

KASHMIR'S SPECIAL STATUS

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and

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Preface

The special provisions, by virtue of which Jammu and Kashmir State enjoys a distinct place in the Indian federal structure, are widely misunderstood and widely misinterpreted. The provisions envisage a partial application of the Constitution of India to the State with many reservations and modifications. The provisions and the reservations imposed upon them are interwoven into a plethora of intricate alternatives and specifications. Curiously enough, some of these reservations have by successive amendments, either lost their meaning and purpose or assumed dimensions which they were never meant to acquire. The present study is an attempt to examine the various aspects of these provisions, assess their constitutional and political significance.

The provisions of the Constitution of India with regard to the Governments in the States are not applicable to Jammu and Kashmir and the Government of the State is not organised in accordance with the provisions of the Constitution of India according to which the other State Governments in India function. At the time the Constitution of India was framed, the State was reserved the right to frame a Constitution for its government and the provisions were included in the Constitution of India which envisaged the institution of a Constituent Assembly for the State. The Constituent Assembly was convened in 1951. In 1956, the Assembly framed the Constitution which was promulgated on 26th January, 1957. In its broad aspects the Constitution of the State is similar to the constitutional structure provided for the States under the Constitution of India. Obviously, therefore, there are two sets of constitutional provisions which govern the State of Jammu and Kashmir and two levels of jurisdiction which determine its operatives. The division of powers between the two governments is governed by the provisions of the Constitution of India to

the extent of the enumerations made in the Union List, and the Concurrent List, except certain subjects, which along with the subjects enumerated in the State List and the residuum are reserved for the State.

The purpose for which this study has been undertaken is fourfold ; first, to locate and analyse the various factors and processes which led to the inclusion of the special provisions for the State in the Constitution of India ; second, to examine the functional operatives which the provisions involve and assess the working of the model, the special provisions embody ; third, to establish a comparative focus between the constitutional position the other Indian States enjoy in the Indian federal structure and the place Jammu and Kashmir has in it ; and finally to establish the validity and the legitimacy of the area of permissibility allowed to the State. The orientation of approach is particularly objective in the sense that the substantive political purposes sought to be achieved by the incorporation of the special provisions for the State were motivated by political compulsion arising out of the partition of the country and the manifold problems the integration of the Princely States involved. Efforts have, however, not been spared to demarcate boldly, individual attitudes and institutional interests, wherever such attitudes and pre-dispositions have found precedence over national objectives.

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Chapter One

Jammu & Kashmir

The territories of Jammu, Kashmir and Ladakh, which constitute the Jammu and Kashmir State, were, before the Punjab was annexed by the British, a part of the Sikh empire of Ranjit Singh. Jammu was annexed by the Sikhs in 1808.¹ The ancient kingdom of Kashmir fell to the Sikhs in 1819.² In 1822, Ranjit Singh granted the province of Jammu to Raja Gulab Singh, a Dogra Rajput chieftain of Jammu, as a fief in perpetual possession.³ Gulab Singh had joined the Sikh armies in the wake of the fall of Jammu and later risen to much eminence and power at the Sikh Court.⁴ A shrewd statesman and a brave soldier, he put the opportunity he was offered by the Sikh monarchy, to purposeful use. Within a decade he subdued the territories and chieftainships lying along the borders of his fief and rapidly extended his possessions over the entire regions south of the Pir Panjal range bringing within his domains the important Rajput principalities of Kishtwar and Badarwah.⁵ In 1834, Gulab Singh invaded Ladakh. The Ladakhis held the jealously guarded monopoly of the lucrative trade in shawl-wool of the main shawl-wool producing centres in Tibet and western regions of Central Asia.⁶ The subjugation of Ladakh was completed by Gulab Singh in 1837.

1 Charak, Sukh Dev. *Maharaja Ranjit Dev and the Rise and Fall of Jammu Kingdom*, p. 123; *Gulab Nama* V. S. p. 100.

2 Panikkar, K. M. *Founding of the Kashmir State*, p. 16.

3 *Ibid.*, p. 32.

4 *Ibid.*, p. 18.

5 *Ibid.*, pp. 34-38.

6 Lamb, Alastair. *Britain and Central Asia*, p. 88.

Ranjit Singh died in 1839. The long internecine strife, which followed the death of the Sikh monarch, sapped the Sikh Durbar of its vigour and resources. The Dogras had become the most powerful political faction at Lahore.⁷ Gulab Singh's brother, Raja Dhian Singh, who had joined the Sikh army after his brother, had been appointed the Prime Minister of the State. The participation of the Rajputs in the Sikh politics had in fact proved a stabilising factor in otherwise paramilitary organisation of the Khalsa. In fact, the astute Sikh monarch had realised that, and had with considerable skill and keen interest forged the Sikh-Rajput fraternity. In the struggle for power that followed the monarch's death the Dogras were liquidated.⁸ Raja Dhian Singh and his valorous son, Hira Singh, were killed. Suchet Singh, the youngest of the Dogra brothers, who also had joined the Sikh army and risen to high eminence, was also killed in the strife. Gulab Singh alone survived.⁹

While the Sikhs were fighting each other, the British, who were by now the virtual masters of the rest of India and had prudently kept away from the Sikhs during the life time of Ranjit Singh, were preparing the plans for the destruction of the Khalsa and the annexation of the Sikh domains. The reduction of the Rajputs and their subjugation was the second phase of the grand design they envisaged.¹⁰ The final denouement, came when the First Anglo-Sikh war broke out and Sikhs fell in headlong collision with the British, an eventuality which Ranjit Singh had all along his career manoeuvred to avoid.

In the meantime, the Khalsa Council had appointed Lal Singh, the Prime Minister of the State. Lal Singh, a favourite of Rani Jindan, was a Brahmin from Jammu who had risen to power by intrigue and duplicity.¹¹ He hardly had the soldierly qualities and the political acumen to lead the Sikh armies in their hour of crisis. Commanded by irresolute

7 Hasrat, Bikarma Jit. *Anglo-Sikh Relations*, p. 184.

8 Panikkar, K. M. *Founding of the Kashmir State*, pp. 64-65.

9 *Ibid.*, p. 64.

10 Ellenborough to the Duke of Wellington, 20th Oct. 1873; *The Punjab Papers*, Ed. Bikrama Jit Hasarat, p. 67. *Kashmir Papers*, Introduction, p. xiv.

11 Hasrat, Bikarma Jit. *Anglo-Sikh Relations*, p. 261.

and corrupt military leaders, the army was defeated in a number of successive engagements.¹² After the battle of Feroz Shah, the Sikh leaders lost whatever of the vigour and zeal was still left in them. In anger and consternation the army, which refused to accept defeat turned to Gulab Singh for leadership and invited him to take control of the affairs at Lahore.¹³ No changes were effected in the army command and both the commanders-in-chief, Lal Singh and Tej Singh, were allowed to conduct the operations of war.¹⁴ This was a fatal mistake and proved the undoing of the empire and the army. The commanders were in secret liaison with the British officials and had been offered proper consideration for their connivance at the destruction of the Sikh army.

Gulab Singh was an ambitious politician and a shrewd statesman. He had carefully watched the events which had followed the death of Ranjit Singh. He realised the significance of the rising strength of the British and the British involvement in northern India. In the British power pressing at the southern borders of the Sikh empire, Gulab Singh visualised his emancipation from the Sikh hegemony and a deterrent to its domineering might. He had followed a measured strategy of securing the British support to carve an independent state for himself, right after the fall of Dhian Singh from power at Lahore.¹⁵ Time and again, particularly after the liquidation of Hira Singh, when his fate hung in the balance, he had sought to secure the British help to save himself from the scourge of the political turmoil at Lahore.¹⁶ More than once he had offered assistance to the British in case they were prepared to reduce the Sikhs.¹⁷ For reasons dictated by political and military considerations, the British, who could have turned the opportunity, the Dogra Chief offered them, to

12 Gough, Sir Charles and Arthur D. Innes. *The Sikhs and the Sikh Wars*, p. 61 and 68. Khushwant Singh. *A History of the Sikhs*, pp. 48-54.

13 Hasrat, Bikarma Jit. *Anglo-Sikh Relations*, p. 276.

14 Hasrat, Bikarmajit. *Anglo-Sikh Relations*, pp. 267-280; Khushwant Singh. *A History of the Sikhs*, Vol. II, pp. 48-54; *Kashmir Papers*, Introduction, p. xiv.

15 *Kashmir Papers*, Introduction, xiv.

16 Hasrat, Bikarma Jit. *Anglo-Sikh Relations*, p. 254.

17 *Ibid.*, pp. 22, 255.

their advantage, proved reluctant to accept his proposals.¹⁸ The strains had shifted now. The British were aggressively keen to destroy the Punjab and they neither lost time nor spared the effort to put to use the tactical advantage Gulab Singh's presence at the Court gave them to liquidate the Sikhs. From the position of authority, Gulab Singh now held at the Court, he was in a position to negotiate with the British with greater advantage to himself.

Gulab Singh, however, was not alone in quest of political gains. The Sikh leaders, except for a few men of honour, were involved in the plot aimed to get the army beaten by the British and then collect, whatever they could of the spoils.¹⁹ Many of the court dignitaries were in league with the British officials, seeking the destruction of the Sikh army, which threatened their ignoble existence. Gulab Singh had an advantageous position. He was insulated in a huge and lucrative fief, was rich in money and materials, and had quite a few powerful legions of hill troops to support him in case he needed to force an issue. In fact, Gulab Singh arrived in the capital at the head of five regiments of his crack hill troops.²⁰

While the Khalsa was crumbling under its own weight, the British strengthened their positions on the fronts. Had the Sikhs made a concerted and a bold move even at this time, the British would have taken a long time to recover for a fresh assault. That, however, did not happen. Instead, the British were given ample time to reorganise their formations, and vital information pertaining to the Sikh positions and the deployment of their troops continued to be supplied to them by treacherous Sikh commanders.²¹ The commanders wanted to destroy both the Khalsa and the new minister at the Court. Gulab Singh, perhaps, more astute, played back and with subtler effect.

The most decisive battle of the First Anglo-Sikh War was fought at Sobraon. The British mounted offensive on the Sikh

positions on February 10, 1846. The Sikhs fought with reckless resignation. But treachery took its toll. Immediately after the assault developed, Tej Singh fled away from the field. Lal Singh and his cavalry troops who were encamped nearby and who, if they had joined the battle, would have reversed the fortunes, never appeared on the scene.²² Leaderless and abandoned, the Sikh troops could not withstand the British onslaught. The battle of Sobraon was lost. With that the Sikhs lost their freedom. On February 20, the triumphant British troops entered Lahore.

The victory in the war gave the British, the territory between Satluj and Bias and a claim to one and a half crores of rupees of war indemnity. In the meanwhile a new Regency, with Lal Singh as the Prime Minister, had been instituted in Lahore and recognised by the British. The British demand for the huge indemnity was not acceptable to Lal Singh. Instead, he offered to cede to the British, additional territories between Bias and Indus including the province of Kashmir and Hazara. Lal Singh's design was to ward off the indemnity as well as to deprive Gulab Singh of his fief, who ironically enough was charged by Lal Singh of having conspired with the British against the Sikhs. The British were reluctant to accept the offer for many military and tactical reasons.²³ The British retained Kulu, Mandi, Nurpur and Kangra. The rest of the territory was offered to Gulab Singh, who had expressed his readiness to make good a part of the indemnity if the Sikh territories of Jammu and Kashmir were transferred to him in independent possession.²⁴ The transaction was formalised at Amritsar on 18th of March, 1846, where by a separate Treaty with Gulab Singh, the territories of Jammu and Kashmir, with the frontier districts of Ladakh and Baltistan, were ceded to the Dogra chief and he was recognised an independent ruler. The treaty of Amritsar stipulated:

“The British Government transfers and makes over for independent possession, to Maharaja Gulab Singh

18 Hasrat, Bikarma Jit. *Anglo-Sikh Relations*, p. 254.

19 *Kashmir Papers*, Introduction, xiv.

