applicable to the State. Article 250 was also not applicable to the State under 1950 Order but was applied in a modified form by 1954 Order vesting the Parliament with the power to make laws for the State in respect of matters not enumerated in the Union List.

It may thus cover areas which are part of residuary power of legislation or strictly powers of Legislature of the State. Article 251 in its application to Jammu and Kashmir State in view of non application of Article 249 in the Order of 1954 had to remain confined to Article 250 alone in its application to the State. Vide Article 253 in its modified form it was made obligatory that after commencement of the constitution (Application to J&K) Order of 1954 no decision affecting the disposition of the State of Jammu and Kashmir could be made by the Government of India without the consent of the Government of the State. Article 255 was omitted from application to Jammu and Kashmir State and Article 254 applied with modifications. The article as applicable to Jammu and Kashmir State at that time read as follows:

“If any provision of law made by the Legislature of State is repugnant to any provisions of laws by Parliament which Parliament is competent to enact, law made by Parliament whether passed before or after the law made by the Legislature of the State shall prevail and law made by the Legislature

of the State shall to the extent of repugnancy be void”.

Clause (2) of the Article as in the Union Constitution was omitted in relation to the J&K State.

From Chapter II of this Part dealing with Administrative Relations, While 1950 Order made Article 256 applicable to the State without any modifications or exceptions and applied Article 257 with the exceptions of clause (3) and (4) thereof, Article 260, 262 and 263 were excepted under the 1954 order. Article 256 was renumbered as clause (1) of that Article and the following new clause (2) was added thereto, namely:-

“The State of Jammu and Kashmir 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; and in particular, the said State shall, if so required by the Union, acquire or requisition property on behalf of and at the expense of the 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.”

Article 259 in its application was omitted and Article 261 applied with minor modifications. In clause (2) thereof the words ‘made by Parliament’ were ordered to be omitted. After this change, Clause (2) of Article 261 in its application to J&K reads as under:

“The manner in which and the conditions under which

the acts, records and proceedings referred to in clause (1) shall be proved and the effect thereof determined shall be as provided by law.”

The next chapter, namely chapter XII deals with finance, property, Contracts and suits. We have seen how constitution Application Order of 1950 had dealt with this Chapter in its application to the State of Jammu and Kashmir. Exception was made in respect of Articles 264, 265, clause (2) of Article 267, 268 and 281, clause (2) of Article 283, Articles 286 to 291, 293, 295, 296, and 297. Articles 266, 282, 284, 298, 299, and 300 were applied in modified form., 1954 Order did radically change the situation in so far as application of this chapter was concerned. 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. The negotiations did not conclude at all between the real representatives of the state and the Government of India till introduction of the report of the Basic Principles Committee and Advisory Committee on Fundamental Rights in the Assembly in the manner described above. 1954 Order however, affirmed omission of clause (2) of Article 267, (2) of Article 283 as in the 1950 order and again repeated that Article 266, 282, 284, 298, 299, and 300 would apply in identical terms as in 1950 Order. This would mean that reference in these Articles to State or States shall be construed as not including reference to the State of Jammu and Kashmir. In Article 277 and 295 commencement of Constitution was to be Construed as Commencement of Constitution (Application to J&K) Order of 1954.

The changes in Article 303, Part XIII deleted reference to any entry relating to trade and commerce in any list in Seventh Schedule as Providing authority of restriction on legislative power of Union and of States in regard to trade and commerce and reference to Article 306 is not necessary since by now this provision stands deleted.

In Part XIV, provisions regarding All India Services (Art. 312) were not applicable to the State even under 1954 Order dated 14th May, 1954.

The Next Part XV dealing with elections and Article 324 thereof was made applicable only in relation to elections to Parliament and to offices of President and Vice-President. Rest of the Articles 325, 326, 327, 328, and 329 were omitted from application to this State.

In Part XVI reference to Scheduled Tribes was omitted in relation to J& K. Article 331, 332, 333, 336, 337, 339, 342, stood omitted and reference to the State or States in Article 334 and 335 were to be construed as not including references to the State of Jammu and Kashmir.

Part dealing with official languages i.e. Part XVII in its application to State of Jammu and Kashmir had to remain related to:

- (a) The official language of the Union:
 - (b) The official language for communication between one state and another, or between a state
-

and the union and

(c) the language of the proceedings of the Supreme Court.

that takes us to another important part namely Part XVIII relating to EMERGENCY PROVISIONS. Articles 352 to 360 are included in this Part.

This chapter was not mentioned in the constitution (Application to J&K) order of 1950. A new clause was added which became sub-clause (4) of Article 352 in the year 1954 as it then was. The sub-clause read as under:

“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 it is made at the request or with the concurrence of Government or that State”.

Article 356, 357 and 360 were omitted in their application to Jammu and Kashmir as per 1954 Order.

Thereafter comes Part XIX MISCELLANEOUS (Article 361, 367). Exception was made in respect of articles 362, 363 and 365 in the 1950 Order. Article 361 was applied with modification in that it would apply so far as it related to President and that article 364 would apply in so far as it related to the laws made by the Parliament about major ports and aerodromes. Vide 1954 Order, however, situation had already been

altered and after clause (4) Of Article 361 clause (5) was added which read as under:-

“The provisions of this article shall apply in relation to the Sadar-i-Riyasat of Jammu and Kashmir as they apply in relation to a Rajpramukh, but without prejudice to the provisions of the Constitution of the State”.

Article 362 and 365 were omitted . In Article 366 clause (21) was omitted. This clause as it stood in the Indian Constitution in the year 1954 was finally delated from the Constitution itself later in 1956.

A new clause was added to Article 367 i.e. clause (4) which read as under:-

“(4) For the purpose of this Constitution as it applies in relation to the State of Jammu and Kasmir:

(a) Reference to this Constitution or to the provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;

(b) references to the Government of the said State shall be construed as including references to the Sadar-i-Rayasat acting on the advice of his Council of Ministers;

(c) references to a High Court shall include references to a High Court of Jammu and Kashmir.

(d) reference the Legislature or the Legislative Assembly of the said State shall be construed as including references to the Constituent Assembly of the said State;

(e) references to the permanent residents of the said State shall be construed as meaning persons who, before the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, were recognised as State subjects under the law in force in the State or who are recognised by any law made by the Legislature of the State as permanent residents of the State; and

(f) references to the Rajpramukh shall be construed as references to the persons for the time being recognised by the President as the Sadar-i-Riyasat of Jammu and Kashmir and as including references to any person for the time being recognised by the President as being competent to exercise the powers of the Sadar-i-Riyasat.”

The provisions of Article 368 which is a sole Article of Part XX relate to power of Parliament to amend the Constitution and procedure therefore. In its application to the State of Jammu and Kashmir the following proviso was added:-

“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 (1) of Article 370.”

From Part XXI Article 369, 371, 373, clause 1, 2, 3

and 5 of Article 374, Article 376 and Article 392 were ordered to be omitted. This Part as earlier noted dealt with “Temporary, Transitional and Special Provisions” and this is this the Part, which like other so-called transitory provisions, contains Article 370.

Article 370, part Article 372 and part Article 374 alone were applicable in the prescribed form to the State of Jammu and Kashmir. In Article 372 clauses (2) and (3) were to be deleted and references to laws in force in the territory of India would also include references to Hidayats, Ailans, Ishtihars, Circulars, Robkars, Irshad, Yadhasht, State Council Resolutions, Resolutions of the Constituent Assembly and other instruments having the force of law in the territory of the State of Jammu and Kashmir and reference to the commencement of the Constitution was construed to be reference to the commencement of the Application Order of 1954. In identical terms in Clause (4) of Article 374 the reference to the authority functioning as the Privy Council of a State was to be constructed as a reference to the Advisory Board constituted under J&K Constitution Act Svt. 1996 and reference to the commencement of the Constitution here also was to be construed as reference to the commencement of the 1954 Order. From Part XXII Articles 394 and 395 were omitted. The position regarding the application of Schedules appended to the Constitution that emerged as a result of the 1954 Order was as under:-

(i)	First Schedule	Applied
(ii)	Second Schedule	Applied except paragraph 6

(iii)	Third Schedule	Applied except Forms V, VI, VII and VIII
(iv)	Fourth Schedule	Applied
(v)&(vi)	Fifth & Sixth Schedule	Not applied
(vii)	Seventh Schedule	(a) Entries in the Union List as already noted above applied.
		(b) State list and the con current list stood omitted.
(viii)	Eighth Schedule	Applied
(ix)	Ninth Schedule	Applied

* * *

Chapter X

Erosion continued Apace

The constitutional relationship between the State and the Union as it existed when the Constitution Application Order of 1950 was repealed and substituted by Constitution Application order of 1954 has been detailed in the preceding chapter. There is no doubt that serious deviations were made and the position altered in some vital matters but for the time being we will only indicate what it is that had not been changed. In the legislative sphere of State-Union relationship, 1954 Order did not alter the position in so far as non applicable to the State of the Concussent List and the State List of the Seventh Schedule was concerned. These two lists were completely excluded in their application in relation to the State of Jammu and Kashmir. This left Residuary Powers of legislation completely with the State Legislature and legislative power of the State was so extensive as to be capable of being available for all things not included in the Union List as applicable to the State of Jammu and Kashmir. Although the 1954 Order had increased the number of items to which the power of Parliament to legislate in respect of Jammu and Kashmir was extended but even so they were not as many as were subsequently added to it for effecting further erosion of autonomy by misuse of Article 370. The cumulative reading indicates that State's power to legislate on matters other than those ceded to the Union Parliament were quite wide and still left a great degree of autonomy with the State.

In Chapter II of Part XI dealing with administrative relations between the Union and the State, Article 256 was applied to the State in a modified form. This modification can be regarded as a normal and natural corollary of the State being a unit of the federation. This incidentally appears to be the spirit of clause 6 of the Instrument of Accession also.

Part VI did not apply with the result that State of Jammu and Kashmir was left free to frame its own Constitution for internal governance. This part also contained Chapter (V) which dealt with High Court in the State. The position in respect of the High Court in the States also continued to be the same as it was at the time of passing of the 1950 Order. The continued non-application of this part of the Indian Constitution both in 1950 and 1954 Orders allowed the existing Constitution of Jammu and Kashmir State as amended upto 1950 to continue to remain a live document and also kept the prospect of State Constituent Assembly framing the Constitution of the State of Jammu and Kashmir alive and left the Constitution of the State as it was on 14th of May, 1954 undisturbed. It meant that the Head of the State and the Chief Executive continued to be Sadar-i-Riyasat and the Prime Minister respectively.

Provisions under Part XIV relating to services under the Union and the State were not applied to the State of Jammu and Kashmir either under 1950 or 1954 Order.

Likewise, provisions under Part XV regarding elections were restricted in their application to Jammu and Kashmir to the elections to parliament & office of the President and Vice

President only. Also, provisions under Part XVI were restricted in their application to the J&K State to the Scheduled Castes only.

The next important Part that requires mention is Part XVIII. In this Part what was common between 1950 and 1954 Orders was non-application of Article 356, 357 and 360. It, however, needs to be noted that the Order of 1954 did make Article 352 applicable in a modified form by addition of sub-clause (4) to Article 352 as mentioned earlier.

In the matter of financial relations many radical changes were made by the Constitution (Application to Jammu and Kashmir) Order 1954. This inspite of the fact that no agreement could be reached in regard to the future financial relationship between the State and the Union under the Delhi Agreement of 1952.

Part XII (Articles 264-300) of the Indian Constitution was made applicable in essence as elaborated in the fore going chapter.

The immenseness and the pace of erosion of State autonomy from 1953 onwards can be gauged from a perusal of the long list of Constitution Orders applying various provisions of the Indian Constitution to the State given below:-

1. The Constitution (Application to J&K order, 1954 C.O. 48 Dated 14.5.1954.
2. The Constitution (Application to J&K Amendment

- Order, 1956 C.O. 51 dated 11.2.1956.
3. The constitution (Application to J&K) Amendment Order, 1958 C.O. 55 Dated 16.1.1958.
 4. The Constitution (Application to J&K) Second Amendment Order, 1958 C.O. 56 dated 26.2.1958.
 5. The Constitution (Application to J&K) Amendment Order 1959 C.O. 57 dated 9.2.1959.
 6. The Constitution (Application to J&K) Second Amendment Order 1959, C.O. 59 dated 23.4.1959.
 7. The Constitution (Application to J&K) Amendment Order 1960, C.O. 60 dated 20.01.1960.
 8. The Constitution (Application to J&K) Second Amendment Order 1960, C.O. 61 dated 22.6.1960
 9. The Constitution (Application to J&K) Amendment Order 1961, C.O. 62 dated 2.5.1961.
 10. The Constitution (Application to J&K) Amendment Order 1963, C.O. 66 dated 28.9.1963.
 11. The Constitution (Application to J&K) Amendment Order 1964, C.O. 69 dated 6.3.1964
 12. The Constitution (Application to J&K) Second Amendment Order 1964, C.O. 70 dated 2.10.1964.
 13. The Constitution (Application to J&K) Third Amendment Order 1964, C.O. 71 dated 21.11.1964.
 14. The Constitution (Application to J&K) Amendment Order 1965, C.O. 72 dated 17.5.1965.
 15. The Constitution (Application to J&K) Second Amendment Order 1965, C.O. 74 dated 24.11.1965.
 16. The Constitution (Application to J&K) Amendment Order 1966, C.O. 75 dated 29.6.1966.
 17. The Constitution (Application to J&K) Amendment
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- Order 1967, C.O. 76 dated 13.2.1967.
18. The Constitution (Application to J&K) Amendment Order 1967, C.O. 77 dated 5.5.1967.
 19. The Constitution (Application to J&K) Third Amendment Order 1967, C.O. 79 dated 11.8.1967.
 20. The Constitution (Application to J&K) Fourth Amendment Order 1967, C.O. 80 dated 26.12.1967.
 21. The Constitution (Application to J&K) Amendment Order 1968, C.O. 83 dated 9.2.1968.
 22. The Constitution (Application to J&K) Amendment Order 1969, C.O. 85 dated 17.2.1969.
 23. The Constitution (Application to J&K) Second Amendment Order 1969, C.O. 86 dated 31.3.1969.
 24. The Constitution (Application to J&K) Amendment Order 1971, C.O. 89 dated 24.8.1971.
 25. The Constitution (Application to J&K) Second Amendment Order 1971, C.O. 90 dated 8.11.1971.
 26. The Constitution (Application to J&K) Third Amendment Order 1971, C.O. 91 dated 29.11.1971.
 27. The Constitution (Application to J&K) Amendment Order 1972, C.O. 92 dated 24.2.1972.
 28. The Constitution (Application to J&K) Second Amendment Order 1972, C.O. 93 dated 6.5.1972.
 29. The Constitution (Application to J&K) Third Amendment Order 1972, C.O. 94 dated 2.8.1972.
 30. The Constitution (Application to J&K) Fourth Amendment Order 1972, C.O. 95 dated 10.8.1972.
 31. The Constitution (Application to J&K) Amendment Order 1974, C.O. 97 dated 1.5.1974.
 32. The Constitution (Application to J&K) Second Amend
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- ment Order 1974, C.O. 98 dated 26.6.1974.
33. The Constitution (Application to J&K) Amendment Order 1975, C.O. 100 dated 29.6.1975.
 34. The Constitution (Application to J&K) Second Amendment Order 1975, C.O. 101 dated 23.7.1975.
 35. The Constitution (Application to J&K) Amendment Order 1976, C.O. 103 dated 2.3.1976.
 36. The Constitution (Application to J&K) Second Amendment Order 1976, C.O. 104 dated 25.5.1976.
 37. The Constitution (Application to J&K) Third Amendment Order 1976, C.O. 105 dated 12.9.1976.
 38. The Constitution (Application to J&K) Fourth Amendment Order 1976, C.O. 106 dated 31.12.1976.
 39. The Constitution (Application to J&K) Amendment Order 1977, C.O. 108 dated 31.12.1977.
 40. The Constitution (Application to J&K) Amendment Order 1985, C.O. 122 dated 4.6.1985.
 41. The Constitution (Application to J&K) Second Amendment Order 1985, C.O. 124 dated 4.12.1985.
 42. The Constitution (Application to J&K) Amendment Order 1986, C.O. 129 dated 30.7.1986.

Not all these Orders can be objected to. For instance none can object to provision for direct elections to Parliament in 1996, delimitation of Parliamentary constituencies, etc. It is the principle that matters. Constitution limits are there to be respected, not violated. Amendments to the Constitution of India were extended as a matter of course to the State.

We have noticed above that in the eagerness to create

an image of cementing closer relations, what followed 1954 is a series of Constitution (Application to J&K) Orders numbering 42 till now which were not conceived at any point of time either in 1950 or in 1952 or even later in May, 1954. Among the changes brought about the most important were in restricting the powers of legislature of the State, extension of powers of the Union Parliament, application to the State of financial provisions of the Constitution of India, provisions relating to emergency. All India Services, superintendence, direction and control of elections of the state legislature and several other matters.

The position having been so radically altered can be put in the following manner so as to indicate actual State-Union relationship which had emerged as a result of changes brought about.

(a) Almost all entries in the Union List are applicable to the State of Jammu and Kashmir with the result that union Parliament's power to legislate extends to matters even beyond the three subjects on which the accession had originally been agreed upon. The list has gone far beyond 20 items of the list attached to the Instrument of Accession or even the Schedules to 1950 Order.

(b) Concurrent List of legislation in essence is applicable even in regard to welfare legislation and essentially local matters.

(c) Most of the provisions about one of the wings

of the State namely the Judiciary are now derivable or definable from the Country's Constitution rather than the Constitution of the State.

(d) Provision relating to All India Services is now applicable to the State.

(e) All the matters under Finance, Trade and Commerce are now applicable. Even the rudiments of financial autonomy have completely been swept away.

(f) Even the field of residuary legislation in the matter of law and order has been curtailed so far as the State is concerned and Entry 97 of the Union list too has been made applicable in curiously modified form to the detriment of the principle of political autonomy.

(g) All emergency powers including those in Article 365 and that too in their un-amended form and retrograde shape are applicable to the State and their misuse during the last eight to nine years has proved beyond doubt that apprehensions entertained in 1950's have come out to be true.

(h) Special provisions of Article 249 dealing with the Parliament's power of legislation in the State List have been extended to the State of Jammu and Kashmir quite surreptitiously in a brazen and clandestine manner by misinterpreting and misusing Article 370.

(i) Superintendence, direction and control of local

elections now vests with the Central Election Commission.

Besides, some changes of far-reaching consequences including that of altering the mode of appointment of the Head of the State were effected in the Constitution of the State. The extent and the nature of autonomy which has been left with the State as of now can be seen from the following table :-

I	Total No. of Articles	395
	No. of Articles applied	260
	Balance	135*

*These relate to matters under part VI of the Constitution of India which pertains to matters concerning the Executive, Legislature and High Courts of States of the Union and provisions whereof are identical to the provisions of the constitution of Jammu and Kashmir.

II	Total No. of entries in the union List	97
	Entries applied	94
	Balance	3*

*Entries 8, 9 and 34 relating to CBI jurisdiction, preventive detention connected with Defence matters, and Courts of wards for the estates of Rulers of Indian States respectively.

III	Total No. of entries in the concurrent list	47
	Entries applied	26
	Balance	21*

*Entries 3, 5, 6, 7, 8, 9, 10, 14, 15, 17, 20, 21, 27, 28,

29, 31, 32, 37, 38, 41 and 44.

These entries relate mostly to matters of social legislation, charitable institutions, relief and rehabilitation of displaced persons, transfer of property etc. etc.

IV	Total No. of Schedules	12
	No. of Schedules applied	7
	Balance	5*

*Schedule 5- Control of the Scheduled Areas and S.T.

Schedule 6- Administration of Tribal Areas.

Schedule 10- Disqualification on grounds of defection except in so far it relates to members of Parliament.

Schedule 11- Powers of Panchayats (new provision of the Indian Constitution vide Seventy-third Amendment Act, 1992)

Schedule 12- Power and responsibilities of Municipalities (new provision of the Indian Constitution vide Seventy fourth Amendment Act, 1992)

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 State's jurisdiction over the matters as envisaged by the Instrument of Accession of Oct. 1947 and the Delhi

* Indicates provisions hitherto not applied to the State

Amendment of 1957 was gradually diminished and systematically had to amend the Constitution four times, by the 59th, 64th, 67th, 68th, 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.

The Union Home Minister, Mr. Gulzari Lal Nanda said on December 4, 1964 that Article 370 could well be used to serve as a "tunnel in the wall" in order to increase the Centre's powers. This was diametrically contrary to the clear intent underlying, and the objective of, Article 370.

Another gross case illustrates the extent of misuse of Article 370. On July 30, 1986 the President made an Order under Article 370 extending to the State Article 249 of the Constitution in order to empower Parliament to legislate even on a matter in the State List on the strength of a Rajya Sabha resolution "Concurrence" to this was given by the Centre's own appointee, Governor Jagmohan. (Indian Express, August 17, 1986).

This is how C.O. 129 was made on July 30, 1986. It said that 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 was made "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.

Successive State governments had in the past accorded their "concurrence" for various reasons and under various political compulsions. No State would otherwise willingly accept curbs on its autonomy.

* * *

Chapter XI

Changes effected in the Basic Structure of the State Constitution

This brings us to the perception which inspired both the State and the Union leadership in early fifties to envisage that the State of Jammu and Kashmir shall frame the Constitution of the State through a constituent Assembly envisaged for it during the days of freedom struggle itself and recognised thereafter by a provision in the Constitution of India. This Constituent Assembly adopted a method of appointment of the Head of the State different from the one adopted by the Constituent Assembly of India in respect of the other States of the Union in as much as it provided for an elected Head (Sadar-i-Rayast). Thus it brought to an end the era of hereditary rulership for all times to come and held out a promise for the future of a fully democratic Constitution for the State.