20 Hasrat, Bikarmajit. *Anglo-Sikh Relations*, p. 276.

21 Lawrence to the Secretary of State, May 16, 1846. Henry Lawrence Private Papers.

22 Hasrat, Bikarmajit. *Anglo-Sikh Relations*, p. 282.

23 Letters from Governor General to the Secret Committee, dated 14th March, 1846; K. M. Panikkar. *Founding of the Kashmir State*, p. 161.

24 Panikkar, K. M. *Founding of the Kashmir State*, p. 104.

and the heirs male of his body, all the hilly or mountainous country, with its dependencies, situated to the eastward of the river Indus, and westward of the river Ravi, including Chamba and excluding Lahul being part of the territories ceded to the British Government by the Lahore State, according to the provisions of Article 4 of the treaty of Lahore, dated 9th March, 1846."²⁵

Article 4 of the Treaty of Lahore provided :

"The British Government having demanded from the Lahore State, an indemnification for the expenses of the war, in addition to the cession of territory described in Article 3, payment of one and a half crore of rupees ; and the Lahore Government being unable to pay the whole of this sum at this time, or to give security satisfactory to the British Government for its eventual payment ; the Maharaja cedes to the Honourable Company, in perpetual sovereignty, as equivalent for one crore of rupees all his forts, territories, rights ; and interests in the hill countries which are situated between the rivers Beas and Indus, including the provinces of Kashmir and Hazara."

Gulab Singh undertook to pay the British a sum of seventy-five lakhs of Nanakshahi rupees, for the prize they bestowed on him and the protection they promised him and his future generations. The district of Hazara was exchanged by Gulab Singh with an equal extent of territory east of Jhelum towards Jammu.²⁶ A significant feature of the Amritsar agreement was that, though, Gulab Singh was recognised independent, he accepted the supremacy of the British and thus bound himself to the vassalage of the British empire. These provisions were embodied in Article 10 of the Treaty of Amritsar.

"Maharaja Gulab Singh acknowledges the supremacy of the British Government and will, in token of such supremacy, present annually to the British Government one horse, twelve perfect shawl goats of

approved breed (six male and six female) and three pairs of Kashmiri Shawls."

Sheikh Imamudin, the Sikh Governor of Kashmir, refused to hand over the province of Kashmir to Gulab Singh. The British troops were despatched to the Valley to assist the Dogras to occupy it.²⁷ Lal Singh met the fate he deserved. He was charged by the British with having incited Imamudin to refuse to surrender the Valley to Gulab Singh. A mock trial was organised by the British officers. On charges of conspiracy he was divested of his power and possessions and banished from the State.²⁸

The British Intervention

By the Treaty of Bhairawal, which the British imposed on the Sikhs in December 1846, the British assumed virtual control over the administration of the Punjab. Rani Jindan was deprived of all her power and pensioned off. The British Government undertook the responsibility to protect the Maharaja during his minority. The control of the administration was vested with the Resident and a Council of eight Ministers who were to be appointed by the Resident. The military administration was also vested with the Resident and he was empowered to recruit Sikh armies, disband them or replace them, whenever he deemed that necessary. Lahore was to continue to be garrisoned by the British troops and the Governor General was authorised to deploy British troops, throughout the State, on such positions, as he thought necessary for the security of the Capital and the preservation of peace in the State. The Khalsa had been defeated and broken. The British now put into operation the second phase of their grand design to reduce the Rajputs and to extend their imperial possessions to the northern borders of the sub-continent, they had conceived long before the Sikh empire had crumbled.²⁹

Hardly a few months after the Treaty of Bhairawal, the British mounted their first offensive against the Dogras. Gulab Singh no longer had the formidable stature which he had

27 Panikkar, K. M. *Founding of the Kashmir State*, pp. 118-19.

28 Singh, Khushwant. *A History of the Sikhs*, p. 59. See also Sethi. *Triaq of Raja Lal Singh*.

29 *Kashmir Papers*, Introduction, p. xiii.

25 Treaty of Amritsar, Article I.

26 Singh, Khushwant. *A History of the Sikhs*, Vol. II, p. 56.

enjoyed as the most powerful Rajput chieftain of the mighty Sikh empire. He was now a petty feudatory subject to the purview of the British Paramountcy. On the ground that the Government of India had received complaints of oppression, alleged to have been perpetrated by the Maharaja on his subjects, the Governor General deputed Henry Lawrence to make an on-the-spot enquiry in the working of the administration in the State and report on the conditions prevailing there. Lawrence found the allegations false and though, he absolved the Maharaja of the blame,³⁰ he addressed a sharp note to the Maharaja urging him to reorganise the administration in the State failing which the Government of India would be compelled to make arrangements "for the protection of the hill people."³¹ Lawrence also advised the Governor General to administer a stern warning to the Maharaja. In his communication, the Governor General wrote to the Maharaja :

"In no case will the British Government be the blind instrument of a ruler's injustice towards his people, and if, in spite of friendly warning, the evil of which the British Government may have just cause to complain, be not corrected, a system of direct interference must be resorted to, which as your Highness must be aware would lower the dignity and curtail the independence of the ruler."³²

Lord Hardinge delivered the first psychological shock to the Maharaja and scored on him the impression that his territories were subject to the wide operation of the British Paramountcy and the Government of India meant to enforce the right to intervene in the affairs of the State, which it had come to possess by virtue of the Paramountcy, it exercised on the Indian States. In 1852 the government of India proposed to the Maharaja, the appointment of a Civil Officer on Special Duty in the State, to look after the European visitors, who came to

30 National Archives of India, Foreign Department, Sec. 28th November, 1847, No. 36 to 41.

31 National Archives of India, Foreign Department, Sec. 28th Jan. 1848, No. 35.

32 National Archives of India, Foreign Deptt., Sec. 28th Jan. 1848, No. 43-A.

Kashmir in large numbers and whose conduct in the State, required supervision.³³ The Maharaja refused to accept the proposal. Heavy pressure was, however, put on him and he ultimately relented and accepted the appointment of the Officer on Special Duty.³⁴

In the wake of the Russian advance in Central Asia after 1860, the British interest in the politics of the State and security of its Northern frontiers assumed new dimensions. Apprehensive of the impact, the Russian frontiers rapidly descending south, would have on the Dogras, who had been probing in for some time, the small tribal principalities situated on the outskirts of the State borders, the British promptly warned Maharaja Ranbir Singh to suspend his activities "And make no attempt to extend his authority beyond the limits which had been conferred on his father."³⁵ The warning was a declaration of the strategic interests the British had in the northern frontiers of Kashmir and also a fresh enunciation of their claim to control the processes of the Dogra politics, whenever that was found necessary. In 1864, the British snatched from the Dogras the monopoly of trade in Shawl-wool, of which Ladakh was the main centre and imposed a new tariff agreement on the Maharaja. In 1867, a British commercial agent was appointed in Ladakh.³⁶

In 1870, the Government of India sent Douglas Forsythe on a commercial mission to Yarkand. In 1873, he was sent again with clearer instructions to report on the strategic importance of the adjoining regions. Forsythe's findings regarding the importance of the frontier regions and their undefended nature were startling. The Government of India was prompted to an immediate reappraisal of the entire frontier policy, which inevitably involved a reconsideration of its relations with Kashmir.³⁷ Across the northern borders of the State were

33 National Archives of India, Foreign Department, Political, 14th Dec. 1852, Nos. 82-83.

34 National Archives of India, Foreign Department Political, 1852, Nos. 82-83.

35 National Archives of India, Foreign Sec. 1877, No. 34-B.

36 Lamb, Alastair. *Britain and Chinese Central Asia*, p. 85.

37 National Archives of India, Foreign Department, Proceedings, Secret, July 1877, No. 34-B.

scattered a number of tribal principalities, the more important among them being Chitral, Yasin, Hunza, Nagar and Dir. These principalities stretched to the south of the strategic passes Baroghil and Ishkoman which led through the great mountain range running north. In case a hostile power came to control these passes, it would dominate the tribal principalities and threaten the British Indian position of Jalalabad, Peshawar and the Punjab.³⁸ Not prepared to risk an involvement in the sensitive outposts so close to the restive Russian borders and reluctant to undertake major military commitments on such a remote front, the British informed the Maharaja that they would help him materially in bringing the tribal principalities under his control.³⁹ The Governor General personally assured the Maharaja in a meeting at Madhopur in November 1876, that "such States as Chitral and Yasin should come under the control of a friend and ally of the British Government like His Highness, rather than be absorbed, in the course of events by powers inimical to Cashmir."⁴⁰ In fact, the proposals suggested by the Government of India were aimed to secure the British a vicarious control over the tribal territories without any major tactical and military commitments. The proposals were, however, subject to the condition that a British Political Officer would be appointed in Gilgit to report directly to the Government of India, about the developments on the frontier. The Maharaja, apparently pleased on the prospect of extending his territories, readily accepted the proposals and in fact suggested a number of measures to effect the extension of his control over the tribal chieftainships.⁴¹

The Dogra efforts to secure the tribal areas, however, proved abortive. Not equipped with necessary power and prestige, incapable of taking any purposeful action and crudely unaware of the cultural and institutional patterns the tribal principalities presented, and intricate interaction of the political

38 National Archives of India, Foreign Department, Proceedings, Secret, July 1877, No. 35.

39 *Kashmir Papers*, Introduction, p. xxi.

40 National Archives of India, Foreign Department Proceedings, Sec. July 1877, No. 38.

41 *Kashmir Papers*, Introduction, p. xxi.

interests and ambitions in the region, the Dogras achieved little. As a matter of fact, the active political interest, the Dogras took in the region upset its age-old balance of power, liberating stresses which were far beyond the Dogras to control. Suddenly, the entire frontier erupted alive. Within a short time it was obvious that the forward thrust by the Dogras and the Gilgit agency had failed to fulfil its objective.⁴² The agency was withdrawn.

Having failed to utilise the Maharaja as a political instrument to influence the trans-frontier politics, presumably one of the main objectives of the British politics in Kashmir, the Government of India sought to tighten its hold on the Maharaja and his administration, for the anxiety remained that the management of a difficult and dangerous frontier could not be left to him. The British officials vehemently advocated intervention in the State, and believed in self-righteous conviction, that the resumption of the State administration, was necessary to secure the strategic interests of the empire in the northern borders of the State and effect reorganisation of its Government. In the background, were, however, subtler compulsions which goaded the British to interfere in the affairs of the State. These compulsions arose out of the inherent expansionism of the British colonial empire, the narrow parochialism of the British officials and the interests of trade and commerce with the Central Asian regions.⁴³ The British officials in India, in fact, never reconciled to the wider orbit of autonomy the Dogras had been allowed under the Treaty of Amritsar.

Maharaja Ranbir Singh died in September, 1885. Immediately, the Government of India conveyed to Maharaja Pratap Singh their decision to appoint a Resident Political Officer in the State. Pratap Singh appealed to the Governor General to reconsider the decision and pleaded for some more time to improve his administration and introduce reforms in the government of the State.⁴⁴ On 25th September, 1885, Pratap Singh was formally installed the Maharaja. The same day, the

42 National Archives of India, Foreign Department Proceedings, Secret, July 1881, Nos. 314-397.

43 *Kashmir Papers*, Introduction, p. xxxvi.

44 *Ibid.*, p. xxv.

Officer on Special Duty took over as the Resident Political Officer in the State. Instructions were given to the Resident to inform the Maharaja, that the Government of India was dissatisfied with the administrative conditions of the State and the Agent was authorised to tell the Maharaja that in case he failed to take immediate and effective action, the Government of India would not hesitate to take such action as they deemed necessary. In fact, the Government of India underlined measures such as the abolition of the State monopolies, rationalisation of taxes, reorganisation of financial administration, construction of roads and removal of restrictions on emigration, which in their opinion deserved the first attention of the Maharaja.⁴⁵ Pratap Singh made some feeble efforts, but his enthusiasm was short-lived. Not many months after the Resident was appointed, he reported to the Government of India that it was hopeless to look for any serious improvement in the administration of the State without material interference in its affairs.⁴⁶

Matters came to a head when the Government of India appointed T. C. Plowden, a diehard British bureaucrat, the Resident in the State. Hostile to the Dogras, the new Resident immediately set out to undo the regime. He broke up the Ministerial Council, inducting in it his proteges and puppets. A clash of approaches followed and the government disintegrated into several factions, each vying with the other to ingratiate itself with whoever mattered. The administration came to a grinding halt. After having outmanoeuvred the Maharaja, the Resident informed the Government of India that the administration had broken down in the State and the time was ripe for intervention in the affairs of the State and final take-over of its administration. The Government of India accepted in general terms the plea made by the Political Agent but hesitated to take the action that was proposed by him.⁴⁷

45 National Archives of India, Foreign Department Proceedings, Secret, E, October 1886, No. 725.

46 Resident to the Secretary to the Government of India, 16th Sept. 1885, *Condemned Unheard*, Appendix A.

7 *Kashmir Papers*, Introduction, p. xviii.

In 1888, Colonel Parry S. Nisbet, a personal friend of Pratap Singh was appointed the Resident in the State. A couple of months after Nisbet assumed office, the Kashmir Residency made a startling disclosure that it had come into possession of treasonable letters written by the Maharaja to the Tzar, Maharaja Dilip Singh and some of his favourites in the State.⁴⁸ The Maharaja vehemently denied having written any of the letters. But the trap was so well laid that the younger brother of the Maharaja, Raja Amar Singh, who had already been won over by the Resident to his side, was made to testify that the letters were genuine and written by the Maharaja himself.⁴⁹ In the whirlwind that followed, Colonel Nisbet in collaboration with his accomplices, extorted from the Maharaja, an Edict of voluntary resignation by virtue of which the Maharaja undertook to relinquish all the powers of the government and entrust the administrative authority to a Council constituted of his two brothers, Raja Amar Singh and Raja Ram Singh, Rai Bahadur Pandit Suraj Koul, Rai Bahadur Bagh Ram and an English Officer nominated by the Government of India.⁵⁰ Nisbet forwarded the Edict to the Government of India urging immediate acceptance of the offer the Maharaja had made. Gilding the perfidy, Nisbet wrote to the Foreign Secretary :

“As the Government of India have carefully refrained as long as was possible, from any sort of interference in the direct management of the affairs of the Kashmir State, so I think now a direct appeal to do so cannot be ignored, and that there should be no hesitation in adopting the best and most complete measure likely to bring about the reforms necessary.”⁵¹

The episode of the treasonable letters and the Edict of voluntary resignation gave the Government of India, the much needed pretext to intervene in the affairs of the State. However, in view of the fact that the Maharaja had denied having written

48 *Ibid.*, p. xxix.

49 Nisbet to Durand, 27th Feb. 1889. *Condemned Unheard*, Appendix A.

50 *Kashmir Papers*, Introduction, xxxi.

51 National Archives of India, Foreign Department Proceedings, Secret, E, April 1889, No. 86.

the letters and the action on the basis of the Edict would have bound them to conditions laid down by the Maharaja in the Edict, including the five year limit, for which he had offered to abdicate, the Government of India did not find it feasible to base their action on the Edict or the issue of the treasonable letters. Decision was taken to relieve the Maharaja of his administrative responsibilities, on the simple ground that Government of India deemed the action necessary.⁵²

On April 1, 1889, the Governor General, by a unilateral Command Order issued to a recalcitrant feudatory, divested the Maharaja of all his powers and entrusted the administrative authority to a Council constituted of the Maharaja's brothers, Raja Amar Singh and Raja Ram Singh and three or four other members selected by the Government of India.⁵³ In his instructions to the Resident, the Foreign Secretary wrote :

"In communicating to the Maharaja and others concerned the decision of the Government of India, you should be careful to avoid basing that decision exclusively either upon the letters or upon the Maharaja's resignation. The letters are repudiated by the Maharaja, and as I have said before, they are not of a very novel character; while on the other hand, Government of India are by no means prepared to make the present settlement a matter of compact with the Maharaja and to accept all conditions laid down by his Edict of the 8th March, for example, the five years' limit. You should, therefore, base the decision of the Government upon a full consideration of all the circumstances, the letters and the Maharaja's wish to retire from the control of affairs being considered amongst other things, but only as portions of a difficult and complicated case, which it has been necessary to settle on broader grounds of general policy."⁵⁴

52 *Kashmir Papers*, Introduction, xxxii.

53 *Ibid.*

54 National Archives of India, Foreign Department Proceedings, Secret, E, April 1889, No. 96.

On April 17, 1889, Colonel Nisbet conveyed the decision of the Government of India to the Maharaja, who perhaps unable to grasp the purport of the communication, promised the Resident to give the communication his immediate and active consideration. Nisbet informed the embarrassed Maharaja, that the communication no longer needed any consideration as it embodied the final orders of the Government of India.⁵⁵

The assumption of the government of the State by the British, earned them greater notoriety than even the Amritsar transaction had involved. The obvious violation of the treaty commitments evoked general censure, not only from the non-official opinion in India, but considerable official and non-official opinion at home also disapproved of the action taken by the Government of India. To placate the ruffled tempers and also to dispel the fears of the other Indian Princes, who had been shaken by the turn the events in Kashmir had taken, the Government of India adopted a measured strategy of gradual restoration of the powers to the Maharaja, while, at the same time, the essential sovereignty over the State and control over its administration was retained unimpaired.

In 1891, the Council was reconstituted and the Maharaja was offered its presidentship which till then was vested with Raja Amar Singh. Raja Amar Singh was appointed the Chief Minister.⁵⁶ The reconstitution of the Council gave the Maharaja little substantial authority which continued to be exercised by the Council under close and strict supervision of the Resident. In 1896, another concession was given to the Maharaja and he was empowered to review the proceedings finally disposed off by a Member in the Council and in case the Maharaja did not agree with the decisions and orders of the Council, he was empowered to return them for reconsideration.⁵⁷ In 1905, the Council was abolished and the Maharaja was empowered to

55 National Archives of India, Foreign Department Proceedings, Secret, E., May 1889, No. 563.

56 Jammu and Kashmir Archives, Papers relating to Procedure of Business in the Council, 1889, No. 49.

57 Papers relating to procedure of Business in the Council, Jammu and Kashmir Archives, 1889, No. 49; State Council Resolution, 24th August, 1896, Jammu and Kashmir Archives, 1889, No. 49.

appoint the Council of Ministers which was to aid and advise him in the conduct of his government. The Council was to be constituted of a Chief Minister and three other Ministers⁵⁸ Granting the powers to the Maharaja, Lord Curzon, in his *Kharita*, wrote to Pratap Singh :

"It rests with your Highness, by exercise of constant restraint and vigilance and by full possession of a sense of great responsibility which now falls on you, to determine, the reputation which future generations shall always be ready to support your Highness in any legitimate undertaking for the good of your country, but it must not be forgotten that, in their duty to the populations which are brought under their influence, they will never be prepared to tolerate a lapse from the standard to which the administration of your state has attained under the existing constitution. But I have every confidence that your Highness's conduct of affairs will justify the extension now made of the authority which was restored to you in 1891, and that it will be entirely for the good of your State and people."⁵⁹

Apparently, the constitutional reforms amounted to the grant of some major concessions to the Maharaja. In reality, however, this was not so. The reforms only widened the procedural functions of the Maharaja without enhancing his powers in any substantial manner. The Council was to be appointed by the Maharaja in consultation with and the final approval of the Government of India. The Maharaja was not to take any "step of importance", without consulting the Resident and was bound to exercise his powers on the advice of the latter. The annual budget was to be prepared in consultation with the Resident and expenditures were not to be incurred without his prior sanction.⁶⁰

Obviously, not content with what he had got, the Maharaja appealed to the Government of India to reconsider their deci-

sion and lift off some of the major limitations still imposed on him. The Government of India ignored his plea and allowed the existing arrangements to continue.

In 1914, the Government of India, on the advice of the Resident, decided to relax the control, the Resident exercised on the finances of the State. A long and protracted correspondence ensued between the Government of India and the Maharaja, which finally culminated in the restoration of some more powers to the Maharaja.⁶¹

In September 1920, the Maharaja addressed an impassioned appeal to the Viceroy pleading for the return of the powers of the administration to him. The Government of India demanded in return an assurance from the Maharaja, that he would accept the advice of the Resident in administrative matters, whenever it was offered and would also inform the Resident of any important changes in the existing rules and regulations and the frontier policy.⁶² The Maharaja accepted the conditions laid down by the Government of India. On February 4, 1921, the Maharaja was restored the powers of the government.⁶³

The Freedom Movement

The British intervention ended the exclusiveness of the Dogras and paved the way for the integration of the State in the Indian Princely Order, which by now was gradually being shaped into a powerful flank of the British Empire in India. The vigour and the ruthlessness with which the British set to reorganise the age-old economic and social structure and the administrative and educational system in the State created a new complex of economic and social relationships, and liberated many, hitherto un-experienced stresses and strains. The most characteristic feature of the new patterns was the consolidation of middle class interests in land and trade, which the British genuinely believed would work as a powerful ring-fence to contain as well as safeguard the Dogra dynasty. The inevitable

58 Documents Relating to the Abolition of the State Council, Jammu and Kashmir Archives, 1905.

59 Curzon to Pratap Singh, 30th August, 1905.

60 Note on the New Arrangements for the Administration of the Jammu and Kashmir State, Jammu and Kashmir Archives, 1905.

61 First Assistant Resident to the Chief Minister, 7th March, 1914.
62 Bannerman to Pratap Singh, 26th Nov. 1920, Jammu and Kashmir Archives, 1920, No. 104.

63 Chelmsford to Pratap Singh, 4th Feb. 1921, Jammu and Kashmir Archives, No. 104.

sequel was the gradual emergence of a middle class intellectual ferment, a development of deep import for the processes of the national struggle in the State.⁶⁴ In fact, this intellectual movement furnished the freedom movement in the State with its determinatives and directives. The educated young men found their way into the State services and thus cast in a new and progressive sociological role assumed the community leadership. The agrarian economic frame of the State, however, promised few prospects to the rapidly increasing number of the educated young men. The administrative organisations of the State also offered a very restricted margin of employment. Most of the administrative offices were filled from among the Indian Civil Service cadres and wherever any opportunities were available, they were distributed by the Dogras on political and other considerations. Naturally, therefore, the middle class intelligentsia developed a reactionary interest in the administrative employments in the State. It is here that the first seeds of mass distrust against the Dogras as well as the British were sown. A number of social and political organisations, more important among them, the Dogra Sadar Sabha, the Mahajan Sabha, the Muslim Youngmen's Association were founded in the State. The organisations reflected the deepening frustration in the educated youth and espoused the cause of wider participation for the middle class intellectuals in the politics and the administration of the State.⁶⁵ The Dogra Sabha, founded in 1905, voiced disapproval of the domination of the administrative structures by the Indian Civil Service cadres, immediately after its inception and from 1912, started a vigorous campaign urging for the reservation of civil service employments for the people of the State. In the Kashmir province, the movement evoked greater response from the small Kashmiri Pandit community, which, with a long academic and intellectual tradition poured out educated youngmen at a fairly more rapid pace, and, therefore, experienced greater containment.