The Constitution finally adopted had the following features:-

- (a) An elected Head of the State.
 - (b) A chapter on Directive Principles ensuring equality, fraternity and social justice for all.
 - (A) An independent Judiciary.
 - (c) A Council of Ministers with a Prime Minister of the State at the Head.
 - (d) A Legislature consisting of two houses with the
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Upper House based on absolute parity between the two regions of the State with very wide and effective powers.

Another important feature of the Constitution adopted and enforced was and continues to be provided by Section 147. This section deals with powers and procedures of amendment of the Constitution. This Section made some provisions of the Constitution of Jammu and Kashmir unalterable and among the unalterable provisions are the following :-

- (a) Section 147 itself.
- (b) Section 3 defining the relationship of the State with the Union of India.
- (c) Section 5 dealing with the extent of executive and legislative power of the State.

The State Constitution can be regarded as very rigid in this respect. This feature that it has provisions which are quite rigid and provisions which are flexible is not unique in the Constitution of the State alone. This is true of many Constitutions. Justice Anand has to say, in this regard, as follows:-

“The French Constitution declares that the Republican character of the Government cannot be changed and in the United States of America no federating State can secede and become independent”.

In more than one ways, Section 3, 4 and 5 in the Con-

stitution of Jammu and Kashmir State can be regarded as the fundamental law on which, in the words of His Lordship, Mr. Justice Sen Anand, "the very structure of the Constitution has been erected".

Our purpose of making reference to these provisions of the Constitution of State of Jammu and Kashmir is to place on record how this fundamental law or the basic structure on which the Constitution is based has been subjected to changes. Even a casual study can indicate that despite the rigidity the requirement of the mandate of un-alterable character of the provisions, politics has swayed someone to adopt measures which should not have been adopted at all.

The Amendment Acts of 1959 and 1965 were introduced respectively before and after the National Conference Party converted itself into a Pradesh Congress Committee, a branch (a) the "State of Indian National Congress." The Constitution of Jammu and Kashmir (Sixth Amendment) Act 1960 introduced changes in Sections 2, 27, 29, 30, 31, 32, 33, 51, 95, 100-A, 100-B and 126.

As a result of the changes effected by this Amendment Act among various other provision that suffered changes, was Section 147 also though declared by the Section itself as unalterable. Section 147 as it stood before the amendment was as follows:-

"An amendment of the Constitution may be initiated only by the introduction of a Bill for the purpose in the Legislative Assembly, and when the Bill is passed in the House by a

majority of not less than two-thirds of the total membership of the House, it shall be presented to the Sadar-i-Rayasat for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill:

Provided that a Bill providing for the abolition of the Legislative Council may be introduced in the Legislative Assembly and passed by it by a majority of the total membership of the Assembly and by a majority of not less than two-third of the members of the Assembly present and voting.

Provided further that no Bill or Amendment seeking to make any changes in-

- (a) this section
- (b) the provision of Section 3 & 5; or the provisions of the Constitution of India as application in relation to the State shall be introduced or moved in either House of the State Legislature."

Besides, an omnibus amendment in Section(2) by introduction of a sub-section (3) affected many other provisions. Sub-section (3) reads as under:-

"Any reference in this Constitution to Sadar-i-Riyasat shall, unless the context otherwise requires, be construed as a reference to the Governor."

Section 147 vide Section (2) of the Sixth Amendment Act of the Constitution of Jammu and Kashmir State suffered change in that the word, 'Governor' was substituted for the word, 'Sadar-i-Riyasat' which could not have been made in view of the provision of the section. This amendment brings about fundamental changes in the core foundation of the Constitution of the State. This was done without considering the implication and so radically that the basic character of the Constitution was infringed upon just within eight years of its adoption and enforcement.

Incidentally, we may digress for a moment here and go to explanation part given at the end of sub-clause (b) of clause (1) of Article 370. This explanation originally was as under:-

"For the purpose of this Article the Government of the State means the person for the time being recognised as Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under Maharaja's proclamation dated 5th day of March, 1948".

The said explanation on the recommendation of the Constituent Assembly of the state of Jammu and Kashmir was changed by a Presidential Order vide C.O.44 dated 17.11.1952 making Article 370 operative with a changed explanation with effect from 7th November, 1952. The substituted explanation reads as under:-

"For the purpose of this Order, the Government of the State means the person for the time being recognised by the

President on the recommendation of the Legislative Assembly of the State as Sadar-i-Riyasat of Jammu and Kashmir acting on the advice of the Council of Ministers of the State for the time being in office”.

So, the part dealing with Maharaja's proclamation of 5th March, 1948 become Sadar-i-Riyasat recognised as such by President of India and acting on the advice of the Council of Ministers of the State for the time being in office with effect from 17th November, 1952. What then is Article 370 after the word 'Sadar-i-Riyasat' is substituted by the word Governor after the Sixth Amendment Act of the Constitution of the State of Jammu and Kashmir if the substitution is not part of the Indian Constitution? The word Sadar-i-Riyasat continues to exist in Article 370 for any kind of changes in Article 370 cannot be brought about by making change in Jammu and Kashmir State Constitution and in the way it was brought about.

The power of the State Legislature can next be found to have been impinged upon insofar as its legal right to elect the Head of State subject to the recognition by the President of India got obliterated. This deprivation cannot but be recorded as a serious assault on the autonomous character of this unit of the federation. The recommendation to have an elected Head as the substitute for the hereditary ruler had been made by the Basic Principles Committee for the Constituent Assembly as early as 1952. This was mutually agreed upon by the State and the Union leaders. Consequently, the Sadar-i-Riyasat was duly elected in 1952 and thereafter after every five years till the Constitution of State was amended in 1965. Why it was nec-

essary in 1965 to deprive the State of electing its Sadar-i-Riyasat and provide for a nominee of the Central Government as Governor need not be dwelt upon at length but, however, reference to 1984, 1986 and 1990 interludes must indicate that but for events happening at the behest of nominated Governors, ground situation in the State of Jammu and Kashmir would in all probability have been different. Why and to satisfy whom did the State leadership after in-coming of Congress into the State embark upon this mis-adventure shall always be regretted.

During 1948-1965 the word Prime Minister of Jammu and Kashmir did not raise any storm in any cup of tea nor did it even remotely lead to any confusion with that of the Prime Minister of the Union. It was there in the State prior to 1947, had continued to be there after Maharaja's declaration of March 5th, 1948 and again after the adoption of interim Constitution in 1952, till the dismissal of the first elected Prime Minister in 1953 and again till March 1965. What has been achieved after writing it off alongwith the principle of election of the Head of the State as also the nomenclature of Sadar-i-Riyasat can now be seen from what has happened in very recent history of the State particularly to State's relationship with the Union.

This assault on State Autonomy must be and has to be un-done. For this purpose appropriate amendments shall have to be made in the Constitution of Jammu and Kashmir and also consequential changes in the provisions of the Constitution of India as applicable to the State.

This requires to be done speedily to restore the faith of the people in the path chosen by them through their representatives in the course of deliberations in the Constituent Assembly of the State way back in 1951-53.

* * *

Chapter XII

Return of Sheikh Mohammad Abdullah to power in 1975 and After

After the dismissal of Jenab Sheikh Mohammad Abdullah from the office of the Prime Minister of Jammu and Kashmir on August 8, 1953 in an unconstitutional and undemocratic manner he was kept under detention for over two decades. However, in February, 1975 due to the pursuation of the Prime Minister of India Mrs. Indira Gandhi, he agreed to take over the state administration pending the next elections of the State Assembly with the support of the then Congress members of the state Legislature, although he insisted on the holding of Assembly elections before taking office. But, as it happened, in March, 1977, much before the due date of Assembly elections, the Congress party withdrew its support to him.

The Janta Party which was then in power at the Centre ordered fresh and fair elections in the State in the same year and the Jammu and Kashmir National Conference under the leadership of Sheikh Saheb won a thumping majority as a result of the fairest ever elections held in Jammu and Kashmir till then after 1953. However, unfortunately even the historically held elections were not made best use of to deepen the roots of national mainstream politics by enlightened national leadership and by yielding to the people of Kashmir what they needed most, what they held to be their birth right, their right to be a special state of the Indian Union with unbridled powers

of legislation in matters other than those ceded under Instrument of Accession or powers incidental or ancillary thereto.

After Sheikh Saheb's death in 1982, fresh elections to the J&K Legislative Assembly were held in June, 1983 and the National Conference under the leadership of Dr. Farooq Abdullah again won the elections with comfortable majority. But in 1984 the Government headed by him was dismissed unconstitutionally and undemocratically and another Government under the leadership of Shri Ghulam Mohammad Shah was installed by engineering defections in the National Conference with Congress Party support from outside.

This experiment also did not succeed. Congress Party withdrew support in March, 1986 and the G.M.Shah Government had to be dismissed. Governor's rule was imposed. In the Assembly elections held in 1987 National Conference, under the leadership of Dr. Farooq Abdullah, won the elections again. In January, 1990 the Central Government brought back a Governor in the State who was unacceptable to the popularly elected State Government with the result that it resigned. Then followed a blood bath and massacre on large scale of innocent persons. Even the mourners of late Mir Waiz Molvi Mohammad Farooq carrying his dead body were not spared. The situation deteriorated to such an extent that only after four months the Governor had to be replaced.

There were massive demonstrations by the people in Srinagar followed by eruption of militancy which the Central Government thought fit to curb under its own auspices but

failed to do so. The demand for Azadi (independence) was raised by a section of the angry youth in Kashmir. It was, however, late in the day that even the Union leadership realised that what is needed for this unit of the Union is autonomy and that "Sky should be the limit" in terms of the then Prime Minister of the Union Shri P.V.Narasimha Rao. The declaration did not, however, go beyond promises having been made so piously.

The United Front Government recognised the need and followed it up only by means of declaration in the Common Minimum Programme in 1996 by holding the prospect of "Greater Autonomy" as a live issue for bringing people of Kashmir back to the era of normalcy and Kashmir's political scenario back into the national mainstream. However, on the assurance of the central Government that it would consider favorably the demand for restoration of autonomy to the State and was prepared to enter into a dialogue with the elected representatives of the State, the National Conference went to the polls in September, 1996 on the autonomy platform with the following manifesto:-

"We pledge that if we are elected, our Party will be bound to accomplish the following:-

Dignified undiluted and meaningful autonomy which has been inspiring our people will be restored and made unalterable. We will strive to bring it to the shape which was kept before us at the time of the Accession. We will also demand credible guarantees from the federal centre to keep constitu-

tional relationship with the State in its pristine form so that the tragic events through which we have had to pass are not repeated in future”.

The people of the State returned the Party to power with a two-thirds majority. It is in pursuance of this mandate of the electorate and assurance of the Central Government that the State Government appointed this Committee to examine the question of restoration autonomy to the State of Jammu and Kashmir.

* * *

RECOMMENDATIONS

Chapter XIII

Recommendations:

Change in the title of Part XXI and heading of Article 370

The word 'temporary' has been used in the title of part XXI and heading of Article 370 of the Constitution of India. In this context it would be relevant to mention as to how and why it came to be used therein. This was because of the provision contained in clause (3) of this Article which came into being at a time when the Constituent Assembly of the State had yet to be convened.

This Article could cease to be operative if the President of the Republic were to issue a notification to this effect on the basis of a recommendation of the State Constituent Assembly. It could also be made operative with modifications and exceptions by a similar process and from such date as may be specified by the President.

The Constituent Assembly ceased to exist after the Constitution for the State was adopted by it in November, 1956. It did not make any recommendation for the removal of this Article.

So it should have been indicated as early as 1956 that it would be a misnomer to call Article 370 'Temporary provision'. In fact it had then become and had to continue as a special provision of the Indian Constitution applicable to the State

of Jammu and Kashmir.

It would be appropriate to quote Jenab Sheikh Sahib's views expressed in this regard while addressing the State Constituent Assembly on 11th August, 1952:

"Here I would like to point out that the fact that Article 370 has been mentioned as a temporary provision in the Constitution does not mean that it is capable of being abrogated, modified or replaced unilaterally. In actual effect, the temporary nature of this Article arises merely from the fact that the power to finalise the Constitutional relationship between the State and the Union of India has been specifically vested in the Jammu and Kashmir Constituent Assembly. It follows that whatever modifications, amendments or exceptions that may become necessary either to Article 370 or any other Article in the Constitution of India in their application to the Jammu and Kashmir State are subject to decisions of this Sovereign Body."

Accordingly, it is recommended as under:-

- i. That the word 'temporary' be deleted from the title of part XXI of the Constitution of India; and
- ii. That the word 'temporary' occurring in the heading of Article 370 be substituted by the word 'special'.

Legislative Relations (Part XI)

We have at length described that breath and soul of State

Union relationship initially was the Instrument of Accession and later this was replaced by provisions of the Indian Constitution as and when these become applicable. The Instrument of Accession was to be the basis. The Instrument conceded powers of legislation to the Federal Union in the matter of Defence, External Affairs and Communications and vide clause (3) this Instrument itself specified matters in the "schedule" thereto with respect to which the Dominion legislature could make laws for the State of Jammu and Kashmir. These scheduled matters were 20 in number and were grouped under sub-heads:-

- a. **Defence.**
- b. **External Affairs.**
- c. **Communications.**
- d. **Ancillary.**

Dominion Legislature, therefore, could legislate with respect to the State of Jammu and Kashmir in respect of matters specified in the schedule to the Instrument of Accession.

Article 1 and 370 became applicable to our State straightway and our State became part of the scheme of distribution of legislative powers enshrined in the Constitution of India. Seventh Schedule to the Constitution itemised the legislative field of operation in the following manner:-

List I	Union list.
List II	State list.
List III	Concurrent list.

With the enforcement of Indian Constitution on 26.1.1950 and simultaneously application of Article 370 to the State of Jammu and Kashmir, Presidential Order of 1950 came to be issued on this very date. With its application relevant Union List items with omissions, exceptions and modifications became applicable from that very date. This was consistent with original terms of accession, conceding powers of legislation to Union Parliament in matters on which State sovereign had acceded to the Union.

The Union thereafter could legislate on items included in the Schedule to 1950 Order. The items which were excluded from the ambit of legislative power of Parliament in respect of the State of Jammu and Kashmir were as under:-

7, 8, 23, 24, 32, 33, 34, 35, 36, 37, 38, 40, 42 to 71, 78 to 92 and 97.

The entries 22 and 76 were applied with modification. A casual examination of these would show that these were rightly not applied being beyond the border line of ceded items of Defence, External Affairs, Communications and Ancillary.

At this stage it would be pertinent to mention that Article 246 in its original form clearly laid down that in relation to the State of Jammu and Kashmir reference to clauses (2) and (3) in clause (1) of the Article and clause (2) (3) and (4) of the Article shall not apply. This made existence of State and Concurrent Lists only a matter of theoretical interest for our

State. All that was yielded in Union List for federal legislation was thus known; rest of the powers were of the State and State alone. Such a decision was quite in keeping with the true spirit and context of federal polity. This is particularly so when application of Articles 248 and 249 was also excluded, the two having been completely omitted from the application to our State.

Their non-application ensured that residuary powers of legislation remained with the State unimpaired and Parliament could not legislate about any State matter even when there would have been a situation envisaged by Article 253.

It is note-worthy that all the entries made applicable particularly the substituted entry 97 read with modified Article 248 were not even remotely connected with Defence. External Affairs and Communications, nor can they in entirety or otherwise be regarded as ancillary to matters covered by these three subjects.

Changes from 1954 onwards, particularly in sixties, were so rapid that things started changing even beyond recognition. Encroachment on State jurisdiction was obvious, thereby reducing the State autonomy to a mockery.

Recommendations

In the legislative field, therefore, it is recommended as under:-

- a. Matters in the Union list not connected with the

three subjects of Defence. External Affairs and Communications and / or ancillary thereto but made applicable should be excluded from their application to the State.

b. All modifications made in Article 246 in its application to the State subsequent to the 1950 Order should be rescinded.

c. Article 248, 249, 250 and 251 whether applied in original or substituted modified form should be omitted in relation to the State.

d. As in 1950 and 1954. List II (State) and List III (Concurrent) of the Seventh Schedule should not be applicable to the State.

e. Article 254 be restored to the position it had in its application to our State in 1954.

f. Article 262 and 263 which were not applicable under 1950 Order but were subsequently extended to the State should cease to apply.

Part XV

Elections

(Article 324 to 329)

Since elections to the State Legislature are held under laws made by the State Legislature, Article 324 should continue to apply in the manner and the way it was applicable in 1950/1954 Order. This is particularly so when the State Constitution had provisions relating thereto.

Recommendation

Therefore, change brought about in this Part after 1954 be reversed and consequential changes in other Articles in this Part be effected.

Part XVIII

Emergency Provision (Article 352 to 360)

The following should be added to Clause 6 of Article 352

Recommendation

a. “provided that this request for concurrence of the Government of the State shall be subject to whatever decision the State Assembly may take within two months of declaration of emergency and failing any such decision, the proclamation of Emergency shall be deemed to have been revoked”.

b. Sub-clause (b) of clause (6) of this Article should be deleted.

c. Article 355, 356, 357, 358, 359 and 360 should be made non-applicable to the State of Jammu and Kashmir as was the position in 1954.

Part III

Fundamental Rights

(Article 12 to 35)

Recommendation

This Part should be deleted. A separate chapter on Fundamental Rights needs to be included in the Jammu and Kashmir Constitution. Situation where Directive Principles do not apply and Fundamental Rights apply is not a happy one. Directive Principles in the State Constitution apply in the absence of a provision these can hardly mean anything to Fundamental Rights which are enshrined in the Union Constitution. Fundamental Rights chapter in the State Constitution would add weight and worth to the organic law of the land and give the citizens satisfaction of even testing worth of Directive Principles for Legislation and for governance according to letter and spirit of law.

Part V

The Union

(Article 52 to 151)

Very few Articles from this Part were made applicable, in 1954 Order but the situation was changed with the passage of Constitution (Application to J&K) Order, 1960 and thereafter. Normally there can be no dispute now with the extended jurisdiction of the Supreme Court over matters in regard to our State, but it has got to be recorded that this aspect of State-Union relationship was not settled at the time of Delhi-Agreement of 1952 and after the events of 1953 quick decisions were forced upon the flawed Constituent Assembly followed by a number of Constitution (Application to J&K) Orders. The position which ultimately has emerged is that the State of J&K

has been accorded the same status as the rest of the States except for the above form of Articles 133 and 134 applied to the State. The judiciary of India has been unitary in character during the British rule and it remained so under the new Constitution of India adopted in 1950. Jammu and Kashmir too became part of it, notwithstanding the fact that strong views to have judicial autonomy were expressed during negotiations for Delhi Agreement, 1952. In any case divergent views were recorded.

The State had at that time a High Court whose judgments were subject to appeal/review before His Highness, advised in his judicial function by a Board of Judicial Advisors consisting of eminent jurists knowledgeable persons. That has not be and reopening that chapter may not sound appropriate now except, of course, where adopting of provisions of the Union Judiciary for the State have in a way infringed upon the corresponding provisions of the State Constitution in regard to the State High Court.

Recommendation

a). Articles 72(1) (c), 72(3), 133, 134, 135, 136, 138, 145(1)(c) and 151(2) should be made non-applicable to the State as was the position in 1950 Order.

b). Articles 149, 150 and 151 should apply to the State in the form in which they were in 1954.

Part VI

Article 124 (4) of the Constitution of India mandates that a Supreme Court Judge shall not be removed from his office except by an Order of the President passed after an address by each House of Parliament supported by a majority of the total membership of that House and by a majority of not less than two thirds of the members of that House present and voting, has been presented to the President in the same session for such removal on the ground of proved misbehavior or incapacity. Article 218 has in the course of time been applied to the J&K State. The position as it obtained prior to C.O. 60 was that under the State Constitution the removal of a judge of the High Court by the President for proved misbehavior or incapacity could be on the basis of an address for removal supported by a majority of the total membership of each House of Legislature of the State and by the majority of not less than two thirds of the members present and voting. But after the aforesaid application Order of 1960, the power to pass an address for such removal vests with the Parliament in accordance with Article 124 (4). Part VII of the State Constitution deals with the State High Court. The Part starts with section 93 (Constitution of High Court) and ends with Section 108 (Officers and Servants of the High Court). Of these, we have Sec. 95 (appointment and tenure of office of judges) and Sec. 99 (Resignation and Removal of a judge of the High Court). The aforementioned provision about removal till 1959 was sub section (2) of section 99 of the State Constitution. The Constitution of Jammu and Kashmir (First Amendment) Act, 1959 vide its section 4 deleted this provision and the question of removal

of a judge for proved misconduct or incapacity was left to be taken care of as in the rest of the country by resort to procedure in section 124 Clause (4) thereof. This was so vide Constitution (Application to J&K) Order NO. 60 of 1960.

All provision about High Court having been retained in the State Constitution including one about administrative expenses, salaries, allowances and pensions continuing to remain a charge upon consolidated fund of the State, deletion of the above provision regarding removal by means of an address being the duty, right and obligation of State Legislature and not Parliament in terms of Section 124(4) is, to say the least, not justifiable. Article 218 conceded this right in respect of other High Courts to Parliament. It is because all other provisions like 93 to 108 of our State Constitution are in their case part of the Union Constitution itself. We would, therefore, recommend the following in this regard:-

Recommendation

i. Article 218 be omitted in its application to the State. That would enable the State Legislature to re-enact the provisions as they existed in sub section (2) and (3) of Section 99 of the State Constitution before the enforcement of J&K Constitution (First Amendment) Act of 1959.

ii. Article 220, 222 and 226 should also be omitted in their application to J&K State.

Part XII.

Finance, Property, Contracts and Suits.