64 Teng, M. K. and Santosh Koul. *Ideological Foundations of the National Movement in Kashmir*, Journal of Political Studies, Vol. IV, No. II, p. 28.

65 Resolutions of the Dogra Sadar Sabha. Annual Sessions, 1912, 1914, 1915.

The middle class ferment proved an ideal ground for the nurture of the many influences which crept in from the other parts of India, particularly from the Punjab after the Rowlatt debacle. An idea of the emerging political outlook can be had from many reports and pamphlets, prepared, during those formative years,⁶⁶ by Sardar Budh Singh, a Sikh revolutionary who was actively associated with the new resurgence, and who gave it direction and later played a memorable role in the freedom struggle till its culmination in the war of resistance against the invaders from Pakistan in 1947. The impressions, the State assimilated during those days, served for many years after, as the basis of the struggle against the Dogra regime in the State.

When the territories of Jammu and Kashmir were handed over to Gulab Singh, the cultural configuration of the new State presented many peculiarities which created a complex situation of cultural contact. Kashmir was predominantly Muslim and for most of its history compelled to seclusion by her geographical location. Jammu province, with a powerful structure of caste control and a history of continuous involvement in the politics of northern India was a part of the Sanskrit people of the Punjab. Ladakh was an independent cultural entity which shared little with the cultural patterns of the other two provinces. The integration of these peoples into a single political entity inevitably put the three patterns in close contact with each other, but the incongruencies and the dissimilarities that each bore to the other had great potentiality for concussion and conflict. The Dogras turned these differences and divisions to their advantage and used the hierarchical gradations as potent instruments of political and social control. In fact, the Dogras used the caste gradations, class factions and other social stratifications to safeguard their interests. Alignments were effected by them with agrarian and commercial interests, the social strata with superior role status and regional influences, to strengthen their regime.⁶⁷

66 Sardar Budh Singh. *Masvada Mulazimat* (Vern.); *Fariyade Rayat* (Vern.); *Kisan Ki Dastan* (Vern.); *Garibon Ke Dukk Ka Illaj* (Vern.).

67 Teng, M. K. and Santosh Koul. *Foundations of National Movement in Kashmir* (ii), Journal of Political Studies, Vol. V, No. II, p. 29.

The vast masses of the people, however, remained imperious to the Dogra persuasion and politics. Dogra administration was characterised by much irresponsibility, considerable corruption and the absence of any development. Many pernicious practices like impressment of forced labour were prevalent in the State. The land rents were heavy and taxes widespread and staggering. Scattered over the State, the peasantry, of which the vast majority was Muslim, bore the brunt of the heavy administrative structure. The plight of the people in the frontier districts of Ladakh and Skardu and on the lower rungs of caste gradation among the Hindus was even worse.⁶⁸

The middle class movement and the reaction articulately expressed by the middle class intellectuals could neither rectify nor remedy these ills. The new class actually constituted an inseparable part of the Dogra political and economic organisation and was, therefore, geared to the perpetuation of these ills. What actually happened, and for obvious sociological reasons, was the break-up of the middle class leadership into regional and communal factions and the growth of reactions which had never been experienced before. The objectives of the various factions were, however, identical. Each contested for wider permissibility, more concessions and opportunities of employment under the regime. Only the determinatives differed. Gradually, however, as the contest among the various factions sharpened, the determinatives assumed precedence over the objectives. The Muslim leadership extra-conscious of its role as the spearhead of a religious majority ruled by the Dogra Rajputs, turned to feed on the seething discontent and distrust among the Muslim masses. As the mass involvement in the Muslim middle class movement increased, the objectives, the Muslim intellectuals sought to achieve, were completely relegated to the background. The movement rapidly widened its

68 Lawrence, Sir Walter. *Valley of Kashmir*, pp. 402, 425-26; *Jagirs, Mauji and Mukararies*; Government of Jammu and Kashmir; Bazaz, P. N. *Inside Kashmir*, p. 60; Residency suggestion regarding the alleviation of the hardships of the people, 1960, M. S. 155/p. 62, Jammu and Kashmir State Archives, Jammu Repository; Official Report of the First Praja Sabha Debates, Vol. III-A, Part III, 1935, p. 26.

scope and operation and soon assumed the expression of a Muslim upsurge against the Dogras.

Maharaja Hari Singh assumed the throne in 1925. He was an intelligent prince. He took a serious view of the deep discontent among his Muslim subjects. On the occasion of his Raj Tilak, he tried to placate the ruffled tempers, declared that his Government would strictly adhere to a secular policy and would abolish any discrimination that any community in the State suffered. A number of concessions were announced by him with regard to revenue assessment, grazing taxes, the cultivation of waste and fallow, etc.⁶⁹ The reforms, though of considerable merit, could hardly satisfy the Muslim aspirations for the concessions meant hardly any radical change in the conditions they were in and nothing short of a drastic transformation of the state policy was needed to restore the Muslims their trust in the Dogra Government. The Dogras had, however, their own commitments to fulfil. They were an inseparable part of the princely order the British had established in India, and their discretion and initiative was as much circumscribed by the nature of the order as by the context and conditions on which their existence was based and which they were kept in the saddle to perpetuate. Beyond the few concessions the Raj Tilak Boons offered, the Maharaja did not accomplish much. The Muslim distrust remained unremedied.

In 1931, an ugly incident occurred at Jammu which allegedly involved the desecration of a Muslim scripture. An enquiry was immediately ordered to be instituted by the Government. Considerable tension ensued. The Muslim press in the Punjab launched a virulent campaign against the Dogras.⁷⁰ The British, who were on the look out for a breach, played one side against the other. Hari Singh, as a matter of fact, had followed a policy of indiscreet reaction against the British patronage. By the end of the summer, a wide-spread and organised Muslim agitation against the Dogras was in progress. The agitation culminated in the crisis of July, 1931 when the Muslims fell into headlong collision with the Dogras.⁷¹ The Dogras, instead

69 A note on Jammu and Kashmir State, Ranbir Government Press, 1928.

70 Ranbir, Jammu, Vol. III, 1927, Nos. 47, 48.

71 Report of the Srinagar Riot Committee, 1931.

of following a sympathetic and organic attitude towards the Muslim expressions, adopted a policy of repression and factless severity. Muslim political factions in the Punjab, in an attempt to exploit the situation in the State, jumped into the fray. Ahrars from the Punjab entered the State in thousands. Their main objective was to eliminate and drive out the Ahmadya elements and influences which had so far directed the Muslim movement in the State. The Government, which probably could suppress the local troubles, was hardly capable of facing the situation created by the Ahrar involvement.⁷² Religious fervour which underlined the agitation, soon gave it a communal turn and within days, communal riots broke out in the Jammu province and some contiguous parts in the Kashmir province. Districts of Mirpur, Punch and Rajouri were completely ravaged. Cut off from the disturbed areas, the government in Jammu stood by helpless.⁷³ The British allowed the events to take their toll for they wanted to see Hari Singh on his knees. The Maharaja finally yielded and appealed to the Government of India to save him from the calamity and offered to entrust the administration of the State to any British civil service officer, the Government of India would nominate. That was what the British waited for. With feverish expedition British troops were despatched to Jammu to quell the riots and bring the situation under control.⁷⁴ An Ordinance was promulgated by the Government of India, prohibiting the Ahrar ingress in the State. The Maharaja was advised to institute a Commission of Enquiry under an officer nominated by the Government of India, to investigate into the allegations and suggest measures to remedy the grievances of the people.⁷⁵

The prospect of the investigation in the administrative processes, the possibility of the consequent reforms and the

72 Report of the Enquiry on Jammu Disturbances, 1931.

73 Report of Mr. L. N. Jardine, Special Minister on the Measures adopted for the Restoration of Law and Order in the Mirpur Wazarat and Rajouri Tehsil.

74 Note on Political Situation, printed at Ranbir Government Press, Jammu, 1932.

75 Commission appointed under the order of the Maharaja in Nov. 1931, under the chairmanship of B. G. Glancy.

shift in the policy of the Government of India toned down the excitement to some extent. Ultimately an agreement was reached between the Government and the Muslim leadership which stipulated the withdrawal of the Muslim agitation. The leadership was assured speedy consideration of the Muslim demands after the enquiry had been completed.⁷⁶

In November 1932, the Muslim leadership called a general convention at Srinagar to which delegates were invited from all over the State. On the final day of the three day convention the Jammu and Kashmir Muslim Conference was founded. Sheikh Mohammad Abdullah, who had first led the Muslim intellectuals and later directed the Muslim agitation, was elected President of the Conference. The Conference committed itself to :

- (a) organise the Muslims of the State and secure their due rights ;
- (b) endeavour and struggle for their economic and cultural betterment ; and
- (c) absolve them from the oppression they laboured under.⁷⁷

The Muslim agitation and the consequent British intervention in the State brought to surface the identity between the interests of the British colonial empire in India and the purposes of the Princely order and uncovered the facade of nativity, the Dogras wore. The Dogras, shaken and seared, liberalised the administration and rationalised the recruitment to the government services. A number of Enquiry Commissions were appointed to look into the grievances of the different communities. A Constitutional Reforms Conference was also convened in 1934, and in pursuance of its recommendations a representative assembly was instituted on the basis of limited and qualified adult franchise.⁷⁸

The mass involvement in the middle class movements in the State, the futility of the half-way political reforms, the arraign-

76 Taseer, Rashid. *Tehrik Hurayate Kashmir*, p. 246.

77 The Constitution of All Jammu and Kashmir Muslim Conference, cl. 2.

78 Regulation No. 1, 1934.

ment of the British imperialism behind the Dogras and the frustration caused by communal violence, ultimately led to the evolution of a secular mass movement in the State. In 1939 the constitution of the Muslim Conference was amended to convert it into a secular organisation, the 'National Conference'. The National Conference committed itself to struggle for the freedom of the country from foreign rule, the establishment of self-government in the State and the realisation of political India comprising the British Indian provinces and the Indian States.⁷⁹

From 1939 to 1941, the National Conference conducted a vigorous campaign for the establishment of responsible institutions in the State. With the outbreak of the Second World War, however, it settled to a more subdued attitude. In 1942, the scarcity of the food grains in the State and the rising prices of the other commodities assumed critical proportions. The National Conference offered to cooperate with the Government in the efforts to deal with the situation. In Jammu, however, the scarcity was severe and a number of people died in police firing in demonstrations organised to protest against the failure of the Government to adopt remedial measures.⁸⁰

In 1943, the Government appointed a high power Commission to investigate into the working of the government and the impact of the constitutional reforms undertaken so far and suggest ways and instruments for the reform of the administrative processes and the introduction of administrative responsibility in the government.⁸¹ All the political organisations of the State were invited to participate in its work. The appointment of the Commission created an atmosphere of optimism and all the political parties including the National Conference agreed to participate in its deliberations. The Conference submitted a long memorandum to the Commission. The Commission was, however, from its very appointment, ill-starred. Differences set in among the participants on a wide variety of matters. The

⁷⁹ Bazaz, Prem Nath. *Struggle for Freedom in Kashmir*, p. 169.

⁸⁰ Saraf, Mulk Raj. Ranbir, Jammu, ix, 6.

⁸¹ Ganga Nath Commission appointed by the Command Order 12th July 1943.

National Conference withdrew from the Commission and published the memorandum, it had submitted to the Commission, in the form of a manifesto under the title 'the Naya Kashmir.'⁸²

In 1944, the Maharaja offered to appoint two ministers from among the elected members of the Legislative Assembly. Erroneously though, the National Conference accepted the offer. Dyarchy, as was expected, did not work well and within a year the National Conference nominee to the Cabinet had to resign.

These were the critical days when the Indian independence was on the anvil. The National Conference represented to the Cabinet Mission that the Indian States were as much a part of India, as the British Indian provinces were and demanded the constitutional right to take part in the efforts to determine the future of the country. "At a time", the National Conference wrote to the Cabinet Mission, "When the new world is being built on the foundations of the Atlantic Charter, a new perspective of freedom is opening before the Indian people, 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 elected representatives to the constitution-making bodies that will construct the frame-work of free India. We emphatically repudiate the right of the Princely order to represent the people of the Indian States or their right to nominate their personal representatives as our spokesmen."⁸³

The Memorandum was ignored. On 19th July, 1946, the National Conference launched the famous 'Quit Kashmir Movement' against the Dogras. The Dogras who were now fully backed by the British, reacted swiftly and suppressed the movement. The repression the Dogras unleashed, caused nation-wide repercussions. Pandit Nehru rushed to Srinagar. At Uri, he was served with an order by the District Magistrate of Srinagar prohibiting him to proceed further. Nehru refused to turn back. He was placed under arrest and detained. A day after, however, he was released to return to Delhi. Leaders and the followers of National Conference, who

⁸² Resolution of the Working Committee of the National Conference, dated 20th February, 1944.

⁸³ Memorandum submitted by the All Jammu and Kashmir National Conference to the Cabinet Mission, 1946, pp. 2-3.

had participated in the movement and who had been detained, were sentenced to various terms of imprisonment and punishment.⁸⁴

While the Dogras were grappling with their people, changes of far-reaching importance were under way on the sub-continent. The future of the colonial structure, the British had built on the sub-continent, and with that the future of the Princely order was on the anvil. India was on the threshold of freedom and the days, the Princes had on their side, were numbered. The Dogras, however, failed to realise that.

Independence to Accession

In 1947, India was divided. With the other Indian States, Jammu and Kashmir was also released from the purview of the British Paramountcy. The Princes were given the choice to determine their relations with the two Dominions and accede to either of them.⁸⁵ The implication, that the Princes would hardly be able to retain the technical independence earned by the lapse of the Paramountcy, was obvious, for the British government was neither prepared to recognise the States as dominions nor carry out any obligations the Paramountcy involved. The States were to finalise the accession to the Dominions before fifteenth of August 1947, the day fixed for the transfer of power.

At this critical hour, the Maharaja and his Government signally failed to appreciate the strains of the situation and finalise the issue of accession. The Maharaja and his Government followed a policy of biding time and deferred a decision on this vital issue. It is difficult to locate the political factors which prompted the Maharaja and his government to stand by in indecision and allow the crucial days to pass. There is little doubt that the advisers and men who surrounded the Maharaja failed to realise the significance of the developments which were taking place on the sub-continent. Most of them, devoid of any political foresight, could not even visualise the possibility of the British withdrawal and the ultimate dissolution of the Indian Princely order. Hari Singh suffered from an excessive

sense of incredibility and found it difficult to realise that the British would abandon the Princes even if they meant to leave India. To that extent the British officers of the State Department spared no efforts to assure the Maharaja. The Prime Minister of the State, Ramchandra Kak, a thoroughbred bureaucrat proved as incapable to read the run of the history as his master did. He scrupulously obeyed his master. Hari Singh continued, as every Indian Prince did, to poison himself on the tight balance between the operatives of the British colonial framework and the Indian national struggle. The princes had little significance otherwise. In fact, the Maharaja and his Prime Minister tried in their own way to put the small weight they had, on the side of the Paramountcy and suppress and sabotage the national movement in the State, realising little that their demonstrative loyalty would actually fling them into oblivion.

Much is not known about the course of action the Maharaja and his government had taken, but all circumstantial evidence proves that independence for him and his State was uppermost in his mind. Ramchandra Kak followed his master with loyal vigour and though adequate evidence is not available to assess his role during those critical days, it can safely be said that he did not disagree with his master, but actively supported the Maharaja till he remained in office, a course which ultimately proved disastrous to both. The coterie of the Court grandees was hostile to the adoption of a politically sound policy. In fact, the zest with which they had isolated the Dogras from the national mainstream and arraigned themselves against the national movement in the State and the fear they harboured that the transfer of power at the national level would consequently involve the loss of patronage they enjoyed, had blinded them completely. With thoughtless resignation they applauded the obstinacy, the State government demonstrated. Ramchandra Kak had, however, a keen sense of history, but he tripped where he should have been able to look miles ahead. Perhaps, he too refused to learn the vital lessons from history to which he had been so devoted. By his obdurate policies he had brought himself as well as the Dogras to a dead end. Time offers no chance, but it is another of the inexplicable turns in the history of the State, that he and his master were saved in the holocaust that followed.

84 *Kashmir on Trial*, p. 12.

85 Gupta, Sisir, *Kashmir, a Study in India-Pakistan Relations*, pp. 76-79.

It was neither realised by the Maharaja nor by his Prime Minister, nor the men who thronged the Court and supported the Maharaja in his endeavour to secure independence for his State, that the Dogra estates, running over long stretches of mountainous terrain, inhabited by less than four million people and with resources barely sufficient to sustain them, could not be integrated into a viable political unity. The State, after it was constituted by the British in 1846, had lived along under the patronage of Paramountcy and in fact, had fed on it. Effective instruments of political control did not exist and the borders of the State stretched along the tactical frontiers of some of the most powerful nations in Asia. Major General H. L. Scott, who commanded the armies of the State had under his command a few battalions of foot troops to man the borders of the State.⁸⁶ Scott was a glamorous old man with much glittering steel in his deep blue eyes, but after all, no independent state could be founded on dramatics. The Englishman was under no illusion himself, for the disposition and the deployment of the State troops, that he ordered to be effected clearly proves that he was well aware of what was to happen and possibly played his part well. The Maharaja and his Prime Minister on whose shoulders the responsibility of the security of the State and its future lay, continued to remain oblivious to what was happening around them. Both, possibly, refused to recognise that the Second World War had shattered the British Colonial Empire and destroyed the Paramountcy for ever. Britain had ceased to be the power it was before the War, and a new balance of power was in the process of evolution. The patterns of power sought to be built on the sub-continent, were therefore, inescapably bound to be affected and determined by the factors other than those involved in Paramountcy. Not long after, the events proved that, for the Dogras could not withstand the onslaught of the invaders from Pakistan, and had it not been for the two hundred gallant men with General Rajinder Singh, the new chief of the State troops, who fought for moments at Uri with their bare teeth and laid down their lives to earn the Maharaja, a day's reprieve, the story would have been different.⁸⁷

⁸⁶ Sen, L. P. *Slender Was The Thread*, pp. 3-4.

⁸⁷ Sen, L. P. *Slender Was The Thread*, pp. 37-38.

Lord Mountbatten came to Srinagar to discuss with the Maharaja the position the latter intended to take with regard to the accession of the State. He had long discussions with the Maharaja.

“Lord Mountbatten spent four days discussing the situation and arguing with the Maharaja. He told him that independence was not in his opinion, a feasible proposition and that the State would not be recognised as a dominion by the British Government. He assured the Maharaja that so long as he made up his mind to accede to one dominion or the other, before fifteenth of August, no trouble would ensue, for whichever dominion he acceded to would take the State under its protection as part of its territory. He went so far as to tell the Maharaja that if he acceded to Pakistan, India would not take it amiss and that he had a firm assurance on this from Sardar Patel himself. Lord Mountbatten went further to say that, in view of the composition of the population, it was particularly important to ascertain the wishes of the people”.⁸⁸

The Maharaja was evasive and avoided to commit himself to any of the courses underlined by the Governor General. Mountbatten sought another meeting with him and his Prime Minister on the morning of the last day of his visit, probably to persuade the Maharaja to take a decision. The meeting, however, did not come off. It is interesting to find that Lord Mountbatten gave an assurance to the Maharaja that if he acceded to Pakistan, the Government of the Dominion of India would readily accept his decision. It is difficult to believe that the Government of India did not know the Maharaja's mind and also that accession to Pakistan would be the last act, the Maharaja was prepared to commit. It is more difficult to appreciate the Governor General offering an assurance to the Maharaja and reiterating a formulation which he knew was only formal. Perhaps the Governor General wanted to convey to the Maharaja, his disapproval and the discomfiture of the Indian leadership at his plans of remaining independent. Pandit Ram Chandra Kak was given ample opportunity by the

⁸⁸ Menon, V. P. *The Story of the Integration of the Indian States*.

Indian leaders to reconsider the course of action, he and his government had taken and take a decision which would ultimately be helpful to the State. Sardar Patel wrote to the Prime Minister and in a very mild and sedate tone told him that the time had come to reconsider the policy with regard to National Conference and evolve a new line of approach in view of the developments occurring on the sub-Continent. Kak assumed silence and did not even care to communicate his views to the Sardar. In July, Patel again wrote to the Prime Minister, exhorting him to reconsider the issue while there was still time. Patel wrote to Kak :

"Do you still think Sheikh Abdullah should continue to remain in jail. I am asking this question purely in the interests of the State. You know my attitude all along and my sympathy towards the State. I am once again advising you as a friend of the State to reconsider the matter without any delay."⁸⁹

Kak was attending the meetings of the Negotiating Committee and Patel felt he could persuade the Prime Minister to relent. Patel, as a matter of fact, plainly advised the Maharaja to join the Indian Dominion and in unambiguous terms laid out the proposals to his Prime Minister, possibly trying to allay the fears, the Maharaja and his advisers entertained about the Indian Dominion and about the future set-up in the State.

Patel also communicated to the Maharaja, his disappointment at the inability of the Maharaja to discuss the issue with Lord Mountbatten when the Governor General was in Srinagar and his inability to avail of the opportunity to come to Delhi on his invitation. Patel in more or less remonstrative words, which were replete with more pathos than impatience almost implored the Maharaja to come to Delhi for talks.

"I fully appreciate the difficult and delicate situation in which your State has been placed, but as a sincere friend and well wisher of the State, I wish to assure you that the interest of Kashmir lies in joining the Indian Union and its Constituent Assembly without

89 Patel to Ramchandra Kak, *Sardar Patel's Correspondence*, Vol. I, p. 32.

any delay. Its past history and traditions demand it, and all India looks up to you and expects you to take that decision. Eighty percent of India is on this side. The States that have cast their lot with the Constituent Assembly have been convinced that their safety lies in standing together with India.

I was greatly disappointed when His Excellency the Viceroy returned without having a full and frank discussion with you on that fateful Sunday, when you had given an appointment which could not be kept because of your sudden attack of choleraic pain. He had invited you to be his guest at Dehi, and in that also he was disappointed. I had hopes that we would meet here, but I was greatly disappointed when His Excellency told me that you did not avail of the invitation.⁹⁰

The Maharaja did not take any decision. On fifteenth of August 1947, the two Dominions of India and Pakistan came into being. Expeditiously, the Maharaja offered a Standstill Agreement to both the Dominions. Pakistan clutched at the opportunity and immediately accepted the Standstill Agreement. Government of India, however, asked the Maharaja to send a representative to Delhi to discuss the implications of the Standstill Agreement. The Maharaja, thus assumed technical independence and isolated himself both from India and Pakistan, unaware of the dangerous possibility that Pakistan, poised all along the borders of the State and more than eager to grab it, could swoop down on him and wrest away the State from him by a single stroke of neat strategy.