(Article 264 to 300 A)

We have seen that in 1952 during and after negotiations for Delhi Agreement that Article 266 (relating to the Consolidated Funds of India and public accounts of India and of the States), Article 282 and 284 (relating to the Union or public account of India), Article 298, 299 and 300 (relating only to the Union or Government of India) were applicable. Exception was made in respect of articles 264 and 265, clause (2) of Article 267, Article 268 to 281. Clause 2 of Act. 283, Article 286 to 291, Articles 293, 295, 296 and 297, C.O. 48 of 14th May 1954 made Articles 264, 265, 268, 272, 274-281, 285, 293, 295 to 297 applicable to our State. Article 269 and 286 were applied with amendments in 1958.

Law for imposition of tax burden is clearly laid down. The rule in federal polity generally is that if the Union levies a tax in respect of matters assigned to it, it retains the proceeds yielded by such imposition. Same is true of a unit in federation. There are however, a number of exceptions as under Articles, 268 and 269 in the matter of distribution of income tax as also of whole or part of proceeds of excise duty. Our State also would collect excise and stamp duties as specified in entries 84 and 91 of list I and appropriate the net proceeds. Same is true as a result of application of Article 269 to our State in respect of levies collected thereunder. Even Article 270 applies to our State.

What has been incorporated in the Constitution of the State viz. Consolidated Fund and Contingency Fund of the State

as also custody thereof, and Public Account of the State is covered by sections, 115, 116, 118 and 119 of the Constitution of our State. In fact the position that emerges from the application of various Constitution Orders is that the provisions of the Constitution of India identical to what has been incorporated in the State Constitution in section 115, 116, 117, 118, 119, 120, 121, 122 and 123 do not apply and for the rest, by and large, provisions of Part XII of the Constitution of India apply to our State as to the rest of the State.

On the passage of Constitution (Application to J&K) Second Amendment Order 1958 (C.O. 56) jurisdiction of the Auditor general and Comptroller was extended. This brought entry 76 of list I into the picture in its application to the State.

Despite allocations available to the State at present, we are firmly of the opinion that in order that the State should be financially viable it needs more financial resources and assistance. It may be recalled that during 1952 Delhi talks, the discussion on financial arrangement between the Union and the State remained inconclusive.

Recommendation

It is, therefore, recommended that the matter be discussed indepth between the State representatives and the Union Government.

Part XIV.

Service under the Union and the States

(Article 308-323)

Article 308 excluded application of this Part to our State. There is hardly any federation in the world where such provisions as those contained in Article 312 and legislative enactments thereunder are envisaged. These were not applicable to the State even in 1954 but have been made applicable thereafter.

Notwithstanding seemingly an attractive proposition one can say without any fear of contradiction that it has dwarfed local talent and made it difficult for local youth to aspire to compete for key civil posts on competitive basis. The weak-kneed attempt to organise Kashmir Civil Service is neither here nor there and increasing inflow of All India Services has meant pretty little in the field for which the services were apparently conceived. No imperial model of civil services in central cadre can be or could be a substitute for what the local youth could be expected to have i.e. local patriotic feeling and passionate attachment for the service of those among whom they live. Ever since the application of these provisions of the Indian Constitution to our State the number of direct recruits from the State has been negligible. The problem has attained so unpleasant a shape, even in the national context, that demands of greater number of promotee from local services all over the country have assumed alarming proportions.

Recommendation

It is, therefore, recommended that in Article 312, the

brackets and words “(including the State of Jammu and Kashmir)” inserted by the Constitution (Application to J&K) Order 1958 be omitted.

Part XVI

Special provisions relating to certain classes

Article 330 to 342

Article 339 regarding control of the Union over the administration of Scheduled Areas and the welfare of Scheduled Tribes was not applicable to the State till 1985. It was applied in a modified form to the State vide Constitution (Application to J&K) Order of 1985.

Likewise, Article 342 has been applied for the first time to the State in 1985.

Recommendation

i. It is recommended that the powers in respect of aforesaid matters be restored to the State.

ii. Article 330, 331, 334, 335, 336 which were applied by 1950 Order should continue to be applicable. Articles 338, 339, 340, 341 and 342 have been applied after 1950. Their application to the State should be omitted and corresponding provisions be made in the State Constitution.

Part XX

Amendment of the Constitution.
(Article 368)

Needless to mention that unlike other states of the Union, the State of Jammu and Kashmir has a Constitution of its own. Before the Constitution (Application to J&K) Second Amendment Order 1975 (C.O. 101) the State Legislature had unfettered powers to amend it. But vide this Order Clause (4) was added to Article 368 of the Indian Constitution in its application to our State which reads as under:-

“(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 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;”

The addition of this clause in the Indian Constitution has restricted the power of the State Legislature to amend its

own Constitution. This uncalled for clog on the constituent powers of State Legislature needs to be removed lock, stock, and barrel.

Recommendation

It is therefore recommended that:-

- (i) clause (4) of Article 368 added vide C.O. 101 be deleted;
- (ii) clause (2) of Article 368 should apply with the provisio already introduced by 1954 Order and Clause (1) thereof which was not in existence in 1954 and was introduced in 1971 should remain omitted in its application to the State.

Part XXII

(Schedules First to Twelve)

The Indian Constitution has 12 Schedules only some of which apply to our State with or without modifications relatable to some of the Articles of the Constitution of India. Each Schedule which is applicable to the State of Jammu and Kashmir being fathered by a specific Article in the Constitution of the country will naturally suffer modification, change/substitution depending upon what that Article contains in regard to its application to the State of Jammu and Kashmir.

Seventh Schedule

Seventh Schedule derives its character and quality from

— — — — —

what Article 246 of the Constitution reads like. Its corresponding quality in respect of Jammu and Kashmir State naturally will depend upon the form and the content that Article 246 of the Constitution of India will assume in its relation to the State of Jammu and Kashmir. In 1950, Article 246 of the Constitution of India had one character and quality/content in its application to the State of Jammu and Kashmir and that was reflected in the number of entries in the Union List in the Seventh Schedule in their application to the State of Jammu and Kashmir. Later on, this Article suffered changes and consequently various entries in the Union List and the Concurrent List also suffered radical changes.

Recommendation

It is recommended that:-

(a) entries in the Union List which were applied to the State by 1950 Application Order should continue and all other entries made applicable to the State by subsequent orders should be omitted;

(b) Concurrent List was not applicable under 1950 Order and it was also agreed in the Delhi Agreement that this should not apply to the State. Hence all subsequent orders applying various entries from this list should be rescinded.

In sum, it is recommended that consistent with the above, requisite changes as may become necessary consequent upon change in the Articles of the Constitution of India in their

application to the State of Jammu and Kashmir as a result of this report be effected in the Schedules concerned.

Changes required in the State Constitution

In view of what has been stated in chapter XI ante, this Committee recommends the repeal of:-

- i. The Constitution of Jammu and Kashmir (First Amendment) Act, 1959 relating to superintendence, direction and control of elections to the State Legislature and provision relating to the State High Court; and
- ii. The Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965 relating to the mode of appointment and nomenclature of the Head of the State and nomenclature of the head of the Executive.

* * *

Chapter XIV

Summary of Recommendations

1. Temporary, Transitional and Special Provisions (Part XXI)

- (i) The word 'Temporary' be deleted from the title of Part XXI of the Constitution of India and the word 'Temporary' occurring in the heading of Article 370 be substituted by the word 'Special'.

2. Legislative Relations (Part XI)

- (a) Matters in the Union List not connected with the three subjects of Defence, External Affairs and Communications/ or Ancillary thereto but made applicable should be excluded from their application to the State.
 - (b) All modifications made in Article 246 in its application to the State subsequent to the 1950 Order should be rescinded.
 - (c) Article 248, 249, 250 and 251 whether applied in original or substituted/modified form should be omitted from their application to the State.
 - (d) As in 1950 and 1954, List II (State) and List III (Concurrent) of the seventh Schedule should not be applicable to the State.
 - (e) Article 254 should be restored to the position it had in
-

its application to the State in 1954.

(f) Article 262 and 263 which were not applicable under 1950 Order but were subsequently extended to the State should cease to apply.

3. Elections (Part XV)

Changes brought about in this Part be reversed and consequential changes in other Articles in this Part be effected

4. Emergency provision (Part XVIII)

(a) The following should be added to C1.6 of Article 352 in its application to the State :-

“Provided that this request for concurrence of the Govt. of the State shall be subjected to whatever decision the state Assembly may take within two months of declaration of emergency and failing any such decision, the proclamation of emergency shall be deemed to have been revoked.”

(b) Sub-clause (b) of C1.(6) of this Article should be deleted.

(c) Article 355, 356, 357, 358, 359 and 360 should be made non-applicable to the State as was the position in 1954.

5. Fundamental Rights (Part III)

This part should be deleted. A separate chapter on Fundamental Rights be included in the State Constitution.

6. The Union (Part V)

- (a) Article 72(1) (c), 72(3), 133, 134, 135, 136, 138, 145(1)(c) and 151(2) should be made non-applicable to the State as was the position in 1950 Order.
- (b) Article 149, 150 and 151 should apply to the State in the form in which they were in 1954.

7. The State (Part VI)

- (i) Article 218 be omitted in its application to the State and the position as it existed before the J&K Constitution (First Amendment Act) of 1959 restored.
- (ii) Article 220, 222 and 226 should also be omitted in their application to Jammu and Kashmir State.

8. Finance, Property, Contracts and Suits (Part XIV)

The matter be discussed between the State representatives and the Union Government as agreed to during the talks in 1952 (Delhi Agreement)

9. Services under the Union and the States (Part XIV)

In Article 312 the brackets and words “including the State of Jammu and Kashmir” inserted by the Constitution (Application to J&K) Order 1958 be omitted.

10. Special Provisions relating to certain classes (Part XVI)

Application of Article 338, 339, 340, 341 and 342 to the State should be omitted and corresponding provisions made in the State Constitution.

11. Amendment of the Constitution of India (Part XX)

- i). Clause (4) of Article 368 added vide C.O. 101 be deleted.
- ii). Clause (2) of the Article should apply with the proviso already introduced by 1954 Order and clause (1) thereof which was not in existence in 1954 and was introduced in 1971 should remain omitted in its application to the State.

12. Schedules

In the Seventh Schedule entries in the Union List not applied to the State by the Constitution (Application to J&K) Order, 1950 should be omitted. Concurrent List which was not applicable to the State in 1950 but was applied by subsequent Orders should cease to apply to the State.

13. Changes in the State Constitution.

All amendments in the Constitution of Jammu and Kashmir made vide:-

- i. **Constitution of Jammu and Kashmir (First Amendment) Act, 1959 insofar as they relate to superintendence, direction and control of elections to the State Legislature and to the State High Court; and**
- ii. **Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965 relating to change of nomenclature of the Head of the State and State Executive, mode of appointment of the Head of the State and other consequential amendments.**

should be repealed and the original provisions of the Constitution of Jammu and Kashmir restored.

To sum up, the provisions of the Constitution of India specified in the Second schedule and the matters specified in the First Schedule to the Constitution (Application to J&K) Order, 1950 and the matters agreed to by the representatives of the State and the Union vide Delhi Agreement of 1952 should continue to apply to the State subject to the same exceptions and modifications as are specified in the said Order and the Delhi Agreement. All Orders issued thereafter under clause (1) of Article 370 of the Constitution of India by the President, applying various provisions and matters of The Constitution of India to the State whether in full or in modified form or making any change in the provisions or matters already applied by 1950 Order or agreed to under Delhi Agree-

1959 and Constitution of Jammu and Kashmir (State Govern-
ment) Act, 1965 be repealed and the original provisions of the
Constitution of Jammu and Kashmir as adopted by the State
Constituent Assembly on November 17, 1956 be restored.

* * *

Chapter XV

Safeguards for future

In the preceding chapters we have discussed in detail the extent of erosion caused to the State autonomy from time to time and also suggested remedial measures. That completes the job assigned to us by first item of the terms of reference. There are, however, two other items which require our consideration. The first is to ensure the “inviolability” of the final settlement, and the other is to keep in mind the need to maintain “harmonious” relations with the Centre.

A suggestion has been made that Article 258 should be invoked for entrusting to the State “functions in relation to any matter to which the executive power of the Union extends.” This would put a seal on the record of the past. “Functions” so “entrusted” can always be recalled back. This issue is not one of executive “functions” but legislative “powers” apportioned between the Union and the State under two solemn compacts between them, the Instrument of Accession in 1947 and the Delhi Agreement of 1952 to which the President’s Order of May 14, 1954 gave constitutional sanction besides, of course, Article 370 itself. To them must we return if popular sentiment is to be respected and resentments assuaged. It is first and foremost a moral issue. It also has important constitutional and political aspects. In the nature of things redress can only be through another compact between the Union and the State. Once the basic principles are agreed, there will be discussion on procedure. Forty years of unconstitutional prac-

tice have created a mess. The best course is for the President to repeal all Orders which are not in conformity with Constitution (Application to Jammu and Kashmir) Order, 1950 and terms of the Delhi agreement of 1952.

Ever since, Article 370 has acquired a dangerously ambiguous aspect. Designed to protect the State's autonomy it has been used systematically to destroy it. A compact is necessary between the Union and the State which makes ample redress and finalizes their relationship by declaring a "Constitutional Understanding" that Article 370 of the Constitution of India can no longer be used to apply to the State of Jammu and Kashmir any other provisions of the Constitution of India beyond the ones extended under 1950 Order and the Delhi Agreement, 1952. This could be embodied in a new Article that specifies the agreement as part of the unamendable basic structure of the Indian Constitution.

Such constitutional understandings have been formulated in other democracies. The complexities of our situation render it the best, perhaps the only, course for removing the debris of an unhappy past and building, in its place, a relationship between the State of Jammu and Kashmir and the Union of India, which reflects the most vital aspect of federalism mutual trust and respect.

sd:
(Gh. Mohi-ud-Din Shah)
Chairman

sd:
(Abdul Ahad Vakil)
Member

sd:
(Abdul Rahim Rather)
Member

sd:
(Piyaray Lal Handoo)
Member

sd:
(Molvi I.H. Ansari)
Member

sd:
(Kushok Thiksay)
Member

sd:
(Mirza Ab. Rashid)
Member

sd:
(S. Teja Singh)
Member Convenor

sd:
(Bodh Raj Bali)
Member

Jammu, April 1999

APPENDICES

Appendix I

Names of individuals and organisations from whom Memorandums and Letters have been received in response to the State Autonomy Committee's Notification No. D 18/J-27/96 dated 14.12.1996.

1. C.R. Khamitkar, consulting Engineer Journalist, Mysore sales D.B.Mahinderkar Building: Shroff Bassaweshwar Road, Bijapur-586101.
 2. Rev. Dr. Kodumutti A.J.Nadar, MBBS, M.Divinity 7, Palaniappa Nagar, Salem 636007, India.
 3. S.Sunil Kumar S/O P.S. Nair Indira Bhawan, Chambayil Road, Neyyattinkar. P.O. Pin No. 695-121, Trivandrum District, State Kerela.
 4. A.A.Syed, Managing Director Sir Syed and Sons Engineering (P) Ltd. Room No. 67 3rd Floor Development Cooperative Bank Building; Paltun Road, Crawford Market Bombay-400001.
 5. President Social and Cultural Welfare Society, Portroad Shaynam, Leh 194101.
 6. President of Educational and Cultural Organisation, Tukcha Leh-194101 (Ladakh) J&K State.
 7. President of Ladakh Buddhist Association.
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8. G.M. Khan R/O Aribal Shalimar Srinagar.
 11. T.N. Saraf (IAS Retd.) FAO Representative at the United Nations (Retd.)
 12. President of Ladakh Buddhist Association, Youth wing, Leh, Ladakh.
 13. President of Lomdon Social Welfare Society, Leh-194101 Ladakh J&K India.
 14. Ashwani Kumar, Convener Panun Kashmir Movement (PKM).
 15. President of Gonpathundal Tsogspa, Cultural and Welfare Society, Leh Ladakh.
 16. P.N.Tengloo, Organisation Secretary All State Kashmiri pandit Conference.
 17. Pyari Lal Sharma of Baramulla C/O Sanjay Sharma 32-R Rani Park Jammu Tawi 180001.
 18. Hari Om Ph. D. Professor and Head of the Department of History and Centre for History and Culture.
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19. Vinayak G. Madhavi, Usha V. Madhave, Miss Sharmila V. Madbhavi, Advocates High Court Swami Nivas, Opp. Dena Bank, 315/3, Thakurdwar, Bombay-400002.
20. Jammu Mukti Morcha.
21. Tsering Samphel, President District Congress Committee (I) Leh, 194101, Ladakh J&K.
22. Harbajan Singh S/O Kartar Singh R/O Rafiabab, Tehsil Sopore, VIII, VIII, Sialkote Distt. Baramulla.
23. Jammu and Kashmir Bhartiya Janta Party, Pt, Prem Nath Bhawan, Kachi Chawani, Jammu.
24. President Lothun Tsogspa, Phey Village Leh-Ladakh.
25. President of Nyamuthun Society Mane-Tselding, Leh Ladakh.
26. Mr. Yog R.Sharma 2329 B-I N. 11th St. Arlington VA 22201 USA.
27. President of Chang Thang Youth Welfare Association, Nyoma Block, Ladakh (J&K) India.
28. Dr. R.S.Kanwar, 245-L, Model Town, Jalandhar.
29. M.I.Ansari Compound, Agra Rd. Narpoli, Bhiwandi-421305, Distt. Thane, Mumbai.

30. Prof M.L.Kapur, 342-Jiwan Shah Street, Shahidi Chowk, Jammu.
 31. Bansi Lal Kaul, Chairman Committee to build response on Autonomy constituted by Kashmiri Pandit Global Smit, 231-C, Ram Vihar, Old Janipura, Jammu Pin. 180007.
 32. Lawers of Jammu, Mubark Mandi, Jammu.
 33. Panun Kashmir C/O Raman and Pawan Steel Works, new plots, Jammu-180005.
 34. Syed Shahabuddin IPS (Retd.) Ex-MP, Advocate, supreme Court of India.
 35. Shri Justice V.M.Tarkunde.
 36. Swami Raj Sharma, IAS, (Retd.) Advocate, J&K High Court Jammu.
 37. R.D.Kewal ramani, Advocate, Supreme Court of India, 65 Lawyer's Chamber Tilk Marg, N. Delhi - 110001.
 38. Satish Sharma S/10-6, Akhnoor.
 39. Abdul Rehman Tukro Secretary Kashmir Council of Communist Party of India.
 40. V.Veulacate Reddy, d2-76, K, R. Palem Seellureipate.
 41. Countours of Autonomy of the State of Jammu and Kashmir by witness.
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Appendix II

List of Members of Political Parties, Journalists, Jurists and other eminent Persons with whom discussions were held in New Delhi in November, 1997

1. Shri Sharad Yadav, President Janta Dal Party, Janta Dal Party Office, 7 Jantar Mantar Road, New Delhi.
 2. Shri Harkishan Singh Surjit, General Secretary, CPI(M).
 3. Justice V.M. Tarkunde.
 4. Congress M.P's.
 - i. Shri G.R. Kar,
 - ii. Shri P.Namgial
 - iii. Shri Janak Raj Gupta Ex-M.P.
 5. C P I Secretaries
 - i. Shri D.Raja
 - ii. Shri Atulkimar Anjaan
 - iii. Shri Shamim Faizi.
 6. Shri A.G.Noorani,
 7. Shri B.G.Vergheese, Journalist.
 8. Shri Shahab-ud-din, Ex-M.P.
 9. Shri S.R.Kesri, President Indian National Congress 7-Purana Qila Road, New Delhi.
 10. Shri Mulayam Singh Yadav, 2-Menon Road, New Delhi.
 11. Justice V.R.Krishana Iyer, Former Judge Supreme Court at Kerela House, New Delhi.
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Appendix III

A

Maharaja of J&K's Letter Dated 26-10-1947 to Lord Mountbatten

My dear lord Mountbatten,

I have to inform Your Excellency that a grave emergency has arisen in my State and request immediate assistance of your Government.

As your Excellency is aware the State of Jammu and Kashmir has not acceded to the Dominion of India or to Pakistan. Geographically my State is contiguous to both the Dominions. It has vital economic and cultural links with both of them Besides my State has a common boundary with the Soviet Republic and China. In their external relations the Dominions of India and Pakistan cannot ignore this fact.

I wanted to take time to decide to which Dominion I would accede, or whether it is not in the best interests of both the Dominions and my State to stand independent, of course with friendly and cordial relations with both.

I accordingly approached the Dominions of India and Pakistan to enter into Standstill Agreement with my State. The Pakistan Government accepted this Agreement. The Dominion of India desired further discussions with representatives of my Government. I could not arrange this in view of the de-

velopments indicated below. In fact, the Pakistan Government are operating Post and Telegraph system inside the State.

Through we have got a Standstill Agreement with the Pakistan Government they have permitted steady and increasing strangulation of supplies like food, salt and petrol to my State.

Afridis, soldiers in plain clothes, and desperadoes with modern weapons have been allowed to infiltrate into the State at first in Poonch and then in Sialkot and finally in mass area adjoining Hazara District on the Ramkot side. The result has been that the limited number of troops at the disposal of the State had to be dispersed and thus had to face the enemy at several points simultaneously, that it has become difficult to stop the wanton destruction of life and property and looting. The Mahora powerhouse which supplies the electric current to the whole of Srinagar has been burnt. The number of women who have been kidnapped and raped makes my heart bleed. The wild forces thus let loose on the State are marching on with the aim of capturing Srinagar, the summer Capital of my Government, as first step to over running the whole State.

I hereby declare that I accede to the Dominion of India on the assurance that if an agreement is made between the Governor-General and the Ruler of this State whereby any function in relation to the administration in this State of any law of the Dominion Legislature shall be exercised by the Ruler of this State, then any such agreement shall be deemed to form part of this Instrument and shall be so construed and have ef-

fect accordingly

The terms of this my Instrument of Accession shall not be varied by any amendment of the Act or the Indian Independence Act, 1947, unless such amendment is accepted by me by an Instrument supplementary to this Instrument.