That is what actually happened. Within a few days after the agreement was signed, Pakistan changed its mood and hardened its attitude towards the Maharaja. The two lines of communication which linked the State with the outside world, ran into Pakistan; the one connecting Srinagar with Rawalpindi and the other, Jammu with Sialkot. Both were sealed. In the beginning of September, Pakistan commenced the first phase of its forward thrust by organising raids all over the State borders

90 Patel to Maharaja, *Sardar Patel's Correspondence*, p. 33.

destroying property and killing people.⁹¹ As the Pakistani offensive intensified, the Maharaja realised the predicament he had placed himself in. Towards the close of the month, Pandit Ram Chandra Kak was dismissed from his office and Meher Chand Mahajan, a judge of the Punjab High Court was appointed the Prime Minister of the State. On 29th September, Sheikh Mohammad Abdullah was released from his imprisonment.

Mahajan had a difficult situation to handle. There were hardly any troops to withstand the onslaught of the Pakistani raiders. Inside the State, there was chaos. The spirited appeals and sharp protests he preferred to the Government of Pakistan proved futile and instead drew counter protests and invective. The National Conference refused to commit itself to any course of action till the Maharaja did not accept the people's demand for political reforms.⁹²

On 22nd October, large bands of armed raiders entered Kashmir via the Abbottabad road near Muzaffarabad. The irregulars were closely followed by the regular troops of Pakistan. Within a couple of days Pakistan mounted offensive all along the borders of the State. The invading armies poured in thousands making a frenzied bid to reach Srinagar and Jammu, the two capital towns of the State. The few Dogra battalions, which were posted at the frontiers, offered heroic resistance but were over-run without much difficulty. The attack was sudden and intense and a considerable section of civilian population perished in the holocaust. How did the people of Kashmir rise in resistance against the invasion is a saga of sheer daring and fortitude. The price that they paid to live and also to save their country was not in any way less than that staked by any freedom loving peoples of the world to uphold their faith.

On the 24th October, the Maharaja appealed to the Government of India for help and offered accession of his State to the Indian Dominion. Three days after, the accession was accepted and the Indian troops were rushed to the State to save it

91 Mahajan, Meher Chand, *Looking Back*, p. 144.

92 Sharma, B. L. *Kashmir Awakes*, p. 78.

from the fast advancing raiders.⁹⁵ After some resistance the invaders fell back. By the end of the year they were fast on retreat.

On 1st January 1948, India appealed to the United Nations and requested the Security Council to ask Pakistan to withdraw the raiders and its forces from the territories of the State. Pakistan, after prolonged silence, presented to the Security Council a long list of complaints against India. Security Council appointed a Commission to conduct on the spot investigations of the complaints lodged by India. The enquiry ultimately confirmed the complicity of Pakistan in the tribal invasion. Long and protracted mediation by the Commission brought round the two governments to accept a cease-fire on the battle front, pending the final disposal of the case. Fighting was suspended on first January, 1949. A large part of the territory of the State remained under the occupation of Pakistan. It is still unreclaimed.⁹⁶

95 Menon, V. P. *Integration of the Indian States*, p. 399.

96 Gupta, Sisir, *Kashmir, a Study of India-Pakistan Relations*, p. 189.

Chapter Two

The Special Status

During the critical days the accession was finalised and the Indian troops were sent to the State, the National Conference leadership insisted that the power be transferred to the popular leaders and a pattern of responsible government be instituted in the State. Immediately after the accession of the State was finalised, an Emergency Administration, headed by Sheikh Mohammad Abdullah, was set up in the State. Other leaders of the National Conference were appointed to the other offices in the Emergency Administration.¹ The Maharaja desired that the Emergency Administration operated within the ambit of the authority earmarked for it by the Council of Ministers, which in fact, was intact but hardly in a position to function effectively and with any prospect of fruitful achievement. Obviously, the Emergency Administration was meant to work in subordination to the Ministerial establishment of the Maharaja. This, however, placed hardly any purposeful initiative and power with the Emergency Administration. Its powers were not defined nor was the orbit of its authority. As a matter of fact, even the territorial jurisdiction of the Emergency Administration was not delimited; confusion reigned supreme and everyone interpreted the powers he had, the way that suited him. For a few days after the institution of the new administration, the Prime Minister of the State carried the impression that the Emergency Administration had been established to cover the province of Kashmir only and he was rudely jolted out of his complacency when an Emergency Officer was despatched to Jammu to take over the administration there.

1 Command Order, 30th Oct. 1947.

Looking back, it is difficult to locate the reasons for which the Emergency Administration was instituted and the tasks it was expected to undertake. The Emergency Administration, as it was organised, was a shoddy structure hardly equipped with the power and prestige to face the crisis the State was in. The situation, as it had emerged after the invasion, and the confabulations which had passed between the Central leadership and the Prime Minister of the State, clearly indicated that a quantum of power would be transferred to the National Conference. Sheikh Mohamad Abdullah had suggested that the powers of the Government be transferred to the Conference leaders and the present ministerial establishment be abolished or, in case, it was allowed to continue, divested of its powers.² In fact, the choice was very limited. The invaders were hardly a few miles away from Srinagar and destroying everything that came in their way in the Jammu Province with fiendish ferocity. Scarcity was acute and the supply lines were suspended. Streams of refugees poured in from the occupied areas. The law and order had completely broken down. The Maharaja, however, was reluctant to part with any substantial authority and hand over any power to the National Conference leadership. The juxtaposition of the Ministerial Council between him and the Emergency Administration, was bound to lead to clash in the operation of the two authorities. That happened and generated considerable ill will and acrimony on the two sides; the Maharaja and his Prime Minister protesting that they had been left with nothing and the leaders in the Emergency Administration grumbling that they had been secured nothing.

In November, the Government of India advised the Maharaja to institute an Interim Government in the State with Sheikh Mohamad Abdullah, the Prime Minister. The Maharaja was advised to retain his Prime Minister in the capacity of his Dewan, who would remain a member of the Council of Ministers and also formally preside over the Council meetings. The plan was the same as that adopted for the Mysore State. Unfolding the proposals, Nehru wrote to the Maharaja :

2 Nehru to Hari Singh, Sardar Patel's Correspondence, p. 104.

"I think that the time has come when there should be no further delay in this matter and a stable government should be established. This will have a good effect on the people of Kashmir, and others outside Kashmir will also realise that enduring arrangements are being made there. We have agreed that this Interim Government should be on the model of Mysore. In Mysore the leader of the popular party was asked to choose his colleagues, he himself being the Prime Minister or Chief Minister. The Dewan was also one of the Ministers and he presided over the meetings of the Cabinet. In following this precedent, Sheikh Abdullah should be the Prime Minister and should be asked to form the Government. Mr. Mahajan can be one of the Ministers and formally preside over the Cabinet. But it would introduce confusion if Mr. Mahajan continues to be styled as Prime Minister. This Interim Government, when formed, should be in full charge and you will be constitutional head of the Government."³

Difficulties again cropped up. Sheikh Mohamad Abdullah was not satisfied with the arrangements and did not agree to the interposition of a Dewan between him and the Maharaja. This was communicated by Gopalaswamy Ayyangar to the Maharaja shortly after Nehru's despatch to him. Ayyangar suggested to the Maharaja that while the broad frame within which the Interim Government would be constituted, would follow the Mysore scheme, certain modifications and adjustments were necessary to be made in the scheme in order to adapt it to the situation as it had developed in Kashmir. Ayyangar suggested that :

- (i) an Interim Government, constituted of a Council of Ministers, be set up under the Constitution Act of 1939 ;
- (ii) Sheikh Mohamad Abdullah be appointed the Prime Minister of the State and the other Ministers of the Council be appointed on his advice ;

³ Nehru to Hari Singh, Dec. 1, 1947. *Sardar Patel's Correspondence*, Vol. I, p. 105.

- (iii) provision for the retention of a Dewan, who would preside over the Council and act as a link between the Ministry and the Maharaja be abandoned and Mr. Mahajan be relieved of his office ;
- (iv) the Maharaja be permitted to retain the power to place restrictions on the function of the Council of Ministers by special directions in respect of certain matters of administration ; and
- (v) the Interim Government would be responsible to the Maharaja.⁴

The plan underlined by Ayyangar envisaged a more coherent and coordinated administrative structure for the State. The interposition of the Dewan, between the Maharaja and the Council of Ministers, would not only create a system of dual government and loyalty but would break up the government of the State into warring factions and hamper the evolution of an organic and integrated administrative function. The Maharaja, however, insisted on the strict adherence to the Mysore model. Instead he drew up another scheme on the basis of the Mysore model and submitted it to Ayyangar for consideration.

The main features of the Scheme drawn by the Maharaja were :

- (i) Matters, such as, the Ruler, his family, prerogatives, succession, privy purse, Constitutional relation between the State and the Dominion of India as defined in the Instrument of Accession, High Court, the appointment of the Judges ; the Chairman and the members of the Public Service Commission, and Auditor-General, the Military, the protection of the legitimate interests of the minorities, summoning and the dissolution of the legislature, elections, emergency and breakdown of the constitutional machinery of the State and the residuary powers be excluded from the purview of the Council of Ministers and specifically reserved for the Maharaja ;
- (ii) Dewan be appointed a member of the Council and be empowered to be the President of the Council and

⁴ Ayyangar to Hari Singh, Dec. 9, 1947. *Sardar Patel's Correspondence*, Vol. I, p. 108.

function as the link between the Ministry and the Maharaja ;

- (iii) Praja Sabha be revived and after fresh elections be declared the Constituent Assembly.⁵

The scheme was neither appreciated by Ayangar nor accepted by the National Conference leadership. Ayangar made a few minor modifications to his plan and agreed to reconsider the reservation of certain subjects for the exclusive control of the Ruler. The wrangle was finally resolved. The Interim Government was instituted by a Proclamation, the Maharaja made on 5th March, 1948. The powers of the administration, except for a few subjects, reserved for the Ruler were vested with the Council of Ministers which was to work on the principle of joint responsibility. The Council was charged with the task of convening a national Constituent Assembly based on adult franchise to frame a Constitution for the State. Four representatives were deputed by the Maharaja to the Constituent Assembly of India.

Though the constitutional crisis was finally averted, the two sides failed to evolve and work in a spirit of compromise. The undercurrent of tension between the Maharaja and the Interim Government continued unabated. In fact, he was hardly left with any substantial authority and could not influence the function of his Ministry. He sulked away, closing himself up in his palace at Jammu; almost indifferent to what the Interim Government did. This left the Interim Government free to operate. For the Government of India, this was far from satisfactory. Commenting on the situation Nehru wrote to Patel :

“There continues to be an undercurrent of tension between the Maharaja and Sheikh Abdullah. There was no incident while I was there and Sheikh Abdullah was courteous throughout to the Maharaja, who participated in some of the functions. But the fact remains that there is this tension. The Maharaja means well but cannot easily get out of the habits of a life time.

5 Maharaja Hari Singh to Gopalaswami Ayangar, Dec. 17, 1947. *Sardar Patel's Correspondence*, Vol. I, p. 94.

His reluctance to meet people helps in creating misunderstandings.”⁶

On their part, the Interim Government too, did not adopt an attitude of sympathy and compromise with the Maharaja. Where the Maharaja required to be consulted he was bullied and where he was needed to be informed, he was ignored. The agreement pertaining to the conduct of the government was hardly followed by the Interim authority and the reserved subjects were shown scant respect. Patel wrote to Nehru :

“In fact, this problem of differences and tension between the two has been worrying me very much. I have written several letters to Sheikh Sahib about easing this tension and improving relations, but I regret to say that I have had no reply. From all accounts it appears that the arrangements regarding reserved and non-reserved subjects to which Sheikh Sahib had agreed in March last are now being treated as nullity and the presence of the Maharaja and the existence of the reserved subjects are both being ignored.”⁷

It looks rather tragic that both Nehru and Patel, who knew so well the actualities of the situation in Kashmir, and realised how dangerous the consequences of the political crisis could be, watched the time and opportunity pass by, helplessly. In the confusion that prevailed in the State, it was difficult to locate the blame and even if the blame was located, it was hardly expected to improve the situation. The Government of India had adopted a policy of wild commitments followed by half-hearted decisions and this had neither served the Maharaja nor carried the National Conference any further. Towards the Summer, 1948, the political crisis deepened and it was clear that the Maharaja and the Interim Government could not go along any longer. Sheikh Mohamad Abdullah became severely critical of the Maharaja and asked for his abdication. In his communication to the Home Minister he wrote :

6 Nehru to Sardar Patel, May 12, 1948. *Sardar Patel's Correspondence*, Vol. I, p. 189.

7 Sardar Patel to Nehru, June 4, 1948. *Sardar Patel's Correspondence*, Vol. I, p. 193.

"I am therefore constrained to aver once again that the choice is finally between the Maharaja and the people and if the choice is not soon made, it might land us into very serious trouble both militarily and politically. The only alternative is that His Highness should abdicate in favour of his son and that there should be no reservations whatsoever in the administration of various subjects under the Ministers. This is my considered opinion after taking stock of the whole situation in the last seven months. I have on a number of occasions apprised Pandit Ji, Mr. Gopalaswami Aiyangar and other high-ranking officials of the Government of India of this. Recently I had a frank talk about this with Rajkumari Amrit Kaur. I am therefore giving here my considered, decisive and final opinion in this behalf. It is now upto the States Ministry and Pandit Ji to decide how this object is to be achieved."⁸

In September 1948, Sheikh Mohamad Abdullah sharply criticised the existing constitutional arrangements in the State, in a press conference in Srinagar. The press conference worked a sharp rejoinder from the Home Ministry. Abdullah hit back harder. The stalemate lingered on for some more time. Finally, on April 29, 1949 a shocked and bewildered Maharaja was politely told by Sardar Patel to leave the State and appoint his son, Yuvraj Karan Singh, the head of the State.⁹

Article 370

The Instrument of Accession transferred to the Dominion Government, the powers with regard to defence, external affairs and communication. The matters corresponding to these powers were enumerated in the Schedule attached to the Instrument of Accession. These matters were :¹⁰

8 Abdullah to Nehru, June 1, 1948. *Sardar Patel's Correspondence*, Vol. I, p. 3.

9 Nehru to Sardar Patel, May 11, 1949. *Sardar Patel's Correspondence*, Vol. I, p. 268.

10 Schedule of the Instrument of Accession : The matters with respect to which the Dominion Legislature may make laws for the State.

- (i) the military, air and naval forces of the dominion, armed forces raised or maintained by the Dominion, forces including the forces raised or maintained by acceding States attached to and operating with any of the armed forces of the Dominion, naval, military and air-force works and the administration of cantonments, arms, ammunition, and explosives ;
- (ii) external affairs, treaties and agreements with other countries, extradition, admission into, emigration, expulsion from India, regulation of the movement of foreign nationals, pilgrimages to places outside India and naturalization ;
- (iii) communications, posts and telegraphs, telephones, wireless, broadcasting and other forms of communication, railways, maritime shipping and navigation, admiralty jurisdiction, major ports, port quarantine, delimitation of port and port authorities, air-craft and air navigation; aerodromes, air-traffic, light houses, beacons, safety for shipping and air craft, carriage of passengers and goods by sea and air and police force of the railways ;
- (iv) Elections to the Dominion Legislature, offences against laws with respect to any of the matters transferred to the Dominion of India, inquiries and statistics with regard to these matters and the jurisdiction of all courts with regard to these matters.

The implications of the division of powers, envisaged by the Instrument of Accession, were neither assumed by the Indian Government nor realised by the Government of the State. In fact, till the controversy with regard to the formation of the Interim Government remained unresolved, the Government of India hardly got the opportunity to assess the issue of Centre-State relationships with any clarity of approach.

Uppermost in their mind was the difficult problem of the finding a balance between what the Maharaja of Kashmir still thought constitutionally right for the State and what the leaders of the National Conference deemed politically expedient. The Government of India was also more than involved

in the disputation with Pakistan and the complicated problem of negotiating a truce on the battlefield and conduct of the plebiscite in the State. The dispute with Pakistan had taken its own course. The Security Council dealt a frontal blow to the idealism Nehru cherished and before the Indian leaders realised the predicament they had pushed themselves into, by going to the Security Council with the complaint, they were in the dock, explaining all else than that relevant to their complaint. India had gone to the Security Council with a sincere belief that the aggression committed by Pakistan was patently obvious. Within a few days, after the complaint was lodged, the Indian leaders, scared and frustrated, were frantically and abjectly trying to prove the obvious again and again, more than often by going to absurd extremes.

After the Maharaja left the State and the Yuvraj was appointed the Regent, the relations between the two governments and the delimitation of their respective spheres of authority came up for consideration. As a matter of fact, the Constitution of India was in the final phase of its making and the constitutional provisions with regard to the State were required to be defined. The process of integration and constitutional adjustment which had been adopted in regard to the other Indian States, was not followed in case of Kashmir, and the constitutional relationship between the State and the Central Government continued to be governed by the provisions embodied in the Instrument of Accession. The issues were discussed in a meeting held in Delhi in May 1949, between the Indian leaders and the leaders from the State. Certain broad principles were agreed upon by the two sides, on which, the constitutional position of the State, in the future constitutional structure of India, was to be based. These principles stipulated :¹¹

1. the constitution of the State would be framed by a Constituent Assembly representing the people of the State ;
2. the future of the dynastic rule of the Dogras would be determined by the Constituent Assembly of the State ;

11 Nehru to Sheikh Mohamad Abdullah, May 18, 1949. *Sardar Patel's Correspondence*, Vol. I, p. 226.

3. the division of powers between the Government of India and the State would be governed by the provisions of the Instrument of Accession ;
4. the Constituent Assembly of the State would be empowered to determine what other powers would be transferred to the Government of India ;
5. provisions with regard to citizenship, Fundamental Rights and the Directive Principles of State Policy, envisaged by the Constitution of India, would be uniformly applicable to this State ; and
6. the operational and the administrative control of the State armies would be taken over by the Government of India.

Not long after, the National Conference leadership started a gradual withdrawal from the commitments it had made in Delhi. The position the State leaders ultimately came to take, crystallised finally, when the special provisions for the State were drafted for being placed before the Constituent Assembly of India. The draft provisions were mainly based on the general principles agreed upon at Delhi by the Central and the State leaders in May. The provisions envisaged :¹²

1. "the provisions of the Constitution of India with regard to the government in the other Indian States which had acceded to the Dominion of India were not to apply to Jammu and Kashmir, which was reserved the power to draft a Constitution for its government ;
2. the State was empowered to convene a Constituent Assembly representing the people of the State to draft the Constitution of the State ;
3. the Government was to have the power to legislate in regard to the State on the subjects enumerated in the Union List, and the Concurrent List, which were declared by the President of India to correspond to the matters specified in the Instrument of Accession and such other matters which the concurrence of the Government of the State, the President would by order specify ;

12 Draft Article 306-A.

4. the provisions of the Constitution of India pertaining to citizenship, Fundamental Rights and the Directive Principles of the State Policy, embodied in the Constitution of India were to apply to the State ;
5. the other provisions of the Constitution of India were to apply to the State by an order of the President, which he was empowered to issue with the concurrence of the Government of the State except in case of the matters incidental to the constitutional provisions for the Government of the State and the subjects transferred to the Government of India under the Instrument of Accession where the President was only required to consult the Government of the State ;
6. The President was empowered to amend or repeal the special provisions for the State on the recommendations of the Constituent Assembly of the State.

Sheikh Mohamad Abdullah wrote to Gopaldaswami Ayangar, shortly after the draft provisions were sent to the State leaders for their final approval, that the proposals had not been accepted by the Working Committee of the National Conference. The Conference leaders were apprehensive of the fact that the powers vested with the Constituent Assembly of the State, opened the possibility of the total abrogation of special provisions and the consequent application of the Constitution of India to the State in its entirety. The Conference leadership was also fearful that the application of the provisions of the Constitution of India with regard to citizenship and Fundamental rights, would affect the State-Subject laws, prohibiting the acquisition of property by other citizens of India in the State and prejudice the land reforms undertaken by the State Government. Sheikh Mohamad Abdullah sent to Gopaldaswami Ayangar an alternative draft which provided for the application of the Constitution of India to the State only in regard to the subjects which had been transferred to the Dominion of India by virtue of the Instrument of Accession.

Ayangar hurriedly redrafted the proposals he had made earlier, and sent them to the National Conference leaders for their approval. The revised draft incorporated the fateful change of omitting the provisions pertaining to the Fundamental

Rights and Directive Principles.¹³ Little did the State leaders, who pressed for this reservation, realise that, they had vested the government in the State with unrestricted authority, and whoever had the government in hand, would assume dictatorial powers and powers which could be operated absolutely.

The revised draft was also rejected by the State leaders. The Indian leaders were far from happy at the turn the events had taken. Nehru was away and for Ayangar it was an ordeal to formulate a compromise. He wrote to Abdullah :

“Our discussion this morning, as I indicated to you, left me even more distressed than I have been since I received your last letter from Srinagar.

But this personal reaction of mine is irrelevant when I feel weighted with the responsibility of finding a solution for the difficulties that, after Panditji left for America and within the last few days, have been created, from my point of view, without adequate excuse.”¹⁴

Ayangar wrote to Sardar Patel also.

Sheikh Abdullah and two colleagues of his had a talk with me for about an hour and a half this morning. It was a long drawn out argument, and, as I told you this morning, there was no substance at all in the objections that they put forward to our draft. At the end of it all I told them that I had not expected that, after having agreed to the substance of our draft both at your house and the party meeting, they would let me and Panditji down in the manner they were attempting to do. In answer, Sheikh Abdullah said that he felt very grieved that I should think so but that in the discharge of his duty to his own people he found it impossible to accept our draft as it was.¹⁵

Finally, however, the wrangle was resolved. A revised draft was prepared by Ayangar in consultation with Mirza

¹³ Redraft of Article, 306-A.

¹⁴ Ayangar to Sheikh Mohamad Abdullah, Oct. 15, 1949. *Sardar Patel's Correspondence*, Vol. I, p. 304.

¹⁵ Ayangar to Sardar Patel, Oct. 15, 1949. *Sardar Patel's Correspondence*, Vol. I, p. 243.

Afzal Beg and other Conference leaders. Another important change was made in the draft and provisions pertaining to citizenship were also dropped out.