Nothing in this Instrument shall empower the Dominion Legislature to make any law for this State authorising the compulsory acquisition of land for any purpose, but I hereby undertake that should the dominion for the purposes of a Dominion law which applies in this State deem it necessary to acquire any land, I will at their request acquire the land at their expense or if the land belongs to me transfer it to them on such term as may be agreed, or, in default of agreement, determined by an arbitrator to be appointed by the Chief Justice of India.

Nothing in this Instrument shall be deemed to commit me in anyway to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future constitution.

Nothing in this Instrument affects the continuance of may 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 this State.

I hereby declare that I execute this Instrument on be-

Given under my hand this 20th day of October, nineteen hundred and forty-seven.

Hari Singh
MAHARAJADHIRAJ OF
JAMMU AND KASHMIR STATE

Appendix III**B****Instrument of Accession of Jammu and Kashmir State**

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

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

Now, therefore, I Shriman Indar Mahandar Rajrajeshwar Maharajadhiraj shri Hari Singh ji Jammu Kashmir Naresh Tibbet adi Deshdahipathi Ruler of JAMMU AND KASHMIR State in the exercise of my sovereignty in and over my said State do hereby execute this my Instrument of Accession and-

I. I hereby declare that I accede to the Dominion of India with the intent that Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall, by virtue of this my Instrument of Accession, but subject always to the terms thereof, and for the purposes of the Dominion, exercise in relation to the State of Jammu and

Kashmir (hereinafter referred to as "this State") such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India on the 15th day of August, 1947 (which Act as so in force is hereinafter referred to as "the Act").

2. I hereby assume the obligation of ensuring that due effect is given to the provisions of the Act within this State so far as they are applicable therein by virtue of this my Instrument of Accession.

3. I accept the matters specified in the Schedule hereto as the matters with respect to which the Dominion Legislature may make laws for this State.

4. I hereby declare that I accede to the Dominion of India on the assurance that if an agreement is made between the Governor-General and the Ruler of this state whereby any functions in relation to the administration in this state of any law of the Dominion Legislature shall be exercised by the ruler of this state, then any such agreement shall be deemed to form part of this Instrument and shall be construed and have effect accordingly.

5. The terms of this my Instrument of Accession shall not be varied by any amendment of the Act or of the Indian Independence Act, 1947, unless such amendment is accepted by an Instrument supplementary to this Instrument.

6. Nothing in this Instrument shall empower the

Dominion Legislature to make any law for this State authorising the compulsory acquisition of land for any purpose, but I hereby undertake that should the Dominion for the purpose of a Dominion law which applied in this state deem it necessary to acquire any land, I will at their request acquire the land at their expense or if the land belongs to me transfer it to them on such terms as may be agreed, or in default of agreement, determined by an arbitrator to be appointed by the Chief Justice of India.

7. Nothing in this Instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future constitution.

8. 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 or 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.

9. I hereby declare that I execute this Instrument on behalf of this State and that any reference in this Instrument to me or to the Ruler of the State is to be construed as including a reference to my heirs and successors.

Given under my hand this 26th day of October Nineteen Hundred and Forty-Seven.

(Sd.) HARI SINGH
Maharajadhiraj of Jammu and Kashmir state.

Appendix III
C
Acceptance of Accession

Lord Mountbatten's Reply to Maharaja Sir Hari Singh
Dated 27th October 1947

My dear Maharajah Sahib,

Your Highness's letter, dated the 26th October, has been delivered to me by Mr. V. P. Menon. In the special circumstances mentioned by Your Highness, my Government have decided to accept the accession of Kashmir State to the Dominion of India. Consistent with their policy that, in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my government's wish that, as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the State's accession should be settled by a reference to the people. Meanwhile, in response to your Highness's appeal for military aid, action has been taken today to send troops of the Indian Army to Kashmir to help your own forces to defend your territory and to protect the lives, property and honour of your people.

My Government and I note with satisfaction that your Highness has decided to invite Sheikh Abdullah to form an Interim Government to work with your Prime Minister.

Yours sincerely,

Sd/- Mountbatten of Burma

New Delhi
October 27, 1947.

Appendix IV

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

C.O. 10

In exercise of the powers conferred by clause (1) of article 370 of the Constitution of India, the President, in consultation with the Government of the State of Jammu and Kashmir, is pleased to make the following Order, namely:-

1. (1) This Order may be called the Constitution (Application to Jammu and Kashmir) Order, 1950.

(2) It shall come into force at once.

2. For the purposes of sub-clause (b) (i) of clause (1) of article 370 of the Constitution, the matters specified in the First Schedule to this Order, being matters in the Union List, are hereby declared to correspond to matters specified in the Instrument of accession governing the accession of the State of Jammu and Kashmir to the Dominion of India as the matter with regard to which the Dominion Legislature may make laws for that State; and accordingly, the Power of Parliament to make laws for that State shall be limited to the matters specified in the said First Schedule.

1. Published with the Ministry of law Notification No. C.O. 10, dated the 26th January, 1950, Gazette of India, Extraordinary, 1950, Part II, Section 3(i), page 673, superseded by C.O. 48.

3. In addition to the provisions of article 1 and article 370 of the Constitution, the only other provisions of the Constitution which shall apply in relation to the State of Jammu and Kashmir shall be those specified in the Second Schedule to this Order, and shall so apply subject to the exceptions and modifications specified in the said Schedule² and to the modification that all references in the said provisions to the Rajpramukh shall be construed as references to the Sadar-i-Riyasat of Jammu and Kashmir.

2. Added by C.O. 43 dated 15th November, 1952.

THE FIRST SCHEDULE

(See paragraph 2)

[Note:- The number of each entry in this Schedule is the number of the corresponding entry in the Union List]

1. Defence of India and every part thereof including preparation for defence.
 2. Naval, military and air forces ; and other armed forces of the Union.
 3. Delimitation of cantonment areas, local self-government in such areas the constitution and power within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.
 4. Naval, military and air force works.
 5. Arms, firearms, ammunition and explosives.
 6. Atomic energy for the purpose of defence and mineral resources for its production.
 9. Preventive detention for reasons connected with defence, foreign Affairs or the security of India.
 10. Foreign Affairs; all matters which bring the Union into relation with any foreign country.
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11. Diplomatic, consular and trade representation.
 12. United Nations Organisation.
 13. Participation in international conferences, associations and other bodies and implementing of decisions made thereat.
 14. Entering into treaties and agreements with foreign countries and implementing of treaties, agreements and Conventions with foreign Countries
 15. War and peace.
 16. Foreign jurisdiction.
 17. Naturalisation and aliens.
 18. Extradition.
 19. Admission into, and emigration and expulsion from. India; passports and visas.
 20. Pilgrimages to places outside India.
 21. Piracies and crimes committed on the high seas or in the air, offences against the law of nations committed on land or on the high seas or in the air.
 22. Railways, but as respects any railway owned by the State of Jammu and Kashmir, and either operated by that State or
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operated on its behalf otherwise than in accordance with a contract with the State by the Government of India, limited to a regulation thereof in respect of safety, maximum and minimum rates and fares station and service terminal charges, interchange of traffic and the responsibility of the railway administration as carriers of goods and passengers, and as respects any railway which is wholly situate within the State and does not form a continuous line of communication with a railway owned by the Government of India, whether of the same gauge or not, limited to the regulation thereof in respect of safety and the responsibility of the railway administration as carriers of goods and passengers.

25. Maritime shipping and navigation including shipping and navigation on tidal waters; provision of education and training for the mercantile marine and regulation of such education and training provided by states and other agencies.

26. Lighthouses, including lightships, beacons and other provision of the safety of shipping and aircraft.

27. Ports declared by or under law made by parliament or existing law to be major ports, including their delimitation, and the constitution and powers of ports authorities therein.

28. Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.

29. Airways; aircraft and air navigation provision; of aerodromes; regulation and organisation of air traffic and of aero-

dromes; provision for aeronautical education and training and regulation of such education and training provided by States and other agencies.

30. Carriage of passengers and goods by railway, sea fair.

31. Posts and telegraphs, telephone, wireless. broadcasting and other like forms of communication.

41. Trade and commerce with foreign countries.

72. Election to Parliament, and the offices of President and Vice President; the Election Commission.

73. Salaries and allowances of members of Parliament, the Chairman and of the House of the People.

74. Powers, privileges and immunities of each House of Parliament and of the members and the committees of each House; enforcement of attendance of persons for giving evidence of producing documents before committees of Parliaments or commissions appointed by parliament.

75. Salaries and allowances of the Ministers for the Union; the salaries, allowances, and right in respect of leave of absence and other conditions of service of the Comptroller and Auditor-General.

76. Audit of the account of the Union.

77. Constitution and organisation of the Supreme Court, and the fees taken therein; persons entitled to practise before the Supreme Court.

80. Extension of the powers and jurisdiction of member of a police force belonging to any State to railway areas outside the State.

93. Offences against laws with respect to any of the matters aforesaid.

94. Inquiries and statistics for the purpose of any of the matters aforesaid.

95. Jurisdiction and power of all courts, except the Supreme Court, with respect to any of the matters aforesaid, but, except with the consent of the State Government, not so as to confer any jurisdiction or powers upon any court ordinarily exercising jurisdiction in, or in relation to, the State; admiralty jurisdiction.

96. Fees in respect of any of the matters aforesaid, but not including fees taken in any court. (2)

THE SECOND SCHEDULE

(See paragraph 3)

Provisions of the Constitution applicable	Exceptions	Modifications
Part-V	Articles 72(1)(c), 72(3), 133, 134, 135, 136, 138, 145(1)(c) and 151(2).	<p>(1) Articles 80 & 81 shall apply subject to the modification that the representatives of the State in the Council of States and the House of the People respectively, Shall be chosen by the President in consultation with the Government of the State.</p> <p>¹(1A) Articles 54 & 55 shall apply subject to the modifications :-</p> <p>(a) that the references therein to the elected members of both House of Parliament and to each elected member of either House of Parliament Shall be deemed</p>

¹ Ins. by C.O.39, dated 20th March, 1952.

to include, respectively, a reference to the representatives of the State in those Houses and to each such representative.

(b) that the reference to the elected members of the Legislative Assemblies of the States and to each such elected member Shall be deemed to include, respectively, a reference to the members of the constituent Assembly of the State and to each such member and

(c) that the population of the State shall be deemed to be forty-four lakhs and ten thousands.

Articles 149 and 150 shall apply subject to the modification that the references therein to the State shall be construed as not including the State of Jammu and Kashmir.

Part XI	Articles 247 to 252, clauses (3) and (4) of article 257 and articles 260, 262 and 263.	<p>(1) Clause (1) of article 246 shall apply subject to the provisions of paragraph (2) of this order and clauses (2) and (3) of article 246 shall not apply in relation to the State.</p> <p>(2) Clause (1) of Article 259 Shall apply subject to the modification that after the words “until Parliament by law otherwise provides”. the words “and the concurrence of the State to such law has been obtained” shall be deemed to be inserted .</p>
Part XII	Articles 264 and 265, clause(2) of article 267, articles 268 to 281, clause (2) of article 283, articles 286 to 291, 293, 295, 296 and 297.	<p>(1) Article 266 shall apply only in so far as it relates to the consolidated fund of India and the public account of India.</p> <p>(2) Article 282 and 284 shall apply only in so far as they relate to the Union or the public account of India..</p>

(3) Articles 298, 299 and 300 shall apply only in so far as they relate to the union or the Government of India.

Part XV	Articles 325 to 329	Article 324 shall apply only in so far as it relates to elections to Parliament and to the offices of the President and Vice President.
Part XVI	Articles 332, 333, and 337 to 342.	<p>(1) Article 330 shall apply only in so far as it relates to seats reserved for Scheduled Castes.</p> <p>(2) Article 334 shall apply only in so far as it relates to the House of the People.</p> <p>(3) Article 335 shall apply only in so far as it relates to the Union.</p>
Part XVII	Nil	The provisions of this Part shall apply in so far as they relate to the official lan-

guage of the Union and to proceedings in the, Supreme Court.

Part XIX	Articles 362, 363, 365 ¹ and clause (21) of article 366.	<p>(1) Article 361 shall apply only in so far as it relates to the President.</p> <p>(2) Article 364 shall apply only in so far as it relates to the Laws made by Parliament.</p>
Part XX	Nil	<p>Article 368 shall apply subject to the additional proviso:</p> <p>“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 (1) of article 370.”</p>
Part XXI	Articles 369, 371 and 373, clause	<p>(1) In clause (3) of article 379 after the words</p>

1. Inserted by C.O.43 infra.

(4) of article 374, articles¹ 376, 378 and 386 and clause (2) of article 388. “Minister for any such State”, the words “other than the State of Jammu and Kashmir” shall be deemed to be inserted.

(2) Article 389 shall apply only in so far it relates to Bills pending in the Dominion Legislature.

(3) Article 390 shall apply only in so far as it relates to the Consolidated Fund of India.

Part XXII	Nil	Nil
First Schedule	Nil	Nil
Second Schedule	Paragraph 6	Nil
Third Schedule	Forms V, VI, VII and VIII	Nil
Fourth Schedule	Nil	Nil
Eighth Schedule	Nil	Nil

1. Substituted *ibid* for “376 and 378”.

Annexure V

Inaugural Speech made by Sher-I-Kashmir Sheikh Mohammad Abdullah Prime Minister J&K State in the Jammu and Kashmir Constituent Assem- bly on 5th November, 1951.

“Mr., President :

Today is our day of destiny. A day which comes only once in the life of a nation. A day on which to remember the hosts of those gone before us, and of those yet to come, and we are humbled by the greatness of this day.

After centuries, we have reached the harbour of our freedom, a freedom, which, for the first time in history, will enable the people of Jammu and Kashmir, whose duly elected representatives are gathered here, to shape the future of their country after wise deliberation, and mould their future organs of Government. No person and no power stand between them and the fulfillment of this - their historic task. We are free, at last to shape our aspirations as people and to give substance to their ideals, which have brought us together here.

We meet here today, in this palace hall, once the symbol of unquestioned monarchical authority, as free citizens of the New Kashmir for which we have so long struggled.

I see about me in this hall, many companions - Hindus, Muslims, Buddhists, Harijans and Sikhs, who first trod with

me that path which has brought us to this Constituent Assembly of 1951. We fought as one, against tyranny and oppression. We survived privations and bitter struggles - The Jails of Hari Parbat, Bahu, Baderwah and those other jails, which only imprisoned our bodies but could not crush our spirit.

When we look back on these years, we see how our footsteps have taken us not among the privileges, but into the homes of the poor and downtrodden, we fought their battle against privilege and oppression and against these darker powers in the background which sought to set man against man on the ground of religion. Our movement grew and thrived side by side with the Indian National Congress and gave strength and inspiration to the people of the Indian States.

I may be forgiven if I feel proud that once again in the history of this State, our people have reached a peak of achievement through what I might call the classical Kashmiri genius for synthesis, born of toleration and mutual respect. Throughout the long tale of our history, the highest pinnacles of our achievement have been scaled when religious bigotry and intolerance ceased to cramp us, and we have breathed the wider air of brotherhood and mutual understanding.

Our movement to freedom has been enacted against the background of this same old struggle. We stood for the brotherhood of men of all creeds and strengthened our union on the basis of common work and sacrifice. Against us were ranged the forces of religious bigotry centered in the Muslim League and its satellites, and the Hindu communalists from within and

without the State. Ranged against us, and often in alliance with communalism were the forces of the autocratic States, backed up on the one hand by British Imperialism, the paramount power, and on the other, by the rich Landowners and other beneficiaries of Court patronage.

We must remember that our struggle for power has now reached its successful climax in the convening of this Constituent Assembly. It is for you to translate the vision of New Kashmir into reality, and I would remind you of its opening words, which will inspire our labours:

“We the people of Jammu and Kashmir, Ladakh and the Frontier regions, including Poonch and Chenani Illaqas - commonly known as Jammu and Kashmir State-in order to perfect our union in the fullest equality and self-determination, to raise ourselves and our children for ever from the abyss of oppression and poverty, degradation and superstition, from medieval darkness and ignorance, into the sunlit valleys of plenty, ruled by freedom, science and honest toil, in worthy participation of the historic resurgence of the peoples of the East, and the working masses of the world, and in determination to make this our country a dazzling gem of the snowy bosom of Asia, do propose and propound the following Constitution of our State.”

This was passed at the 1944 Session of the National Conference in Srinager. Today, in 1951, embodying such aspirations, men and women from the four corners of the State in this Constituent Assembly has become the repository of its

sovereign authority. This Assembly, invested with the authority of a constituent body, will be the fountain-head of basic laws, laying the foundation of a just social order and safeguarding the democratic rights of all the citizens of the State,

You are the sovereign authority in this State of Jammu and Kashmir, what you decide has the irrevocable force of law. The basic democratic principle of sovereignty of the nation, embodied ably in the American and French Constitution, is once again given shape in our midst. I shall quote the famous words of Article 3 of the French Constitution of 1791:-

“The source of all sovereignty resides fundamentally in the nation.... . Sovereignty is one and indivisible, inalienable and imprescriptible. It belongs to The nation.”

We should be clear about the responsibilities that this power invests us with. In front of us lie decisions of the highest national importance, which we shall be called upon to take. Upon the correctness of our decisions depends not only the happiness of our land and people now, but the fate as well of generation to come.

What then are the main functions that this Assembly will be called upon to perform !

One great task before this Assembly will be to devise a constitution for the future governance of the country, Constitution-making is a difficult and detailed matter. I shall only refer to some of the broad aspects of the Constitution, which

should be the product of the labours of this Assembly.

Another issue of vital importance to the nation involves the future of the Royal Dynasty. Your decision will have to be taken both with urgency and wisdom for on that decision rests the future form and character of the State.

The third major issue awaiting your deliberations arises out of the Land Reforms which the Government carried out with vigour and determination. Our "land to the tiller" policy brought light into the dark homes of the peasantry; but, side by side, it has given rise to the problem of the landowner's demand for compensation. The nation being the ultimate custodian of all wealth and resources, the representatives of the nation are truly the best jury for giving a just and final verdict on such claims. So in your hand lies the power of this decision.

Finally, this Assembly will after full consideration of three alternatives that I shall state later, declare its reasoned conclusion regarding accession. This will help us to canalise our energies resolutely and with greater zeal in direction in which we have already started moving for the social and economic advancement of our country.

To take our first task, that of Constitution-making we shall naturally be guided by the highest principles of the democratic constitution of the world. We shall base our work on the principles of equality, liberty, and social justice, which are an integral feature of all progressive Constitution. The rule of

law as understood in the democratic countries of the world should be the cornerstone of our political structure. Equality before the law and the independence of the Judiciary from the influence of the Executive are vital to use. The freedom of the individual in the matter of speech, movement and association should be guaranteed; freedom of the Press and of opinion would also be features of our Constitution. I need not refer in great detail to all those rights and obligations, already embodied in NEW KASHMIR, which are integral parts of democracy which has been defined as "an apparatus of social organization wherein people govern through their chosen representatives and are themselves guaranteed political and civil liberties."

You are no doubt aware of the scope of our present constitutionalities with India. We are proud to have our bonds with India, the goodwill of whose people and Government is available to us in unstinted and abundant measure. The Constitution of India has provided for a federal union and in the distribution of sovereign powers has treated us differently from other constitutional units. With the exception of the items grouped under Defence, Foreign Affairs and Communication in the Instrument of Accession, we have complete freedom to frame our constitution in the manner we like. In order to live and prosper as good partners in a common endeavour for the advancement of our peoples. I would advise that, while safeguarding our autonomy to the fullest extent so as to enable us to have the liberty to build our country according to the best traditions and genius of our people, we may also by suitable constitutional arrangements with the Union establish our right

to seek and compel federal cooperation and assistance in this great task, as well as offer our fullest cooperation and assistance to the Union.

Whereas it would be easy for you to devise a document calculated to create a framework of law and order, as also a survey of the duties and rights of citizens, it will need more arduous labour to take concrete decision with regard to the manner in which we propose to bring about the rapid economic development of the State and more equitable distribution of our national income among the people to which we are pledged. Our National conference avows its faith in the principal that there is one thing common to meet of all castes and creeds, and that is their humanity. That being so, the one ailment which is ruthlessly sapping the vitality of human beings in Jammu and Kashmir is their appalling poverty, and if, we merely safeguard their political freedom in solemn terms, it will not affect their lives materially unless it guarantees them economic and social justice.

NEW KASHMIR contains a statement of the objectives of our social policy. It gives broadly a picture of the kind of life that we hope to make possible for the people of Jammu and Kashmir and manner in which the economic organization of the country will be geared to the purpose. These ideals you will have to integrate with the political structure which you will devise.

The future political set up which you decide upon for Jammu and Kashmir must also take into consideration the ex-

istence of various sub-national groups in our State. Although culturally diverse, history has forged an uncommon unity between them; they all are pulsating with the same hopes and aspirations, sharing in each others joys and sorrows. While guaranteeing this basic unity of the State, our constitution must not permit the concentration of power and privilege in the hands of any particular group or territorial region. It must afford the fullest possibilities to each of these groups to grow and flourish in conformity with their cultural characteristics, without detriment to the integral unity of the state or the requirement of our social and economic policies.

Now let us take up an issue of basic importance which involves the fundamental character of the State itself. As an instrument of the will of a self determining people who have now become sovereign in their own right, the constituent Assembly will now re-examine and decide upon the future of the present ruling dynasty, in respect of its authority.

The present House of the Rulers of our state based its claim to authority on the treaty Rights granted to it by the British Government in 1846. To throw light on the nature of these rights it will be helpful to recall that the British power, in its drive for territorial expansion, achieved its objectives through a network of alliances with the Indian Princes, subsidiary and subordinate offensive and defensive. This mutually helpful arrangement enabled the British to consolidate their power and strengthened the grip of the princes, giving them military help in the event of rebellion by their exploited subjects. The Butler Committee Report on Treaty Rights in 1929, bears ample

testimony to this say.

“The duty of the Paramount Power to protect the State against rebellion and insurrection is derived from the clause of treaties and sanads, from usage and from the promise of the King Emperor to maintain unimpaired the privileges, rights and dignities of the Princes..... The promise of the King Emperor to maintain unimpaired the privileges, rights and dignities of the Princes carries with it a duty to protect the Prince against attempt to eliminate him and substitute another form of Government”

In recognition of their services to the British Crown, the Indian Princess earned the rewards of a limited sovereignty over their States under the Protection and suzerainty of the Paramount power. It was in this way that their right, privileges and prerogatives were preserved.

Thus the pioneers of the British imperialism subjugated India, aided by the Indian Princes. This was hardly diplomacy. it amounted to fraud and deceit: Mutual agreements arrived at for such ignoble purposes were invested with the sanctity of treaties. And it is from such “treaties that the Princes claimed their right to rule. Our own state provides a classic example of this. One glance at a page of our history will lay bare the truth.

The State of Jammu and Kashmir came to be transferred to Maharaja, Gulab Singh in 1846, after the Sikh Empire began to disintegrate. His failure to render competent assistance to the Sikh armies was duly noticed by the British as also his

- willingness to acknowledge their authority. This paved the way for the total occupation of Northern India by the British who were not slow in recognizing Maharaja Gulab Singh's services to them- in reward they sold him the territory of Jammu and Kashmir for 75 lakhs of rupees, and in the Treaty of Amritsar, the British Government made over the entire country independent possession of Maharaja Gulab Singh and the heirs male of his body. In this way, the entire population of Jammu and Kashmir state came under his absolute authority. The peculiar indignity of the transaction naturally offended the national self-respect of our people who resisted the occupation of their country. But the direct intervention of the British troops helped the Maharaja to take possession of the territory.

This event in the history of the State had catastrophic consequences for the people. The old feudal order, which was bad enough, gave way to more exacting rule, in which the Maharaja assumed all proprietary rights over land. The entire state was plunged into a chaotic economic condition, aggravated by a heavy state of taxation, tributes and levies which were required to make up for the money given by the Maharaja to the British. This unrelieved despotism reduced the bulk of the people to the level of serfs. There was general impoverishment in 1948, some 4000 artisans started on a trek to Lahore, with the object of permanently settling there. Even the British counseled the Maharaja to loosen his grip so as to avoid a total collapse of his administration. Perhaps the forefathers of the great poet philosopher son of Kashmir, Iqbal, were also part of the same trail of migrants who left the State at this time. When his agony over the fate of the people of his home-

land bruit out in immortal verse, his feelings are echoed in the heart of every Kashmiri.

“O Wind, if you pass through Geneva, give this message to the comity of the people of the world. They sold the peasant, his field, his property and the roof over his head, in fact, they sold the entire nation and for what a paltry price”

Invested with this absolute authority acquired in 1846, the present ruling dynasty was in power for one hundred years. This sad and stern century of servitude has stultified the growth of our people, leaving them in the backwaters of civilization. While in British India, and even in some of the Indian States, many a measure of reform was introduced to alleviate the misery of the people, in this state the unenlightened absolutism of the Rulers drove them deeper and deeper into poverty and degradation. The conditions became increasingly intolerable they made determined efforts to wrest power from the hands of the Ruler.

By 1947, India had achieved independence and reached one of her historical watersheds. It was clear that with the withdrawal of the Paramount Power, the treaty rights of the Indian Princes would cease Sovereignty in that case should revert to the people: they wished, therefore, to be consulted about the arrangements to be made with regard to the transfer of power. But a strange situation arose, The cabinet Mission, while admitting the claims of the Indian National Congress and the Muslim League in British India, completely refused a similar representation of the States people, who would not allow the

right of the princes to speak on their behalf.

In our own state, the National Conference had made it clear as early as February 10, 1946 that it was against any further continuance of the treaty rights of the princes which had been made in times and under circumstances which do not obtain now and which have been framed without seeking in consent of the state peoples. Under such circumstances no treaties or engagements which act as dividing wall between their progress and that of their brethren in British India, can be binding on the people”

It was in this connection that I invited the attention of the Cabinet Mission to the standing inquiry of the Treaty of Amritsar and sought its termination. I wrote to the Cabinet Delegation that:

“As the mission is at the moment reviewing the relationship of the princes with the Paramount Power with reference to treaty rights, we wish to submit that for us in Kashmir re-examination of this relationship is a vital matter because a hundred years ago in 1846, the land and people of Kashmir were sold away by the British for 50 lakhs of British Indian Rupees. the people of Kashmir are determined to mould their destiny and we appeal to the Mission to recognise the justice and strength of our cause”

In the Memorandum submitted to the Cabinet Mission later by the National Conference the demand for independence from autocracy was reiterated: Today the National demand of

the people of Kashmir is not merely the establishment of responsible Government, but their right to absolute freedom from autocratic rule. This immensity of the wrong done to our people by the sale deed of 1846 can only be judged by looking into the actual living conditions of the people. It is the depth of our torment that has given strength to our protest”

The indifferent attitude of the Cabinet Mission to the claims of the State people convinced us that freedom would not be given to a hundred million people, who were to be left to groan under the heel of autocratic rulers. Consequently, the National Conference gave a call to the people to prepare themselves for fresh ordeals and new responsibilities in the final bid for the capture of power from the hands of autocracy. This call came on the eve of the transfer of power in India and was therefore in keeping with the spirit of the times.

The partition of India in 1947 brought many new problems and developments in its wake in Kashmir, the very foundations of the administration began to shake and the Government made frontal efforts to patch up the cracking structure. Its incompetence had become glaring with the tribal raids on the State in October, 1947, it was obvious that the Maharaja's authority had ceased to function and the real power lay in the hands of the peoples organization, the National Conference. Even at this hour of grave national danger, the Ruler failed to see the wisdom of taking this organization into his confidence and he preferred escape to the dignity of a formal surrender. When the situation became critical, the unprecedented pressure of the people, forced him to call upon the representatives

of the National Conference to deal with the emergency, when he himself had failed to handle the affairs of the State effectively.

The emergency Administration in the State marked in effect a revolutionary transfer of power from the Ruler to the people.

It was, however, the proclamation of March 5, 1948, which constituted the first step towards the completion of National emancipation. On this day, I, as leader of the largest party of the State, was entrusted with its Government being assisted by a cabinet with full powers to run the administration. The Maharajas authority was limited to that of a constitutional ruler, making it imperative upon him to consult his Government on an issues relating to the governance of the State.

This was obviously an interim measure. The cabinet of the peoples representatives thus chosen functioned with the support and cooperation of the National Conference, but with the passage of time it became clear that the Maharaja could not reconcile himself to this democratic system of government. He put positive impediments in the way of the Government. These threatened to block much needed reforms in various spheres of administration. It was, therefore, natural that following disagreement between him and the Government on matters of policy, that he should disconnect himself from the administration and leave the state. His young son Yuvaraja Karan Singh thereupon became the Regent and has functioned since as constitutional head of the state.

Today, the Constitution Assembly having met, the time has come for the people's representatives to make fundamental decision about the future position of the present dynasty.

It is clear that this dynasty can no longer exercise authority, on the basis of an old discredited Treaty. During my trial for sedition in the "Quit Kashmir" movement I had clarified the attitude of my party when I said:

"The future constitutional set up in the State of Jammu and Kashmir cannot derive authority from the old source of relationship which was expiring and was bound to end soon. The set up could only rest on the active will of the people of the State, conferring on the Head of the State the title and authority drawn from the true and abiding source of sovereignty, that is the people"

On this occasion, in 1946 I had also indicated the basis on which an individual could be entrusted by the people with the symbolic authority of a Constitutional head.

"The State and its Head represent the constitutional circumference and the centre of this sovereignty respectively, the Head of the State being the symbol of the authority with which the people may invest him for the realisation of their aspirations and the maintenance of their rights"

In consonance with these principles, and in supreme fulfillment of the peoples aspirations, it follows that a constitutional Head of the State will have to be chosen to exercise

the functions which this Assembly may choose to entrust to him:

So far as my party is concerned, we are convinced that the institution of monarchy is incompatible with the spirit and needs of modern times which demand an egalitarian relationship between one citizen and another. The supreme test of a democracy is the measure of equality of opportunity that it affords to its citizens to rise to the highest point of authority and position. In consequence, monarchies are fast disappearing from the world picture, as something in the nature of feudal anachronisms. In India, too where before the partition, six hundred and odd princes exercised rights and privileges of rulership, the process of democratisation has been taken up and at present hardly ten of them exercise the limited authority of Constitutional Head of State.

After the attainment of complete power by the people, it would have been an appropriate gesture of goodwill to recognize Maharaja Hari Singh as the first constitutional head of the state. But I must say with regret that he has completely forfeited the confidence of every section of the people. His incapacity to adjust himself to changed conditions and his antiquated views on vital problems constitute positive disqualification for him to hold the high office of a democratic Head of the State. Moreover, his past actions as a ruler have proved that he is not capable of conducting himself with dignity, responsibility and impartiality. The people still remember in with pain and regret this failure to stand by them in times of crisis, and his incapacity to afford protection to a section

of his people in Jammu.

Saint Thomas Aquinas, as early as the thirteenth century, described the consequences of a king refusing to realise his responsibilities in these wise words:

“A king who is unfaithful to his duty forfeits the claim to obedience. It is not rebellion to depose him for he is himself a rebel whom the nation has a right to put down. But it is better to abridge his power that he may be unable to abuse it. All political authority is derived from the people, and all laws ought to be made by them or their own representation. There is no security for us so long as we depend upon the will of another man”

Because of his background, it would, therefore, be impossible to think of his being associated again with the administration of the State.

I am sure none of us is interested in a personal controversy with the Maharajas family. In the conduct of public affairs, it is necessary that an impartial view of every individuals deeds should be taken. Our judgement should not be wrapped by ill will or personal rancour. During our association with Yuvaraj Karan Singh these last few years, I and way colleagues in the Government have been impressed by his intelligence, his broad outlook and his keen desire to serve the country. These qualities of the Yuvaraj single him out as a fit choice for the honour of being chosen the first Head of the State.

There is no doubt that Yuvaraj Karan Singh in his capacity as a citizen of the State, will prove a fitting symbol of the transition to a democratic system in which the ruler of yesterday becomes the first servant of the people, functioning under their authority and on their behalf.

The next issue before us is that of the compensation which we should or should not grant to those landowners who have been expropriated during the putting into operation of the land to the tiller legislation under which land was given, or given back to the man who actually cultivates it.

It is not possible for you to consider this question dispassionately unless you understand something of the history of land tenure in the State. For us the well being of the peasants who form the vast majority of the population of this country is a top priority; we realize that on a sound organization of agriculture, and the elimination of debt and the evils of landlordism, their ultimate welfare depends. We sincerely believe that our body politic cannot be healthy as long as there exists here an army of men doing little or no work and getting easy remuneration for it, and as long as we perpetuate the dangerous age old class division of our society that landlordism breeds. Our attempt has been to make our land dwellers contented. We set about these fundamental reforms in the following way.

On Martyrs day, the 13th of July, 1950 the Government declared its policy of liquidating the big landed estates and transferring land to the tillers of the soil. On the 17th of Octo-

ber, 1950 was enacted the Big Landed Estates Abolition Act. By this Act, the right of ownership in respect of lands in excess of 22/34 acres of land excluding orchards, grass and fuel reserves was abolished and such land was decreed to be transferred to the actual tillers to the extent of their possession. In this way, the right of the cultivator to the ownership of land in his possession was recognized and enforced and no new class of intermediaries or rent receivers was allowed to come into being. The abolition of landlordism is thus an accomplished fact and there is no going back on the decision already taken. The big landed Estates Abolition Act, however, provides for the Constituent Assembly to settle the question of compensation with respect to the land from which expropriation has taken place, that question is now before you for decision.

The system of individual ownership of land is of modern growth and originally, the land belonged in common to communities of kinsmen or to the State. Before the British rule, the proprietors were by no means the real owners of the soil and of all method for the collection of revenue during that time, the most noteworthy was that of collecting it direct from the cultivators through the Headmen of the villages. There is very little evidence to show that in Mughal and Sikh times, there were many rent paying tenants. The Ain-I-Akbari not only contains no regulations about tenants, but also recognise no intermediary between the cultivator and the State. Nevertheless there were some types of intermediaries in the pre British period and also in later times, and it is the existence of these intermediaries, which led to the development of landlordism in the State. The revenue farmers were one class of

such intermediaries and so were the different privileged classes of assignees, Jagirdars, muafidars and mukarraridars, all enjoying feudal concession, which were created during the Mughal and Sikh times and also during the Dogra Rule.

In the Jammu Province, ownership of land was granted by State Deeds during the Sikh Rule and the earlier period of the Dogra Rule. In the Kashmir Province, the ownership of land was held by the ruler since 1846 when Maharaja Gulab Singh purchased Kashmir from the British. It was in 1933 as a result of the pressure of public opinion that proprietary right in land was conferred on the landholders in the Kashmir province including the Frontier Districts, but this concession to mass demand for transfer of proprietorship of land to the actual cultivators was reduced to a fiction inasmuch as large tracts of land, granted by earlier Rulers to influential persons, Rajas and Dewiness by state Deeds were construed and acted upon as grants of the right of proprietorship in land in this manner were created big proprietors who did not cultivate their land themselves, but had tenants who paid them rent in cash and kind. The small peasant proprietor who cultivated land with his own hands also existed, but there were cases where the cultivators who had originally acquired Holders, right and were recorded as such were relegated to the position of tenants by the right of land holding being granted by the Ruler to some of his favorites who did not cultivate the land themselves and where pure and simple rent receivers.

While the land settlement in the State was rightly made with the peasant proprietors, the settlement with the peasant proprietors, the settlement with the intermediary proprietors

was not made on their recognition as proprietors of the soil, but because of certain political and financial reasons. It was well understood, even by the successive settlement officers and Settlement Commissioner in the State that though the intermediary proprietors were to be declared the proprietors of the soil, their tenants really were no ordinary tenants, but were in most cases, the original and hereditary possessors of the soil. The First Regular Settlement conducted in the state had perhaps nothing to do with the determination of the historical and accurate theory of the intermediary proprietors position, nor was its function to confer on the proprietors a position comparable to what they originally were. It appears that the task of the settlement authority was only to legalize all the original acts of illegality and usurpation by which intermediary revenue framers or rent receivers had assumed great power and influence in the period of disorder, before a proper Revenue Administration came to the country.

At the first Regular Settlement the area of land not under cultivation was very large. In 1891 AD when the later Sir Walter Lawrence was in the State, every inducement was given to the cultivators to till the land and in this way large tracts of State land were brought under cultivation. But even such lands as had been reclaimed and brought under the plough by the cultivators were gifted away in proprietary right to influential person. There were grants of land known as Chaks made under orders No. 5 and 6, otherwise known as the Pratap Code. All these grants were subject to substantial concession in land revenue. There were grants in different kind, as for instance, State Official's Grants in perpetuity, Hindu, Grants and oth-

ers. The vast majority of these concessionist landholders obtained their grants by virtue of the high positions they had acquired. The grants under the Pratap Code were entirely made to the clan and kinsmen of the Royal House in whose favour were also released some State Forest Reserves and cultivable areas in some Game Reserves. With the demarcation of forests in the State, several areas were excluded from the forests and let out for cultivation and for purposes of agriculture, State lands were similarly permitted to be used as Grazing Ground. The reclaimed land out of the Wular Lake and in and around the Dal Lake, which was owned by the State, was also released for cultivation. And then under Raj Tilak Room No. 4 about 26 years ago, State waste lands were granted as Village Commons equivalent to the aggregate cultivated land of each village, with the same rights as the landholders enjoyed in respect of their existing holdings. Even after the First Regular Settlement, many estates were sold to speculators or given over to those who were prepared to meet the land revenue demand in cases where default was made by actual cultivators, and the right to own land was recognized as that of the revenue payer as against the actual cultivator who defaulted. The non-cultivating land owners leased out their interests and the middlemen leased it out in turn, creating a long chain of rent receivers and rent payers, who intervened between the state and the actual cultivators.

It will thus be seen that a substantial portion of the landed property came to be owned from such land as was the property of the state before and in every case the acquisition of land was free from any encumbrance or payment of any

consideration. It is in the light of this historical background, therefore that the Hon'ble Member of this House shall have to consider whether there is any justification for payment of any compensation to such land owners for lands from which they are expropriated under the Big landed Estates Abolition Act.

Finally, we come to the issue, which has made Kashmir an object of world interest, and has brought her before the forum of the United Nations. This simple issue has become so involved that people have begun to ask themselves, after three and a half years of tense expectancy. "Is there any solution?" Our answer is in the affirmative. Everything hinges round the genuineness of the will to find a solution. If we face the issue straight, the solution is simple.

The problem may be posed in this way. Firstly, was Pakistan's action invading Kashmir in 1947 morally and legally correct, judged by any norm of international behaviour? Sir Owen Dixon's verdict on this issue is perfectly plain. In unambiguous terms he declared Pakistan an aggressor. Secondly, was the Maharaja's accession to India legally valid or not? The legality of the accession has not been seriously questioned by an irresponsible or independent person or authority.

These two answers are obviously correct. Then where is the justification of treating India and Pakistan at par in matter pertaining to Kashmir? In fact, the force of logic dictates the conclusion that the aggressor should withdraw his armed forces, and the United Nations should see that Pakistan gets

out of the State.

In that event, India herself, anxious to give the people of the state a chance to express their will freely would willingly cooperate with any sound plan of demilitarization. They would withdraw their forces, only garrisoning enough posts to ensure against any repetition of that earlier treacherous attack from Pakistan.

These two steps would have gone a long way to bring about a new atmosphere in the State. The rehabilitation of displaced people, and the restoration of stable civic conditions, would have allowed people to express their will and take the ultimate decision.

We as a Government are keen to let our people decide the future of our land in accordance with their own wishes. If these three preliminary processes were accomplished we should be happy to have the assistance of international observers to ensure fair play and the requisite conditions for a free choice by the people.

Instead invader and defender have been put on the same plain. Under various grabs, attempts have been made to side track the main issues. Sometimes, against all our ideals of life and way of living attempts to divide our territories have been made in the form of separation of our State religion-wise with ultimate plans of further disrupting its territorial integrity once an offer was made to police our country with Common wealth forces, which threatens to bring in impartial control by the

back door. Besides, the repugnance which our people have however, to the idea of inviting foreign troops on their soil, the very presence of Common wealth troops could have reacted suspicion among our neighbours that we were allowing ourselves to be used as a base of possible future aggression against them. This could easily have made us in a second Korea.

We have watched all this patiently but we cannot be indifferent to the growing sufferings of our people. We cannot any longer tolerate being banded about and left with an indefinite future. Not only has our patience been tried to its limits but our self-respect has been challenged by allegation that we are the stooges of India. And nobody in our own land that our influence rests on Indian bayonets that we are running a police state and various other taunts and fantastic allegations.

We, therefore, thought it best to call upon our own people to declare what future they seek. At last we, in October, 1950 decided to convoke a Constituent Assembly, which would pronounce upon the future affiliations of our state. We were, and are, convinced that whatever some groups or individuals in the world outside might have to say about this decision of ours, there are in every country many people who have faith in justice and straightforward dealing.

I have no doubt that our considered views will be understood and supported by freedom - loving, peace-loving and democratic minded people all over the world. I am sure too that Almighty God who guards all just causes will bestow his blessings upon us and guide our footsteps towards correct and

honest ends.

The problem, then of accession has to be considered against the background of history in particular, of the immediate past consequent on the British quitting India, disappearance of the paramount power. The end of the war brought to ahead the question of Indian freedom. Let me recapitulate The Cabinet Mission was sent to India to hammer out plans for the transfer of power. This mission had a series of consultations with parties and leaders of opinion in British India, but refused to agree to the people of the Indian States being represented by their popular leaders and instead backed up their old allies, the Indian princes I and my colleagues had at that time raised our voice against this attitude in the following words of our Memorandum:

“The fate of the Kashmiri nation is in the balance and in this hour of decision we demand our basic democratic right to send our selected representatives to the constitution making bodies that will construct the framework of Free India. We emphatically repudiate the right of the Princely Order to represent the people of the Indian States of their right to nominate their personnel representatives as our spokesmen.”

I have no doubt in my mind that if popular representatives from the Indian States had been included in the discussions they would have certainly helped in having many controversial issues resolved fairly and smoothly. But that was not to be. To our misfortune, and to the misfortune of millions of people in India and Pakistan, the Cabinet Mission as well as

the Indian political parties seemed to have been swayed by various conflicting considerations, with the result that the Indian sub-continent which had acquired an organic unity through ages of social, cultural and economic intercourse, was suddenly vivisected in to the two Dominions of India and Pakistan, I need not relate here the horrors that followed this unnatural, operation. Millions of hearts in both countries still ache with wounds that will not heal.

The agony of this change over became all the more intense as a result of the position in which the Indian States were left under the Indian independence Act of the British parliament the paramountcy of the British Crown, against which the princes had been leaning, lapsed, and it was made clear that it would not be transferred to either of the succeeding Dominions. There were three alternative courses open to them. They could accede to either of the two Dominions or remain independent. This gave the princes, themselves the option to decide the fate of their States.

Following the announcement of the 'Mountbatten plan' on Jun 3, some of the Indian States acceded to Pakistan and some to India by means of Instruments of Accession executed through their princes. There were also some who entered in to stand still Agreements with either or both pending finalization of their decisions.

The betrayal of the interests of the State people had been expected following the rejection of the Memorandum of the National Conference, and so we in Kashmir decided to

place the issue before the people themselves.

This is how our well-known "Quit Kashmir" agitation began. The National Conference once again led the people through a great struggle, and once again the Ruler tried to curb it, this time with unprecedented severity. But when a whole people is on the move, it is not possible to repress them and they do not stop until they wrest freedom and justice for themselves from the unwilling hands of those above them.

The crucial date of Indian and Pakistani independence therefore, came when I and my colleagues were still behind prison bars. The whole sub-continent was in a state of high tension and disturbance. If at that time, the head of the State of Jammu and Kashmir had even the slightest sense of realism or a proper awareness of the danger lurking in the situation, he would have immediately taken the people into his confidence. By associating their representatives with administration, I am sure many of the complications that arose later, could have been avoided.

Instead of that, the Maharaja's Government entered in Stand Still Agreement with Pakistan, and this was accepted without question by that Dominion. A similar arrangement was suggested to India, also but it is noteworthy that the Government of India insisted that it could not consider any agreement entered into by the Government of the State valid until it had the approval of the people's representatives.

While the leaders constantly refused to recognise vital issue of accession without first securing the approval of his

people, the Muslim League and the Pakistan Government supported the claims of the Rulers to speak for their States. The late Mr. Jinnah took the position that after the lapse of Paramountcy, the Princes were completely independent and that they could themselves determine what relations they should have with the two Dominions. Throughout the struggles that the people of Kashmir waged against autocracy we should never forget that the Muslim League leadership had completely dissociated itself from them and that, during the upsurge of 1946 their local party organs had assisted the administration to suppress the movement.

At this crucial time, then, Pakistan was under strict cover of secrecy perfecting her own plans, and the Dawn, the Muslim League official organ in Karachi, was appealing to the Maharaja to accede to Pakistan on the grounds that he would have far greater freedom there than in India.

It was at this stage taking advantage of the isolation of the Kashmiris from the rest of the world, that Pakistan imposed an economic blockade upon us with a view to starving us into submission. Attempts were made even to excite communal hatred to disrupt our peaceful civic life. Even in the face of such provocation, the National Conference, I am proud to say, took an objective and democratic stand. Immediately on my release from imprisonment, I clarified the issue at a mass meeting in Srinagar. The first and fundamental issue before us was the establishment of a popular Government. Our objective might be summarised as "Freedom First." Then alone could we as a free people decide our future associations through

accession. I also made it clear that the National Conference would consider this issue without prejudice to its political friends and opponents, and strictly in accordance with the best interests of the country as a whole. I said that in the state of tension and conflict that obtained both in India and Pakistan, it was difficult for the people here and now to predict what the final shape of both would be.

You will realize, therefore, that we could not be accused of being partial to one side or the other. During that period we openly discussed the matter with representatives of the Muslim League who had come to Srinagar for this purpose. We even sent one of our representatives to Lahore to acquaint the authorities in Pakistan, with our point of view. We were thus still struggling against autocracy and for freedom when the state was suddenly invaded from the side of Pakistan.

The overwhelming pressure of this invasion brought about a total collapse of the armed forces of the State as well as its administrative machinery, leaving the completely defenseless people at the mercy of invaders. It was not an ordinary type of invasion, inasmuch as no canons of warfare were observed. The bribement tribesmen who attacked the state in thousands, killed, burned, looted and destroyed whatever came their way and in this savagery no section of the people could escape. Even the nuns and nurses of a Catholic Mission were either killed, or brutally maltreated. As these raiders advanced towards Srinagar, the last vestige of authority, which lay in the person of the Maharaja, suddenly disappeared from the Capital. This created a strangle vacuum, and would have certainly

led the occupation of the whole state by Pakistani troops and tribesmen, if, at this supreme hour of crisis, the entire people of Kashmir had not risen like a solid barrier against the aggressor. They halted his onrush, but could not stop him entirely as the defenders, had not enough experience, training and equipment to fight back effectively. There is no doubt that some of them rose to great heights of heroism during these fateful days. Who can help being moved by the saga of crucified Sherwani, Abdul Aziz, Brigadier Rajendra Singh, Prempal Sardar Rangil Singh early Militia boys like Pushakar Nath Zadoo, Somnath Bira, Ismail among scores of other named and unnamed heroes of all communities. But we though rich in human material lacked war equipment and trained soldiers.

When the raiders were fast approaching Srinagar, we could think of only one way to save the State from total annihilation by asking for help from a friendly neighbour. The representative of the National Conference, therefore, flew to Delhi to seek help from the Government of the India. But the absence of any constitutionalities between our State and India made it impossible for her to render us any effective assistance in meeting the aggressor. As I said earlier, India had refused to sign a stand still agreement with the State for the ground that she could accept such an agreement until it had the approval of the people. But now, since the people's representatives themselves sought an alliance, the Government of India showed readiness to accept it. Legally the instrument of Accession had to be signed by the Ruler of the State. This the Maharaja did. While accepting that accession, the Government of India said that she wished that "as soon as law and order

have been restored in Kashmir and her soil cleared of the invader, the question of the States accession should be settled by reference to the people”.

Actuated by a sincere desire to avoid bloodshed and further conflict, the Government of India approached the Security Council in 1948 with a plan against Pakistan. The request was simple. The contention of India was that Pakistan was responsible for the invasion of Kashmir and was continuing to help the raiders who had been employed as mercenaries for this purpose. And it was further said that legally bound as India was to clear the Jammu and Kashmir State of raiders. She might be constrained to pursue the invaders to their bases in Pakistan, which might lead to a still bigger conflagration. India, therefore, wanted the Security Council to dispose of the case as quickly as possible in the interest of peace. If this had been done, condition would have ip-so-facto come into being when the people of Jammu and Kashmir would have expressed their will with regard to the continuance of the accession to the Dominion they had joined. This was not to be.

This is the essential background, which we must fully take into account. Now I shall indicate some of the considerations which should be kept in view when you the Hon'ble Members of this august Assembly, shoulder the grave responsibility of giving your considered opinion on this issue of accession which effects not only the present generation of our people but generations yet to come.

The Cabinet Mission Plan has provided for three

courses which may be followed by the Indian states when determining their future affiliations. A state can either accede to India or accede to Pakistan but, failing to do either, it still can claim the right to remain independent. These three alternatives are naturally open to our state, while the intention of British Government was to secure the privileges of the Princes: the representatives of the people must have the primary consideration of promoting the greatest good of the common people. Whatever steps they take must contribute to the growth of a democratic social order wherein all invidious distinctions between group and creeds are absent. Judged by this supreme consideration, what are the advantages and disadvantages of our states accession to either India or Pakistan, or of having an independent status?

As a realist, I am conscious that nothing is all black or all white, and there are many facts to each of the proposition before us. I shall first speak on the merits and demerits of the State's accession to India. In the final analysis, as I understand it, it is the kinship of ideals, which determines the strength of ties between two States. The Indian National Congress has consistently supported the cause of the State's Peoples' freedom. The autocratic rule of the Princes has been done away with the representative Governments have been entrusted with the administration. Steps towards democratization have been taken and these have raised the people's standard of living, brought about much needed social reconstruction, and, above all built up their very independence of spirit. Naturally, if we accede to India there is no danger of a revival of feudalism and autocracy. Moreover, during last four years, the Government

of India has never tried to interfere in our internal autonomy. This experience has strengthened our confidence in them as a democratic State.

The real character of a State is revealed in its Constitution. The Indian Constitution has set before the country the goal of secular democracy based upon justice freedom and equality for all without distinction. This is the bedrock of modern of democracy. This should meet the argument that the Muslims of Kashmir cannot have security in India, where the large majority of the populations are Hindus. Any unnatural cleavage between religious groups is the legacy of Imperialism, and no Modern State can afford to encourage artificial divisions if it is to achieve progress and prosperity. The Indian Constitution has amply and finally repudiated the concept of a religious State, which is a throwback to medievalism, by guaranteeing the equality of rights of all citizens irrespective of their religion, color, caste and class.

The national movement in our State, naturally, gravitates towards these principles of secular democracy. The people here will ever accept a principle, which seeks to favour the interests of one religion or social group against another. This affinity in political principles, as well as in past association, and our common path of suffering in the cause freedom, must be weighed properly while deciding the future of the State.

We are also intimately concerned with the economic well being of the people of this State. As I said before while referring to constitution-building, political ideals ate often

meaningless unless linked with economic plans. As a State, we are concerned mainly with agriculture and trade. As you know, and as I have detailed before, we have been able to put through our "land to the tiller" legislation and make of it a practical success. Land and all it means is an inestimable blessing to our peasants who have dragged along in servitude to the landlord and his allies for centuries without number. We have been able under present conditions to carry these reforms through; are we sure that in alliance with landlord ridden Pakistan, with so many feudal privileges intact, that these economic reforms of ours will be tolerated? We have already heard that news of our Land Reforms has traveled to the peasants of the enemy-occupied area of our State who vainly desire a like status, and like benefits. In the second place, our economic welfare is bound up with our arts and crafts. The traditional markets for these precious goods, for which we are justly known all over the world, have been centered in India. The volume of our trade, in spite of the dislocation of the last few years, shows this, Industry is also highly important to us. Potentially we are rich in minerals, and in the raw materials of industry; we need help to develop our resources India, being more highly industrialized than Pakistan, can give us equipment, technical services and materials. She can help us too in marketing. Many goods also which it would not be particle for us to produce here for instance, sugar, cotton, cloth and otherwise essential commodities, can be got by us in large quantities from India. It is around the efficient supply of such basic necessities that the standard of living of the man-in-street depends.

I shall refer now to the alleged disadvantages of acces-

I shall refer now to the alleged disadvantages of accession to India.

To begin with, although the land frontiers of India and Kashmir are contiguous, an all-weather road-link as dependable as the one we have with Pakistan does not exist. This must necessarily hamper trade and commerce to some extent, particularly during the snowy winter months. But we have studied this question, and with improvements in modern engineering, if the State wishes to remain with India the establishment of an all weather stable system of communication is both feasible and easy. Similarly, the use of the State rivers as a means of timber transport is impossible if we turn to India, except in Jammu where the river Chenab still carries logs to the plains. In reply to this argument, it may be pointed out that accession to India will open up possibilities of utilizing our forest wealth for industrial purposes and that, instead of lumber, finished goods which will provide work for our carpenters and labourers, can be exported to India where there is a ready market for them. Indeed in the presence of our fleets of timber-carrying trucks, river transport is a crude system which inflicts a loss of some 20% to 35% in transit.

Still another factor has to be taken into consideration. Certain tendencies have been asserting themselves in India, which may in the future convert it into a religious State wherein the interests of Muslims will be jeopardized. This would happen if a communal organization had a dominant hand in the Government, and Congress ideals of the equality of all communities were made to give way to religious intolerance. This

continued accession of Kashmir to India should, however, help in defeating this tendency. From my experience of the last four years, it is my considered judgement that the presence of Kashmir in the Union of India has been the major factor in stabilizing relations between the Hindus and Muslims of India. Gandhiji was not wrong when he uttered words before his death which para-phase; "I lift up mine eyes onto the hills, from whence cometh my help."

As I have said before, we must consider the question of accession with an open mind, and not let our personal prejudices stand in the way of balanced judgement. I will now invite you to evaluate the alternative of accession to Pakistan.

The most powerful argument, which can be advanced in her favour, is that Pakistan is a Muslim State, and a big majority of our people being Muslim the State must acceded to Pakistan. This claim of being a Muslim State is of course only a camouflage. It is a screen to dupe the common man, so that he may not see clearly that Pakistan is a feudal State in which a clique is trying by these methods to maintain itself in power. In addition to this, the appeal to religion constitutes a sentimental and a wrong approach to the question. Sentiment has its own place in life, but often it leads to irrational action. Some argue, as supposedly natural corollary to this that our acceding to Pakistan our annihilation or survival depends. Facts have disproved this. Right thinking men would point out that Pakistan is not an organic unity of all the Muslims in this sub-continent. It has on the contrary, caused the dispersion of the Indian Muslims for whose benefit it was claimed to have been

created. There are two Pakistans at least a thousand miles apart from each other. The total population of Western Pakistan which is contiguous to our state, is hardly 25 million, while the total number of Muslims resident in India is as many as 40 million. As one Muslim is as good as another, the Kashmiri Muslim if they are worried by such considerations should choose the forty millions living in India.

Looking at the matter too from a more modern political angle, religious affinities alone do not and should not normally determine the political alliances of State. We do not find a Christian bloc, a Buddhist bloc, or even a Muslim bloc, about which there is so much talk now a days in Pakistan. These day's economic interests and a community of political ideals more appropriately influence the policies of States.

We have another important factor to consider, if the State decide to make this the predominant consideration. What will be the fate of the one million non-Muslims now in our State? As things stand at present, there is no place for them in Pakistan. Any solution which will result in the displacement or the total subjugation of such a large number of people will not be just or fair, and it is the responsibility of this House to ensure that the decision that it takes an accession does not militate against the interests of any religious group.

As regards the economic advantages. I have mentioned before the road and river links with Pakistan. In the last analysis, we must however remember that we are not concerned only with the movement of people but also with the movement

of goods and the linking up of markets. In Paksitan there is a chronic dearth of markets for our products. Neither, for that matter, can she help us with our industrialization, being herself industrially backward.

On the debit side, we have to take into account the reactionary character of her politics and State politics. In Pakistan, we should remember that the lot of the State subjects has not changed and they are still helpless and under the heel of their Rulers, who wield the same unbridled power under which we used to suffer here. This clearly runs counter to our own aspirations for freedom.

Another big obstacle to dispassionate evaluation of her policies is the lack of a constitution in Pakistan. As it stands at present, this state enjoys the unique position of being governed by a Constitution enacted by an outside Parliament which gives no idea whatsoever of the future shape of civic and social relations. It is reasonable to argue that Pakistan cannot have the confidence of a freedom loving and democratic people when it has failed to guarantee even fundamental rights of its citizens. The right of self-determination for nationalities is being consistently denied and those who fought against Imperialism for this just right are being suppressed with force. We should remember Badshah Khan and his comrades, who laid down their all for freedom, also Khan Abdus Samad Khan and other fighters in Baluchistan. Our national movement in the State considers this right of self-determination inalienable, and no advantage however great, will persuade our people to forego it.

The third course open to us has still to be discussed. We have to consider the alternative of making ourselves an Eastern Switzerland, of keeping aloof from both States, but having friendly relations with them. This might seem attractive in that it would appear to pave the way out of the present deadlock. To us as a tourist country it could also have certain obvious advantages. But in considering independence we must not ignore practical consideration. Firstly, it is not easy to protect sovereignty and independence in all small country, which has not sufficient strength, defend itself on our long and difficult frontiers bordering so many countries. Secondly, we must have the good will of all our neighbors. Can we find powerful guarantors among them to pull together always in assuring us freedom from aggression? I would like to remind you that from August 15 to October 22, 1947, our State was independent and the result was that our weakness was exploited by the neighbour with whom we had a valid standstill Agreement. The State was invaded. What is the guarantee that in future to we may not be victims of a similar aggression?

I have now put the pros and cons of the three alternatives before you. It should not be difficult for men of discrimination and patriotism gathered in this Assembly to weigh all these in the scales of our national good and pronounce where the true well being of the country lies in the future.

Mr. President, it will be fitting here if I on this solemn occasion remember the last words of one of our martyrs which still ring in my ears. In 1931, the State Police had fired on our demonstrators, and many lay wounded and dying in the grounds

of the Jammu Mosque. One man, supported by his old mother and young wife, was nearing his last breath, and he comforted them in their misery, forgetting his own. Then he called for me. When I came to him he looked me straight in the eyes and said, "We have done our day. Now it is for you and the nation to carry it through to a successful end" Perhaps the spirit of that hero is in this Hall today to see one fulfillment of his dreams of this land of Kashmir. Today is a day of fulfillment for all- a day when we finally, and triumphantly assert our right to decide our own future, free from threats of force and outside dictation.

On this historic day, we remember the Prime Minister of India, our cherished friend and never failing comrade on this difficult journey and, besides, an illustrious son of Kashmir, the many friends in India and some even in Pakistan, who in the years before partition, helped us forward. We remember the Ahrars who went to jail in their thousands for us; Badshah Khan and our friends of the frontier, now in jails and fighting for their own freedom. Nor can we ever forget our kith and kin across the cease-fire line, who are at present living under the heel of the enemy. Their welfare is always dear to us and we shall continue to regard them as an integral part of ourselves.

For twenty years, Mr. President, we have journeyed to this day and our criterion in all we do must be the welfare of our people. This consideration alone must be the welfare of our people. This consideration alone must guide our decision.

Now again, I have put my deepest thoughts before you and may God, in His mercy, lead us all forward on the right path.

Annexure VI

Constitutional Relationship between the Jammu and Kashmir State and the Indian Union.

¹Speech made by Jenab Sheikh Mohammad Abdullah, the Prime Minister of the state, in Jammu and Kashmir Constituent Assembly on 11th August, 1952

Sir, I crave permission to make a statement before the House in regard to constitutional relationship between the Jammu and Kashmir State and the Indian Union. As the Hon'ble Members are aware, during the last Session of the Constituent Assembly, the Basic Principles Committee had submitted a report making certain specific recommendations about the future. Head of the State. The Drafting Committee will, no doubt, submit its report to the House during this Session.

Since the changes proposed by this Assembly involved corresponding adjustments in the Indian Constitution, the Government of India desired that it should have time to discuss with our representatives the proposals pending in this Assembly. Accordingly, a Delegation headed by Hon'ble M.A. Beg was sent by us to Delhi. The Government of India also availed of this opportunity to discuss with our representatives other matters pertaining to the constitutional relationship, it became necessary for me and some of my other colleagues in the Government to participate in the talks. I am now in a posi-

1. Jammu and Kashmir Constituent Assembly (debates) Part 1st Vol. 1951-1955
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tion to inform the House that certain broad principles have been laid down certain and decisions have been tentatively arrived at between the two Governments.

Before I apprise this House of the details of these tentative decision, I wish to review briefly the background of our relationship with India. For sometime past, there has been a good deal of discussions on this important question both here as well as outside. In the heat of public controversy, which this question aroused, the points at issue were sometime obscured.

May I mention here the developments which led to the establishment of our relationship with India in October, 1947? After the Independence Act of 1947 was passed by the British Parliament, the Dominion Status was conferred on India and Pakistan; and the British Parliament having lapsed, the Indian States became Independent. They were however, advised to join either of these two Dominion. It is a tragic commentary on these arrangements proposed by the British Government that the position of these Indian States, comprising one-fourth of the total population of the entire Indian sub-continent, was left absolutely vague and nebulous with the result that the future of the States people came to be subjected to the vagaries of their respective rules. Many of them acceded to either of the two Dominions after a good deal of procrastination while others hesitated and delayed the final decision to the detriment of the interests of the people living in these States.

The Jammu and Kashmir State was one of the States whose ruler had not taken a decision in regard to accession.

While the State was in the condition of uncertainty and indecision and while the national movement was seeking transfer of complete power to the representatives of the people and the then State Government was indulging in repression in certain areas of the State particularly in Poonch, the State was suddenly invaded. Thousands of tribesmen from Pakistan as well as Pakistan nationals, launched a savage attack against the people of this State. The administration then in charge of its affairs proved singularly ineffective to cope with the grave emergency and consequently it collapsed all of a sudden. At that critical movement in the history of the State, the National Conference stepped into avert what looked like total annihilation at the hands of the raiders from Pakistan who were later proved to have been abetted by the Pakistan Government. The National Conference once mobilized all sections of the population in an effort to prevent conditions of chaos and dislocation from spreading to the entire State. This factor was mainly responsible for the splendid moral displayed by the people of Kashmir who were inspired to heroic deeds in their resistance against the invaders.

It was, however, obvious that in face of the overwhelming number of the well armed raiders, unarmed people of Kashmir could not hold out for long. Consequently, it became urgently necessary for us to seek the assistance of the friendly neighbour which alone would enable us to throw back the invaders. In that critical moment, we could turn only to India where the Government and the people had demonstrated their sympathies for the ideals for which we were fighting the raiders.

But legal complications came in the way of India rendering the State any immediate help for its defence against aggression. The Government of India could send their army only if the State would acceded to that Dominion. In accordance with the Indian Independence Act. of 1947, the Instrument of Accession had to be executed by the Ruler of the State in order to make it legally valid. Consequently, with the backing of the most popular organization in the country, the Maharaja signed the Deed of Accession on the 26th of October, 1947, and the State of Jammu and Kashmir became part of the Indian Dominion.

The basis of our relationship with India is the Instrument of Accession which enable our State to enter into a union with India. In accordance with the terms of the Instrument, certain powers were transferred to the Centre. The principle matters specified for this purpose in respect to which the Dominion Legislature could make laws for this State were:

- (a) Defence,
- (b) External Affairs, and
- (c) Communications.

This arrangement involved a division of sovereignty which is the normal feature of a Federation. Beyond the powers transferred by it to the Dominion, the State enjoyed complete residuary Sovereignty.

These terms of the association of our State with the

Dominion of India were maintained; and, subsequently, when the Constituent Assembly of India was charged with the task of framing a constitution, this overriding consideration was kept in determining the position of the State in the proposed Constitution earlier to this, it had been agreed between the two Government that “in view of the special problems arising in respect of this State and the fact that the Government of India have assured its people that they would themselves finally determine their political future”, a special position should be accorded to Jammu and Kashmir in the future Constitution so that a limited field of the Union Powers over the State is ensured. Four representatives were nominated from the Jammu and Kashmir State to the Constituent Assembly of India. These representatives participated in the deliberations of the Constituent Assembly of India at a time when the bulk of the Indian Constitution had already been adopted. It was at this stage that the constitutional position of the State was determined in the Constitution of India. The representatives of the Jammu and Kashmir State reiterated their views that our association with India should be based on the terms of the Instrument of Accession. It was also made clear that while the accession of the Jammu and Kashmir State with India was complete in fact and in law to the extent of the subjects enumerated in this instrument, the autonomy of the State with regard to all other subjects outside the ambit of the Instrument of Accession should be preserved.

Taking into account the special circumstances in which this State was placed, a special constitutional arrangement was evolved and provided in Article 370 of the Constitution which

defines the position of Jammu and Kashmir as follows:-

“Notwithstanding anything in this Constitution.

(a) the provision 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 States shall be limited to;

(i) 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 of the Dominion of India as the matters with respect to which the Dominion legislature may make laws for that State; and

(ii) such other matters in the said lists as, with the concurrence of the Government of the State, the President may by order specify.

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 Minister for the time being in office under the Maharaja's proclamation dated:

the fifth day of March, 1948;

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

(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 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 to in the last preceding proviso, shall be issued except with the concurrence of the Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (I) or in the 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 there on.

(3) Notwithstanding anything in the foregoing provisions of the Article, the President may, by public Notification, declare that this Article shall cause to be operative or shall be operative only with such exceptions and modifica-

tions 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.”

While the State of Jammu and Kashmir is included in the list of States in part B of schedule I of the Constitution, it is apparent from a perusal of this Article that the provisions of Article 238 relating to the Constitution of the State in Part B shall not apply to the State of Jammu and Kashmir. In view of the special position and character of the State and with a view to regulate the relationship of the State with the Union of India, Article 370 was devised.

The other important feature of this constitutional step is that the matters specified in the Instrument of Accession shall apply in relation to the Jammu and Kashmir State in consultation with the Government of Jammu and Kashmir State and all other matters which do not fall within the terms of the Instrument of Accession shall not apply in relation to our State except with the final concurrence of the Jammu and Kashmir Constituent Assembly.

Here I would like to point out that the fact that Article 370 has been mentioned as a temporary provision, the Constitution does not mean that it is capable of being abrogated, modified or replaced unilaterally. In actual effect, the temporary nature of this Article arises merely from the fact that the power to finalize the Constitutional relationship between the State and the Union of India has been specifically vested in the

Jammu and Kashmir Constituent Assembly. It follows that whatever modifications, amendments or exceptions that may become necessary either to Article 370 or any other Article in the Constitution of India in their application to the Jammu and Kashmir State are subject to decisions of this Sovereign Body.

Since a good deal of confuted thinking and uninformed criticism is indulged in by some interested people, I would like to point out here that the Constitution has confined the scope and jurisdiction of the Union Powers to the terms of Instrument of Accession with the proviso that they may be extended to such other matters also as the President may be order specify with the concurrence of the Jammu and Kashmir Constituent Assembly. The special problems facing the State were thus taken into account and under the Constitution the relationship approximated to that subsisting under the Instrument of Accession. The Constitution of the Indian Union, therefore, clearly envisaged the convening of a Constituent Assembly for the Jammu and Kashmir State which would be finally competent to determine the ultimate position of the State in respect of the sphere of its accession which would be incorporated as in the shape of permanent provisions of the Constitution.

This briefly, is the position which the Constitution of India has accorded to our State. I would like to make it clear that any suggestions of altering arbitrarily this basis of our relationship with India would not only constitute a breach of the spirit and letter of the constitution, but it may invite seri-

ous consequences for a harmonious association of our State with India. The formula evolved with the agreement of the two Government remains as valid today as it was when the Constitution was framed and reasons advanced to have this basis changed seem completely devoid of substance.

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.

I would, therefore, plead that the validity of such constitutional arrangement should not be appraised academically but in the proper context of the extraordinary circumstances through which the State has been passing for the last five years or so. Since the State was invaded in 1947, the situation here has been bristling with such compelling urgencies as needed drastic administrative and economic changes. The revolutionary conditions prevailing in our State could be coped with only through extraordinary measures. The Government of the State was, therefore, called upon to take vital decisions which could not wait. Accordingly it enacted laws which were calculated to transform the social and economic fabric of the common people. With the improvement in the internal situation of the country, the necessity for a legislature become obvious. Consequently it was decided to convince a Constituent Assembly for the State elected on the basis of adult franchise. This Assembly accordingly came into being in October, 1951.

The Hon'ble members are aware that as the Leader of the National Conference party, I indicated in my inaugural address the scope of the decisions which I felt the Constituent Assembly would have to take. I listed the four main issues as pertaining to the main functions to the Assembly, viz., the future of the Ruling Dynasty, payment of compensation for the land transferred to cultivators under the Big Landed Estates Act, Ratification of the State's accession to India as well as the framing of a Constitution for the State. While discussing these in my address to this House, I had given clear indications of my party views in regard to them. I had also an occasion to place my point of view on these issues before the representatives of the Government of India and I had the dissatisfaction that they approved of it.

When the Constituent Assembly commenced its labours, it had to tackle these issues in course of time. It took decisions in regard to payment of compensation to landlords and it came to the conclusion that no compensation was justified.

The Constituent Assembly has, at present, under its consideration the future of the Ruling Dynasty. In this connection the Basic Principles Committee recommended that the Institution of hereditary rulership in the State should be abolished and in future the office of the Head of the State should be elective. While accepting the recommendations of the Basic Principles Committee this Assembly charged the Drafting Committee to place before this House appropriate proposals for the implementation of these recommendations.

As I said in the beginning of my statement, such a fundamental decision involved corresponding adjustments in the Indian Constitution and in order to finalize the position in respect to this issue and other matters pertinent to it. I and my colleagues had discussions with the representatives of the Government of India as a result of which we arrived at some tentative agreements, the details of which I wish to place before the House.

The Government of India hold the view that the fact that the Jammu and Kashmir State was the constituent unit of the Union of India led inevitably to certain consequences in regard to some important matters, namely:-

- (a) Residuary powers;
- (b) Citizenship;
- (c) Fundamental Rights;
- (d) Supreme Court of India;
- (e) National Flag;
- (f) The president of India;
- (g) The Headship of the State;
- (h) Financial Integration;
- (i) Emergency Provisions; and
- (j) Conduct of election to Houses of Parliament.

Permit me, Mr. President, now to deal with each one of these items and also the agreement arrived at between the Jammu and Kashmir Government and the Government of India in relation to them.

RESIDUARY POWERS

It was agreed that while under the present Indian Constitution, the Residuary Powers vested in the Centre in respect of all States other than Jammu and Kashmir, in the case of our State, they vested in the State itself. This position is compatible with Article 370 of the Indian Constitution and the Instrument of Accession on which this Article is based. We have always held that the ultimate source of sovereignty resides in the people. It, is therefore, from the people that all powers can flow. Under these circumstances, it is up to the people of Kashmir, through this Assembly, to transfer more powers for mutual advantage to the custody of the Union Centre.

CITIZENSHIP

It was agreed that in accordance with Article 5 of the Indian Constitution persons who have their domicile in the Jammu and Kashmir State, shall be citizens of India. It was further agreed that the State Legislature shall have power to define and regulate the rights and privileges of the permanent residents of the State, more especially in regard to acquisition of immovable property, appointments to services and like matters. Till then the existing State law would apply. It was also agreed that special provisions should be made in the laws governing citizenship to provide for the return of those permanent residents of Jammu and Kashmir State, who went to Pakistan in connection with the disturbances of 1947 or in fear of them as well as of those who have left for Pakistan earlier but could not return. If they returned, they should be

entitled to the rights, and privileges and obligations of citizenship.

There are historic reasons which necessitate such constitutional safeguards as for centuries past, the people of the State have been victims of exploitation at the hands of their well-to-do neighbours. The Hon'ble Members are perhaps aware that in the late twenties, the people of Jammu and Kashmir agitated for the protection of their bonafide right against the superior competing interest of the non-residents of the State. It was in response to this popular demand that the Government of the day promulgated a Notification in 1927 by which a strict definition of the term "State Subject" was provided. I am glad to say that the Government of India appreciated the need for such a safeguard. No definition of the special rights and privileges of the residents of the State can afford to remain static. The need may arise at one stage or the other to liberalize such a definition. The importance of the fact that the State Legislature shall retain powers to be able to effect such modifications becomes obvious in this context.

There is yet another class of State Subjects whose interests had to be safeguarded. The Hon'ble Members of this House are aware that on account of the disturbances of 1947 and also as a consequence of the invasion of this country by Pakistan, large numbers of the residents of this State suffered dislocation. We have therefore, to visualize the possibility of their return to their homes and hearths as soon as normal conditions are restored. It has been suggested in certain quarters that this protection has been provided only for those residents

of the State who are at present stranded in Pakistan. I would like to make it clear, as I have stated earlier, that this protection will operate only when the conditions are normal and such conditions naturally presume that the resettlement of the dislocated population, whether Muslims or Non-Muslim cannot be one sided or unilateral.

FUNDAMENTAL RIGHTS

It is obvious that while our Constitution is being framed, the Fundamental Rights and duties of a citizen have necessary got to be defined. It was agreed, however, that 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 taking into account the economic, social and political character of our movement as enunciated in the New Kashmir Plan. The need for providing suitable modifications amendments and exceptions as the case may be in the Fundamental Rights Chapter of the Indian Constitution in order to harmonize those provisions with the pattern of our principles was admitted. Particular care would have to be taken to preserve the basic character of the decisions taken by this House on the question of land compensation as well as the laws relating to the transfer of land to the tiller and other matters. The main point to be determined is whether the Chapter of our Fundamental Rights should form a part of the Kashmir Constitution on that or that of the Union Constitution.

SUPREME COURT

It was agreed that the Supreme Court should have original jurisdiction in respect of disputes mentioned in Article 131 of the Constitution of India. It was further agreed that the Supreme Court should have jurisdiction in regard to Fundamental Rights which are agreed to by the State.

On behalf of the Government of India, it was recommended that the Advisory Board in the State, designated "His Highness's Board of Judicial Advisors" should be abolished and the jurisdiction exercised by it should be vested in the Supreme Court of India. That is to say that the Supreme Court should be the final Court of Appeal in all civil and criminal matters as laid down in the Constitution of India.

We, however, felt that this would need a detailed examination and consequently it was agreed that we should have time to consider it further.

NATIONAL FLAG

We agreed that in view of the clarifications issued by me in my public statements while interpreting the resolution of this House according to which the old State flag was substituted by a new one, it was obvious that the new State flag was in no sense a rival of the National Flag. But for historical and other reasons connected with the freedom struggle in the State, the need for the continuance of this flag was recognized. The Union Flag to which we continue our allegiance as part of the

Union will occupy the supremely distinctive place in the State.

PRESIDENT OF INDIA

It was agreed that the powers to grant reprieve, commute death sentences, etc. should also belong to the President of the Union.

HEADSHIP OF THE STATE

I am glad to inform this House that the Government of India have appreciated the principle proposed by the Basic Principles Committee as adopted by this Assembly in regard to the abolition of the hereditary rulership of the State. In order to accommodate this principle, the following arrangement was mutually agreed upon:-

- (i) The Head of the State shall be the person recognized by the President of the Union on the recommendation of the Legislature of the State;
 - (ii) He shall hold office during the pleasure of the President;
 - (iii) He may, by writing under his hand addressed to the President, resign his office;
 - (iv) Subject to the foregoing provisions, the Head of the State shall hold office for a term of five years from the date he enters upon his office;
-

FINANCIAL INTEGRATION

In regard to this subject, we agreed that it would be necessary to evolve some sort of financial arrangement between the State and the Indian Union. But as this involved far reaching consequences, it was felt that a detailed and objective examination of this subject would be necessary.

EMERGENCY POWERS

On behalf of the Government of India, it was stated that the application of Article 352 of the Constitution was necessary as it related to vital matters affecting the security of the State. They did not press for the application of Article 356 or 360.

On behalf of the Kashmir Delegation, it was stated that the application of Article 352 to the State was not necessary. In the event of war or external aggression, item 1 in the Seventh Schedule relating to the defence of India applied and the Government of India would have full authority to take any steps in connection with defence, etc. In particular, we were averse to internal disturbance being referred to in this connection as even some petty internal disorder might be considered sufficient for the application of Article 352.

In reply, it was pointed out that Article 352 could only be applied in a state of grave emergency and not because of some small disorder or disturbance.

In order to meet our view point, it was suggested on behalf of the Government of India that Article 352 might be accepted as it is with the addition at the end of the first paragraph (1) of the following words:-

“but in regard to internal disturbance at the request or with concurrence of the Government State”

We generally accepted this position, but wanted some time to consider the implications and consequences as laid down in Article 353, 358 and 359, which on the whole accepted. In regard to Article 354, we wanted to examine it further before expressing our opinion.

CONDUCT OF ELECTIONS TO HOUSES OF PARLIAMENT

Article 324 of the Indian Constitution already applies to the State in so far as it relates to elections to Parliament and to the offices of the President and the Vice-President of India.

I have put before this House the broad indications of the agreement arrived at between us and the Government of India. As the Hon'ble Member will, no doubt, observe, the attitude of the Government of the Government of India has been most helpful. A satisfactory position has emerged and we are now able to assess the basic issues of our constitutional relationship with India in clearer terms. There has been a good

deal of accommodation of our respective points of view. Both the representatives of Government of India and the Kashmir Delegation have been impelled by the desire to strengthen further the existing relationship to remove all obscurity and vagueness. We are convinced, as ever before, that we have the full support both of the Government and the people of India in the fulfillment of our democratic ideals and the realization of our objectives.

This good will and amity, I am sure, will result in the consolidation of freedom and democracy in our country. I may however, emphasize, that the supreme guarantee of our relationship with India is the identity of the democratic and secular aspirations, which have guided the people of India as well as those of Jammu and Kashmir in their struggle for emancipation and before which all constitutional safeguards will take a secondary position.

It is of course, for the Constituent Assembly, which is seized of these matters to determine the extent and scope of the State's accession to India. The Assembly may agree to continue this relationship on the present basis or extend its scope as it might like and consider feasible and proper. In the course of framing the Constitution for the State, the Hon'ble Members of this Assembly, will have an opportunity of discussing these agreements and expressing their views thereon.

I thank you Sir, for affording me this opportunity to place before the Hon'ble Members of the House the result of our recent talks with the representatives of the Government of India

Appendix VII

¹Statement of Pt. Jawahar Lal Nehru, Prime Minister of India in the House of People on July 24, 1952

“..... Now, the position since the Constitution was framed, is thus contained in Article 370 and in the Presidents’s Order following it. Article 370 was obviously of a transitional nature, and it allowed the President to make any additions to it, any variations to it, later on, the subject being that if any change or addition was required, we need not have to go through the cumbrous process of amending our Constitution, but the President was given authority to amend it in the sense of adding a subject, part of a subject, whatever it was to the other subjects in regard to Kashmir. But in Article 370, the old principle was repeated and emphasized that all these changes or any change required the approval of the Constitution Assembly of Jammu and Kashmir State.....”

“.....Now in regard to the talks we have had, the position, obviously the admitted position, is that the Jammu and Kashmir State is a constituent part or unit of the Indian Republic. It is a unit of India and is therefore a part of the territory of India. That is the basic position.

The question of citizenship arose obviously. Full citizenship applies there. But our friends from Kashmir were very apprehensive about one or two matters. For a long time past.

1. As per press release issued by Press Information of Bureau, Government of India dated July 24, 1952

In the Maharaja's time, there had been laws there preventing any outsider, that is, any person from outside Kashmir, from acquiring or holding land in Kashmir, if I may mention it in the old days the Maharaja was very much afraid of a large number of Englishmen coming and settling down there. Because the climate is delectable, and acquiring property. So, although most of their rights were taken away from the Maharaja under the British rule, the Maharaja stuck to this that nobody from outside should acquire land there. And that continues. And in the State Subjects notification by the Maharaja, they have defined four grades of subjects, Class number one, class two, class three and class four. And unless you come in one of these classes, you just cannot acquire land there, or any immovable property. So the present Government of Kashmir is very anxious to preserve that right because, they are afraid, and I think rightly afraid, that Kashmir would be over run by people whose sole qualification might be the possession of too much money and nothing else, who might buy up and get the delectable places. Now they want to vary the old Maharaja's law to liberalize it, but nevertheless to have checks on the acquisition of lands by persons from outside. So far as we are concerned, I agree that under article 19-clause (5) of our Constitution, we think it is Clearly permissible both in regard to the existing law and any subsequent legislation. However, we agreed that this should be cleared up. The old State's subjects definition gave certain privileges regarding the acquisition of land, the services, and other minor things, I think, State scholarships and the rest. So, we agreed and noted down this .

The State legislature shall have power to define and

regulate the rights and privileges of the permanent residents of the State, More especially in regard to the acquisition of immovable property appointments to services and like matters. Till then the existing State law should apply.

Then there was another matter relating to citizenship because owing to these troubles in Kashmir Since 1947 and little before and after there, have been large number of people who have gone out of Kashmir but want to return. So there must be provision made for them to return. In fact in our own Constitution, some provision has been made and I might inform the House that this question was raised early this year or last year about the inclusion of a large number of migrants from East Bengal. We could not include them in our electoral rolls, because they came too late. We are including them now. Those that fulfil the conditions will come in. So those who had gone away from Kashmir to Pakistan or elsewhere and who normally speaking might not be eligible for citizenship should be provided for, if they want to return so we said:

Special provision should be made in the laws governing citizenship who the return of those permanent residents of Jammu and Kashmir State, who went to Pakistan in connection with the disturbances of 1947 or earlier in fear of them, and could not return they should be entitled to the rights and privileges and obligations of citizenship.

Then came the question of fundamental rights. Now there was general agreement that there should be fundamental rights and these fundamental rights should apply to the State.

But again there were great apprehensions in the minds of our friends from Kashmir. First of all, the question was how far these fundamental rights might not come in the way of their land legislation now or any later development of it. Certainly we did not want them to come in the way of their land legislation. We like their land legislation. We thought it was very good. In fact it is quite impossible to upset a thing that has been done, But we said the matter should be cleared.

The Second thing was this. Owing to all business of invasion of Kashmir State, war, cease fire, all kinds of continuing tensions, difficulties due to infiltration, constant attempts are made by infiltration, espionage cases are repeatedly heard. There is sabotage and the rest; but if you go to that State, you find normalcy there, that is to say, the State is functioning adequately normally, but behind that normalcy there is this tension, constant tension of an enemy trying to come in to create trouble, to disturb and all that. And that State Government has to be wary and watchful all the time and so we were told that it was possible that some part of the fundamental rights provisions might very well hamper the activities of the State Government from taking these precautions and these measures. We agreed that it was essential and in the interests of Kashmir Situated as the State is now that the State Government should have that authority. So subject to this, further consideration can be given to it as to how this could be done, on that a fuller consideration of this like matters was required, so so that the fundamental rights might be applied with necessary modifications and exceptions as might be considered with such modi-

Then in regard to the Supreme Court it was agreed that the Supreme Court should have original jurisdiction in respect of disputes mentioned in Article 131 of the constitution of India. It was further agreed that the Supreme Court should have Jurisdiction in regard to fundamental rights, which are applied to that State. On behalf of the Government of India we recommended that the advisory tribunal in the State which is designated as His Highness's Board of Judicial Advisors Should be abolished and the jurisdiction exercised by it should be vested in the Supreme Court of India that is to say that the Supreme Court Should be the final Court of Appeal in all civil and criminal matters as laid down in the Constitution of India. The Kashmir Government delegation had no objection to this. They were prepared to agree but they said they would like to consider the matter in some detail further.

Now I come to the question which has been much discussed and referred to in the newspapers, the question of the head of the State.

I might mention that apart past history when this Constituent Assembly met in Kashmir, the inaugural address to that Assembly Stated quite clearly some of the policies that they were going to pursue, and among these policies was the election, by democratic process, of the head of the State. That has been the declared policy of the National Conference Organization in Kashmir for a long time. We had no objection with regard to the enunciation of that principle then, Now after careful consideration because we have always has consider two matters: firstly give affect to the wishes of the people of

the State and secondly, to give effect to our own Constitution. We have come to an agreed formula. Of course, you will not attach too much importance to the language. A word here or there. For legal and constitutional purposes the words may be changed, but it describes the way we have been thinking and what we have agreed to. Now it was agreed (1) that head of the State shall be the person recognized by the president on the recommendation of the Legislature of the State. How the legislature of the recommended is a matter for the Legislature. Whether it is by the process of election or not it is for them to decide: it may be by the process of a majority or two thirds majority: it is entirely for them to decide. Anyhow they recommend and then it is for the President to recognize (2) He that is Head of the State, shall hold office during the pleasure of the President (3) He, the Head of the State may by writing under his hand addressed to the president. Resign his office. (4) Subject to the foregoing provisions of this article, the head of the State shall hold office for a term of five years from the date he enters upon his office provided that he shall notwithstanding the expiration of his term, continue to hold office until his successor enters upon his office. That is so-for as the Head of the State is concerned.

Then there has been a good deal of misunderstanding in regard to the National Flag. This has been cleared up, I think, adequately by public statements made. Nevertheless, we thought that this should be further cleared up. Sheikh Abdullah, the Prime minister of Jammu and Kashmir State, had stated publicly that the question did not arise so far as they were concerned. Because the National Flag was the supreme flag and it

had exactly the same status and position in the Jammu and Kashmir State as in any other part of India. The State flag was in no sense a rival to the National flag but for historical and sentimental reasons connected with their struggle for freedom in Kashmir, they wanted this state symbol to continue. This was agreed. It was added that this should be made clear in a formal manner, preferably by the constituent Assembly of the State.

Thus in regard to the president of India, it was agreed that the powers to reprieve and commute death sentences etc. Should belong to the president of India.

There has been some talk about financial integration. It was decided that such financial arrangements between the State and the Government of India should be considered further and details worked out. The position as I said, is a dynamic changing one. Matters have to be gone in the some detail; so whatever the financial arrangements might be, we shall gradually work them out.

Then there is the question of emergency power contained in our constitution, more especially in our article 352 of the Constitution, it was agreed to; I will remind the House what article 352 is in case of invasion, external danger or internal disturbances, the President has power to declare a state of emergency and then various consequences flow from it. This parliament is then seized of the position. Now this was agreed to; but the friends from Kashmir were slightly apprehensive of what internal disturbances meant there. For the rest

they have said, of course, if there is a grave emergency, this should happen. So with regard to adding some words to clear up, not to clear up that matter but rather to bring in the fact that in the case of internal disturbances any action taken should be with the concurrence of the Government of the State. It was agreed that article 352 of the Constitution should apply to the State with the addition at the end of the first paragraph of the following words;

“but in regard to internal disturbances, at the request or with the concurrence of the Government of the State”.

That is the State of emergency will be declared with the concurrence of the Government of the State.

These are the principal things that have been discussed and I think that we have arrived at very satisfactory decisions. Agreement which are in consonance with the wishes of the people of Kashmir and in consonance with our Constitution.....”

Annexure VIII

**Dr. Rajendra Prasad's note to Shri Jawahar Lal Nehru
dated September 6, 1952**

Rashtrapati Niwas

Simla

6th September 1952

My dear Prime Minister,

When you last saw me, I promised to send you a note on the legal and Constitutional aspect of the proposal to substitute a system of elected head for the Jammu and Kashmir State in place of the existing Rajpramukh. I now enclose a note for your consideration. In view of the complexity and importance of the issues, involved, I have no doubt that the Attorney General and the Law Minister will be consulted.

I have received a memorial from the Maharaja, a copy of which, I understand, has also been received by you. Presumably, the Minister for States has also received a copy. I shall be glad in due course to have the comments of yourself and the Minister for States on this memorial.

I am leaving Simla on the morning of Sunday 7th September for places in the interior of Himachal Pradesh, but will be back by the evening of Tuesday, the 9th September.

I am sending copies of this letter with enclosure to the

Ministers for Education, Defence and States.

Yours sincerely,

Rajendra Prasad

Shri Jawaharlal Nehru
Prime Minister

Enclosure:

The Prime Minister of Jammu and Kashmir has forwarded a copy of the Constituent Assembly of the Jammu and Kashmir State relating to the substitution of a system of elected head of the state in place of Rajaparmukh as at present with a request to the Government of India to take action to enable effect being to the resolution. Along with the resolution two draft notifications to be issued by the President, one under clause (1) of that Article, have also been received. The former draft involves amendment of a provision of the Constitution of India and the latter contemplates a modification of two other provisions of the Constitution in its application to the State of Jammu and Kashmir. The proposal raises questions of considerable importance concerning the Constitutional scope of the proposed notifications and also about the competence of the President to have repeated recourse to the extraordinary powers conferred on him by the Article in question.

Before I take up this question it is very necessary to know whether any steps are being taken to amend the present Constitution of the State of Jammu and Kashmir. It appears from paragraph 6 of the resolution that there is already in existence the Jammu and Kashmir Constitution Act of 1996, which has been amended by Act No. XVII of 2008. Under this Constitution the Maharaja is presumable the head of the State, and it would obviously be necessary, as a first step, to amend that Constitution if it is decided to give immediate effect to the proposal now under consideration. Not having a copy of the Jammu and Kashmir Constitution Act, I am not in a position to say whether provision exists in that Constitution for its amendment, but inasmuch as it has been amended as recently as the Hindu Year 2008, I believe such provision does exist. I suggest that this question needs looking into.

The first draft notification enclosed with the letter of the Prime Minister of Jammu and Kashmir purports to be issued under clause (3) of Article 370. This clause is of a peculiar and exceptional nature in as much as it authorises amendments of Constitution by an executive act of the Government of India as distinguished from Parliament. The Constitution of India contemplates and lays down, apart from this article, two methods for its amendment. An amendment proper of the Constitution can be effected by the special procedure laid down in Article 368. There are certain other provisions in the Constitution in regard to which it is specially and specifically laid down that Parliament, by ordinary legislation, can effect changes. In both these cases, it is the Parliament alone which can effect amendments. In the first case, even the power of

Parliament to amend the Constitution is limited in as much as it can do so only if the special procedure in Article 368 is followed. In the second group of cases the Parliament is left free to pass legislation which may amount to amendment of the Constitution laid down. Nowhere else, as far as I can see is there any provision authorising the executive Government to make amendments in the Constitution, the temporary provisions contained in the article 391 and 392 having come to an end. There can be no doubt that Article 370, and particularly clause (3) thereof, is of an exceptional nature. While it safeguards in clause (2) the right of the Constituent Assembly of Jammu and Kashmir to revise or annul any action taken by the Government of that State in giving concurrence under clause 1(b)(ii) and the second proviso to clause 1(d) of Article 370, it excludes altogether the Parliament of India from having any say regarding the Constitution of Jammu and Kashmir and places full power in the hands of the government including the power to amend the Constitution of India. It is therefore, necessary to examine the wording of this peculiar clause with some care for a correct appreciation of the comprehensive terms that:

“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 he may specify:

“Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be neces-

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sary before the President issues such a notification.”

Clause (1) of this Article lays down that

- (a) the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;
- (b) that the power of Parliament to make laws for the said State shall be limited to;
 - (i) those matters in the Union list and the concurrent list which, in consultation with the Government of 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 matter with respect to which the Dominion Legislature may make laws for that State; and
 - (ii) such other matters in the said Lists as with the concurrence of the Government of the State the President may by order specify.

Then follows explanation of the term “Government of the State” namely, the person for the time being recognized by the President as the Maharaja of Jammu and Kashmir acting on the advice under the Maharaja’s proclamation dated the fifth day of March 1948.

The Article proceeds further to lay down in paragraph (c) and (d) of clause (1) that the provisions of Article 1 and of

the Article shall apply in relation to that State; and that such of the other provisions of the Constitution shall apply in relation to that state subject to such exceptions and modifications as the President may by order specify: Provided that no such order which relates to the matter specified in the Instrument of Accession of the State referred to in paragraph (1) of sub-clause (b) shall be issued except in consultation with the Government of the State: and provided further that no such order which relates to matters other than those referred to in the last proceeding provision shall be issued with the concurrence of that Government.

The present proposal is to amend the Explanation in clause (1) by substituting for the words "as the maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth of March 1948". The word "as the Sadar-i-Riyasat of Jammu and Kashmir acting on the advice of the Council of Minister for the time being in office".

It is worth noting that, while the proviso to clause (3) of Article 370 lays down that the recommendation of the Constituent Assembly of the State is a condition precedent to the issue of any notification by the President under the substantive provisions of the clause, it does not make it obligatory for the President to issue a notification to give effect to any recommendation that he may receive from the Constituent Assembly. Presumably it is deliberately so worded in order that the recommendation of the Constituent Assembly could be examined on its merits before the President is advised to

issue a notification under that clause. It is also worth noting that the clause envisages two alternatives for the President, namely, either to declare that the whole of Article 370 shall cease to be operative or to declare that the whole of only with exceptions and modifications. In either case the President is further required to specify the date from which the notification is to take effect.

As I have already observed, the scope of this Article, if literally intercepted, is exceedingly wide. Suppose the first alternative is adopted and whole of the Article is declared to be inoperative, what will be the result? One view would be that the Article being in the nature of an exception to the application of the Constitution of the State of Jammu and Kashmir, abrogation of the Article would result in the whole Constitution becoming applicable to the State of Jammu and Kashmir without any exception or modification. But the Article itself has been very peculiarly worded. For paragraph (c) of clause (1) of that Article expressly applies the provision of Article 1 of that Article to the State. In fact, it is because of this application of Article 1 to the State that the State is included within the territories of the Union. The abrogation of Article 370 abrogates along with the application of Article 1 to the State with the result that the State ceases to be part of the territory of India. I do not think that this could have been the intention of the framers of the Constitution for nowhere is the President empowered to exclude any portion of the territories of India from the Union. As a matter of fact, Article 2 contemplates the admission of fresh territories into the Union or the establishment of new States, but nowhere does the Con-

stitution contemplate the exclusion of any territory from the territories of the Union.

Further, under the second alternative envisaged in clause (3), extensive power is conferred on the President to apply the Constitution to the State with such exceptions and modifications as may be specified in the notification and the question at once arises whether such an extensive power is exercisable from time to time or is exhausted by a single exercise thereof, judging by the language employed and by the very exceptional nature of the power conferred. I have little doubt myself that the intention is that the power is to be exercised only once, for then alone would it be possible to determine with precision which particular provisions should be excepted and which modified. The fact that President is also required to specify the date from which the notification is to take effect also tends to confirm this view. Although the phrase "exceptions modification" is used, there can be no doubt that what is involved is really an amendment by executive order of the Constitution in relation to the State of Jammu and Kashmir. Parliament could never have intended that such an extraordinary power of amending the Constitution by executive order was to be enjoyed without any limitation as to the number of times on which it could be exercised or as to the period within which it was exercisable or as to the scope and extent of the modifications and exceptions that could be made. It cannot be seriously maintained that for all time to come the application of our Constitution to Jammu and Kashmir would derive its authority from Article 370, to the complete exclusion of Parliament. The marginal note to Article 370 itself describes the

nature of the Article as “Temporary Provision with respect to the State of Jammu and Kashmir”. The conclusion, therefore, seems to me to be irresistible that clause (3) of Article 370 was not intended to be used from time to time. The correct view appears to be that recourse is to be had to this clause only when the Constituent Assembly of the State has been fully framed.

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Appendix IX

¹ The Constitution (Application to Jammu and Kashmir) Order, 1954 C.O.48

In exercise of the powers conferred by clause (1) of article 370 of the constitution, the President, with the concurrence of the Government of the state of Jammu and Kashmir, is pleased to make the following Order-

1. (1) This Order may be called the Constitution (Application to Jammu and Kashmir) Order 1954.
- (2) It shall come into force on the fourteenth day of May 1954, and shall there upon supersede the Constitution (Application to Jammu and Kashmir) Order, 1950.
2. The provisions of the Constitution which in addition to article 1 and article 370, shall apply in relation to the state of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows:-
 1. The preamble.
 2. Part I: To article 3, there shall be added the following further proviso namely-

1. Published in the Gazette of India, extraordinary, Part II, Section 3 dated 14th May, 1954.

“Provided further that no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of Legislature of that State.”

3. Part II: (a) This part shall be deemed to have been applicable in relation to the State of Jammu and Kashmir as from the 26th day of January, 1950.

(b) To article 7, there shall be added the following further proviso namely:-

“Provided further that nothing in this article shall apply to a permanent resident of the State of Jammu and Kashmir who after having so migrated to the territory now included in the Pakistan, returns to the territory of that State under a permit for resettlement in that State or permanent return issued by or under the authority of any law made by the Legislature of that State, and every such person shall be deemed to be a citizen of India.”

4. Part III:- (a) In article 13, references to the commencement of The Constitution shall be construed as reference to the commencement of this Order.

(b) In clause (4) of article 15, the reference to Schedule Tribes shall be omitted.

(c) In clause (3) of article 16, the references to the State shall be construed as not including a reference to the State of Jammu and Kashmir.

(d) In article 19, for a period of five years from the commencement of this order:-

(i) in clause (3) and (4), after the words “in the interest of” the words “the security of the State or” shall be inserted;

(ii) in clause (5) for the words “or for the protection of the interests of any Scheduled Tribes” the words “or in the interests of the security of the State” shall be substituted; and

(iii) the following new clause shall be added, namely:-

(7) The words “reasonable restrictions” occurring in clause (2), (3), (4) and (5) shall be construed as meaning such restrictions as the appropriate Legislature deems reasonable’

(e) In clauses (4) and (7) of article 22, for the word “Parliament”, the words “the Legislature of the State” shall be substituted.

(f) In article 31, clauses (3), (4) and (6) shall be omitted; and for clause (5) there shall be substituted the following clause, namely:-

“5 Nothing in clause (2) shall effect:-

(a) the provisions of any existing law; or

(b) the provisions of any law which the State may here after 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.”

(g) In article 31-A, the proviso to clause (1), shall be omitted; and for sub-clause (a) of clause (2), the following sub-clause shall be substituted, namely:-

‘(a) “estate” shall mean land which is occupied or has been let for agricultural purposes or for purposes subservient to agriculture, or for pasture, and includes-

(i) sites of buildings and other structures on such land;

(ii) trees standing on such land;

(iii) forest land and wooded waste;

(iv) area covered by or fields floating over water;

(v) sites of jandars and gharats;

(vi) any jagir, inam, muafi or mukarrari or other similar grant; but does not include-

(i) the site of any building in any town, or town area or village abadi or any land appurtenant to any such building or site;

(ii) any land which is occupied as the site of a town or village; or

(iii) any land reserved for building purposes in a municipality or notified area or cantonment or town area or any area which a town planning scheme is sanctioned.”

(h) In article 32, clause (3) shall be omitted; and after clause (2), the following new clause shall be inserted, namely:-

“(2-A) Without prejudice to the powers conferred by clauses (1) and (2), the High Court shall have power through out the territories in relation to which is exercises jurisdiction to issue to any person or authority, including in appropriate cases any Government within those territories, directions or orders or writs, including writs in the nature of habeas corpus, mandamus, prohibition, quo warranto and certiorari, or any of them, for the enforcement of any of the rights conferred by

this part.”

(i) In article 35-

(i) references to the commencement of the Constitution shall be construed as reference to the commencement of this order;

(ii) in clause (a) (i), the words, figures and brackets “clause (3) of article 32” shall be omitted; and

(iii) after clause (b), the following clause shall be added namely:-

“(c) no law with respect to preventive detention made by the Legislature of the State of Jammu and Kashmir, whether before or after the commencement of the Constitution (Application to Jammu and Kashmir) Order , 1954 shall be void on the ground that it is inconsistent with any of the provisions of this part, but any such law shall, to the extent of such inconsistency, cease to have effect on the expiration of five years from the commencement of the said Order except as respects things done or omitted to be done before the expiration there of”.

(j) After article 35, the following new article shall be added namely:-

“35-A.. Saving of laws with respect to permanent residents and their right: Not with standing anything contained in this Constitution, no existing law in force in the State of Jammu

and Kashmir, and no law here after enacted by the Legislature of the State,-

(a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or

(b) conferring on such permanent residents any special right and privileges or imposing 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 scholarships and such other forms of aid as the State Government may provide,

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this Part.”

5. Part V:- (a) In article 54 and 55, references to the elected members of the House of the people and to each such member shall include references to the representatives of the State of Jammu and Kashmir in that House; and the population of the State shall be deemed to be forty-four lakhs and ten thousand.

(b) In the provision to clause (1) of article 73, the words

“or in any law made by Parliament” shall be omitted.

(c) Article 81 shall apply subject to the modifications of that the representatives of the State in the House of the people shall be appointed by the President on the recommendation of the Legislature of the State.

(d) In article 134, clause (2), after the words “Parliament may”, the words “on the request of the Legislature of the State” shall be inserted.

(e) Article 135, 136 and 139 shall be omitted.

(f) In articles 149 and 150, references to the State shall be construed as not including the state of Jammu and Kashmir.

(g) In article 151, clause (2) shall be omitted.

6. Part XI :- In article 246, 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.

(b) Article 248 and 249 shall be omitted.

(c) In article 250, for the words “to any the matters enumerated in the State List”, the words “also to matters not enumerated in the Union List” shall be substituted.

(d) In article 251 for the words and figures, “articles 249 and 250”, shall be substituted and the words “under this constitution” shall be omitted; and for the words “under either of the said article”, the words “under the said article” shall be substituted.

(e) To article 153, the following proviso shall be added, namely:-

“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 a State”,

(f) In article 254, the words, brackets and figure “or to any provision of an existing law with respect to one of the matters enumerated in the Concurrent List, then, subject to the provision of clause (2) and the words “or as the case may be, the existing law”, occurring in clause (1), and the whole of clause (2) shall be omitted.

(g) Article 255 shall be omitted.

(h) Article 256 shall be renumbered as clause (1) of that article, and the following new clause shall be added thereto, namely:-

“(2) the State of Jammu and Kashmir shall so exercise

its power as to facilitate the discharge by the Union of its duties and responsibilities under the Constitution in relation to that State; and in particular, the said State shall, if so required by the Union, acquire or requisition property on behalf and at the expense of the Union, on if the property belong to the State, transfer it to the 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”.

(i) Article 256 shall be omitted.

(j) In clause (2) of Article 261, the words by Parliament” shall be omitted.

(7) Part XII:-(a) Clause (2) of article 267, article 273, Clause 2 of article 283, articles 290 and 291 Shall be omitted.

(b) In articles 266, 282, 284, 298, 299, and 300, references to the State or States shall be construed as not including references to the State of Jammu and Kashmir.

(c) In articles 277 and 295, reference to the commencement of the Constitution Shall be construed as reference to the commencement of this Order.

(8) Part XIII:-(a) In clause (1) of article 303, the words “by virtue of any entry relating to trade and commerce in any of the Lists in seventh Schedule” shall be omitted.

(b) In article 306, reference to the commencement of the constitution shall be construed as references to the commencement of this Order.

(9) Part XIV:- In article 308 , after the words “first Schedule”, the words “other than the Jammu and Kashmir” shall be added.

(10) Part XV :-(a) Article 324 shall apply only in so far as it relates to elections to Parliament and to the offices of President and Vice President.

(b) Article 235, 326, 327, 328 and 329 shall be omitted

11. Part XVI:-(a) In article 330, references to the “Scheduled Tribes” shall be omitted.

(b) Article 331, 332, 333, 336, 337, 339, and 342 shall be omitted.

(c) In article 334 and 335 reference to the State of State shall be construed as not including references to the State of Jammu and Kashmir.

(12) Part XVII:- The Provisions of this Part shall apply only in so far as they relates to-

(i) the official language of the Union;

(ii) the official language for communication be-

tween one State and another, or between a State and the Union; and

(iii) the language of the proceedings in the Supreme Court.

13. Part XVIII:-(a) To article 352, the following new clause shall be added, namely:-

“(4) No Proclamation of Emergency made on ground only of internal disturbance or imminent danger thereof shall have effect in relation to the State of Jammu and Kashmir (except respects article 354) unless it is made at the request or with the concurrence of Government of that State”.

(b) Articles 356, 357 and 360 shall be omitted.

14:- Part XIX:-(a) In article 361, after clause (4) the following shall be added, namely:-

“(5) The provisions of this article shall apply in relation to the Sadar-i-Riyasat of Jammu and Kashmir as they apply in relation to a Rajpramukh, but without prejudice to the provisions of the Constitution of the State”.

(b) Articles 362 and 365 shall be omitted.

(c) In article 366, clause (21) shall be omitted.

(d) To article 367, there shall be added, the following clause, namely:-

(4) For the purposes of this Constitution as it applies in relation to the State of Jammu and Kashmir.

(a) references to this Constitution or to the Provisions thereof shall be construed as references to the Constitution or the provisions thereof as applied in relation to the said State;

(b) references to the Government of the said state Shall be construed as including references to the Sadar-i-Riyasat acting on the advice of his council of Ministers;

(c) references to a High Court shall include references to the High Court of Jammu and Kashmir;

(d) reference to the Legislative Assembly of the said State shall be construed as including reference to the constituent Assembly of the said State;

(e) references to the Parliament residents of the said State shall be construed as meaning persons who, before the commencements of the Constitution (Application to Jammu and Kashmir) Order, 1954, were recognised as State Subjects under the law in force in the State or who are recognised by any law made by the Legislature of the State as Parliament residents of the State; and

(f) reference to the Rajpramukh shall be construed as ref-

erences to the persons for the time being recognized by the President as the sadar-i-Riyasat of Jammu and Kashmir and as including references to any person for the time being recognised by the President as being competent to exercise the power of the sadar-i-Riyasat”.

(15) Part XX: To article 368, the following pervious shall be added, namely:-

“ 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(1) of Article 370”.

16 Part XXI :-(a) Article 369, 371, 373, clauses (1), (2), (3), and (5) of article 374 and articles 376 to 392 shall be omitted.

(b) In Article 372.

(i) clauses (2) and (3) shall be omitted.

(ii) references to the laws in force in territory of India shall include reference, to Hidayats, Ailans, Ishtihars, circulars, Robkars, Irshads, Yadashts , State, Council Resolutions, of the Constitution Assembly, and other instruments having the force of law in the territory of the State of Jammu and Kashmir; and

(iii) references to the commencement of the Con-

stitution Shall be construed as references to the commencement of this order.

(c) In clause (4) of article 374, the reference to the authority functioning as the privy Council of a State shall be construed as a reference to the Advisory Board constituted under the Jammu and Kashmir Constitution Act, 1996, and reference to the commencements of the Constitution shall be construed as references to the commencement of this Order.

17. Part XXII article 394 and 395 shall be omitted.
 18. First Schedule.
 19. Second Schedule: Paragraph 6 shall be omitted.
 20. Third Schedule: Forms V, VI, VII, & VIII shall be omitted.
 - (i) for entry 3, the entry "3. Administration of cantonments" shall be substituted;
 - (ii) entries 8, 9, 33 and 34, the words "trading corporations including" in entry 43, entries 44, 50, 52, 54, 55, 60, 67, 69, 78 and 79, the words "inter State migration" in entry 81, and entry 97 shall be omitted;
 - (iii) for entry 53, the entry "53 Petroleum and Petroleum products, but excluding the regulation and development of oil-fields and mineral oil resources; other
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liquids and substances declared by Parliament by law to be dangerously inflammable” shall be substituted; and

(iv) in entries 72 and 76, the reference to the States shall be construed as not including reference to the State of Jammu and Kashmir.

(b) The State list and the Concurrent list shall be omitted

23. Eighth Schedule.

24. Ninth Schedule : After entry 13, the following entries shall be added, namely:-

“14. The Jammu and Kashmir Big Landed Estates Abolition Act (No. XVII of 2007).

15. The Jammu and Kashmir Restitution of Mortgaged Properties Act (No. XVI of 2006).

16. The Jammu and Kashmir Tenancy Act (No. 11 of 1980).

17. The Jammu and Kashmir Distressed Debtors Relief Act (No. XVII of 2006).

18. The Jammu and Kashmir Alienation of Land Act (No. V of 1995).

19. Order No 6H of 1951 dated : 10th March, 1951 re

sumption of Jagirs and other assignments of Land Revenue etc.

20. The Jammu and Kashmir State Kuth Act (No. 1 of 1978)".

(Sd.) RAJENDRA PRASHAD,
President.