The draft was moved in the Constituent Assembly on 17th October. Shortly before the revised draft was taken up for discussion, controversy again cropped up, now on the question of who constituted the Government of the State. The Conference leaders, extra-conscious of their role in the politics of the State, insisted that the Government of the State should be construed to mean the Maharaja acting on the advice of the "Council of Ministers" appointed under the Maharaja's Proclamation dated 5th March, 1948." Ayangar had probably glossed over the intricacy involved in the definition evolved by the Conference leaders and accepted to include it in the revised draft. However, when the draft was circulated in the Assembly, many members objected to the draft stipulation on the obvious ground that the definition was restrictive to the extent that it covered only the Ministry appointed by the Proclamation issued on 5th March, 1948, and excluded any subsequent ministries appointed under the Proclamation. Ayangar modified the explanation to the extent that the Government of the State would be construed to constitute of the Maharaja acting on the advice of "the Council of Ministers for the time being in office under the Maharaja's proclamation dated 5th March, 1948." However, when the modified explanation was presented to the State leaders, they blankly refused to accept it. Ayangar assured the Conference leaders that the changes made in the explanation were trivial, but were considered necessary from many points of view. Maulana Azad also tried to persuade the Conference leaders to accept the changes suggested by the members of the Constituent Assembly. The Conference representatives, however, refused to relent. The draft provisions were put before the Assembly with the amendment made by Ayangar, and passed unanimously.¹⁶ The Conference leaders sulked away. Sheikh Mohamad Abdullah wrote a sharp rejoinder to Ayangar asking

16 Gopaldaswamy Ayangar to Sheikh Mohamad Abdullah, Oct. 17, 1949. *Sardar Patel's Correspondence*, Vol. I, p. 307.

him to reconsider the issue failing which, he threatened to resign from the Constituent Assembly.¹⁷ The controversy, however, ended there.

The special provisions as they came to be included in the Constitution of India, were finally embodied in Article 370 of the Constitution.¹⁸ In accordance with these provisions, the State was exempted from the application of the provisions of the Constitution of India dealing with the States included in Part B of the First Schedule of the Constitution. In part B of the First Schedule were listed the princely States which had acceded to the Dominion of India and which were not either merged with any province or brought under the Central control but were organised into viable units of administration. The Princely States, when they acceded to the Dominion of India in 1947, transferred to the Dominion Government, powers with regard to three subjects only namely, foreign affairs, defence and communications, retaining the residual powers with them. Later, however, most of the Rulers, transferred, by subsequent agreements to the Dominion Government, all the powers with regard to the Union List and the State List except with regard to taxation. The Part B States, therefore, were put at parity with Part A States except for the special provisions embodied under Article 238 and the supervisory powers the centre was given for a transitional period of ten years. Kashmir was saved from the application of the special provisions provided for the States included in Part B of the First Schedule. The State was reserved the right to frame a Constitution for its government. Provisions were included in the Constitution of India, for the institution of a Constituent Assembly in the State which would prepare a constitution for the State.¹⁹

The powers of the Parliament to legislate in regard to the State were limited to the matters which were declared by the President, in consultation with the Government of the State, to correspond to the Instrument of Accession.²⁰ The Union

17 Sheikh Mohamad Abdullah to Gopaldaswamy Ayangar, Oct. 18, 1949. *Sardar Patel's Correspondence*, Vol. I, p. 309.

18 Constitution of India, Article 370, cl. 1 (a).

19 *Ibid.*, Article 370, cl. 2.

20 *Ibid.*, Article 370, cl. 1 (b) i.

Government retained the powers which the Dominion Government had been transferred by virtue of the Instrument of Accession. The residuary powers were reserved for the State. The scheme of the division of powers between the Union and the States embodied in the Constitution of India, was not, therefore, adopted in case of the Jammu and Kashmir State. The President was empowered to transfer powers with regard to such other subjects in the Union List and the Concurrent List as he specified in concurrence with the Government of the State.²¹ In case, any agreements were reached between the Union and the State with regard to such transfer of powers to the Union, before the Constituent Assembly of the State was convened, the agreements were to be "placed before the Assembly for such decision as it might take thereon."²²

Among the other provisions of the Constitution of India, the provisions embodied in Art. 1 were made applicable to the State.²³ The State was included in the Schedule listing the territories of the Union and therefore brought within the territorial jurisdiction of the Union defined by the Constitution of India. The territories of the State were defined as the territories which formed the State, when the Maharaja of the State had signed the Instrument of Accession and therefore, included the part of the State under the occupation of Pakistan. Other provisions of the Constitution of India, including those pertaining to the Fundamental Rights and the Directive Principles were not made applicable to the State. Powers were vested with the President of India, to order the extension of the other provisions of the Constitution of India to the State. No such order was, however, to be issued without the concurrence of the State Government.²⁴ In case, any such order was issued before the Constituent Assembly of the State was convened, the concurrence given by the State Government was to be placed before the Constituent Assembly "for such decision as it may take thereon."

21 Ibid., Article 370, cl. 1 (b) ii.

22 Ibid., Article 370, cl. 1 (c).

23 Ibid., Article 370, cl. 1 (c).

24 Ibid., Article 370, cl. 1 (d).

Provisions were also embodied in Article 370 by virtue of which the President of India was empowered to declare, by a public notification, these provisions or any part of these provisions not operative or operative with such modifications as he would specify. The Powers vested with the President were subject to the limitation that he could restrict or limit the operation of the special provisions only on the recommendations of the Constituent Assembly of the State.²⁵ Obviously, the President was not vested with the power to amend or abrogate the special provisions envisaged by Article 1; he was only authorised to order restrictions and limitations on its operation.

On 25th November, 1949, Yuvraj Karan Singh, by a proclamation, ordered that the relationship between the State and the Union of India be governed by the Constitution of India. According to the proclamation the Constitution of India superseded and abrogated all other constitutional provisions inconsistent with it which were in force in the State. On 26th January, 1950, the Constitution of India came into force.

Operatives and Impediments

Not long after the special provisions for the State were incorporated in the Constitution of India, many lacunae and short-comings which the special provisions were fraught with, came to surface. In fact, the special provisions had a number of inherent defects. The Government of the State left apart, the division of powers between the State and the Union created difficulties of great magnitude. Obviously, no organic and tenable federal relations between the State and the Union could be based on the division of powers envisaged by the special provisions for the State. The legislative relations, though intricate, did not present with as pressing a problems as those created by the administrative and financial relations between the Union and the State. In the absence of any federal instruments to carry out the decisions of the Central Government, the Central Government found itself at the mercy of the State Government. In regard to the other Indian States, the Central Government was vested with the power to direct and instruct the State Governments not only to execute the decisions

25 Ibid., Article 370, cl. 2.

of the Central Government, but also to exercise their administrative authority so as not to impede the execution of the decisions of the Union Government. However, no rescript of the Union could operate in Jammu and Kashmir State. The problem assumed fresh significance after the unforeseen and unexpected pressures were piled on the Government of India as a result of the turn the events took in the Security Council. The rude jolt, the Indian leadership received from the Council and the merciless mauling it got, ultimately compelled the Government of India to recast the entire strategy they had adopted in regard to the State. The need was acutely felt to build defences against the political blackmail and the psychological war unleashed by Pakistan. The population of the State predominantly muslim, the task was not only difficult, it was also delicate. The State leaders, however, jealously guarded the exclusive sphere of authority, the State Government was reserved under the special provisions. The division of powers, in regard to which the Union Government was at a disadvantage, set apart, the State leaders vehemently refused to accept the extension of the provisions of the Constitution of India, pertaining to Citizenship, Fundamental Rights, Directive Principles of the State Policy and the Union Judiciary, to the State.

The exclusion of the Fundamental Rights from the provisions applicable to the State, and the consequent deprivation of the people of these rights, was the most glaring defect the special provisions suffered from. The National Conference leadership had pledged itself to secure the people of the State, the basic rights to freedom and liberty. In its manifesto, 'Naya Kashmir', the Conference had underlined a Charter of Basic rights for the people of the State.²⁶ However, at the time Article 370 was framed, the Conference leaders exhibited much reluctance to accept the extension of the provisions of the Constitution, envisaging the Fundamental Rights, to the State. The Conference leaders also failed to devise an interim system of rights and remedies till the Constitution of the State, which presumably was to embody these rights, was drafted. The

problem of national security and the unsettled conditions in the State, necessitated limits on the general right to freedom, but in no case did these exigencies warrant a total denial of the rights to the people of the State. The absence of the rights and liberties had many implications in the circumstances where the operation of the government had no directives to follow a due process of law. Exercise of authority was indiscriminate and led to the curtailment of the right to freedom and personal liberty. The people of the State continued to be governed under the stringent provisions the local penal code and the penal procedures embodied and in fact more than necessary measures were adopted by the government to restrict the sphere of individual activity. The majoritarianism, more often than not, identified with communal and regional prejudices had many deleterious effects on the growth and function of the democratic ideas and institutions of the State.

The moral and ethical aspects of the problem were more important, for the reason that a section of the people of one and the same country were denied rights and liberties the rest of the people enjoyed. The National Conference leadership had insisted for the immediate transfer of power to them and in fact more feverishly on the establishment of a representative Assembly. The Conference leaders had, however, exhibited little enthusiasm to define the limits of political authority which throughout the Dogra rule had remained unrestricted in operation and caused irreparable damage to the people. The Conference leadership clutched at the strings of power with such vigour that even the Government of India faced considerable inconvenience and embarrassment. The Conference leadership incessantly clamoured for the institution of a "National Assembly" probably to achieve executive responsibility, but failed to lay down any imperatives to contain the power vested in the executive, they constituted or would come to be vested with the Assembly, they invoked. The limitations on executive as well as legislative authority had the same object: the prevention of dictatorship and despotism.

"It must be conceded that there are such rights in every free government beyond the control of the State. A government, which held the lives, the liberty and the

property of its citizens subject at all times to the absolute disposition and unlimited control of even the most democratic depository of power, is after all but a despotism. It is true, it is a despotism of the majority, if you choose to call it so, but is none-the-less despotism."²⁷

The Conference leaders made a fetish of the National Assembly, and after it was instituted, they secured their political precedence without much difficulty. The Constituent Assembly also functioned as the legislature of the State, and the Council of Ministers declared itself to be responsible to it. Soon, however, the distinctions were blurred and the Council, the Legislature and the Constituent Assembly were fused into one monolithic instrument.

Another anomalous feature of the special provisions with regard to the State was the total absence of any arbitral and judicial machinery to settle any disputes that could arise between the Union Government and the State. For inexplicable reasons, the provisions of the Constitution of India with regard to the jurisdiction of the Supreme Court, were not made applicable to the State. The Supreme Court of India is vested with the jurisdiction, to the exclusion of all other courts, in disputes between :

- (a) the Union of India and one or more States ;
- (b) the Union of India and any State or States and one or more States ; and,
- (c) two or more States.²⁸

Judicial supremacy and the provisions for a machinery of impartial arbitrament is a pre-requisite for a federal structure. In fact, an impartial and independent judiciary is a guarantee for the division of powers between the federal government and the governments of the federating units. The orbit of powers, the federal government is vested with and the governments of the States are vested with, is determined by the judiciary, and judicial interpretation, therefore, acts as a safeguard against any encroachment of the power the two tiers of the government. The Constitution of India clearly envisages provisions which em-

27 Citizen's Saving and Loan Association V. Topeka.

28 Constitution of India, Art. 131.

power the Supreme Court, to settle, in its original jurisdiction disputes between the Union Government and the States. The Constitution, creates infra-instruments within the federal structure, to safeguard the powers vested in the Union Government and the States. This is a validly viable provision of the Constitution. It is unbelievable, however, that the framers of the Indian Constitution should have ignored this important aspect of the division of powers between the federal government and the government of Jammu and Kashmir and the provisions in regard to the jurisdiction of the Supreme Court were not extended to the State. More intriguing is the fact that the State leaders stubbornly refused to accept the extension of the jurisdiction of the Supreme Court to the State. The State leaders, by insisting on the exclusion of the State from the purview of the original jurisdiction of the Supreme Court, preferred to leave the ultimate authority, to determine the federal relations between the Union and State, to the Parliament of India. For a long time the autonomy, the State enjoyed, remained without safeguards. A wily and aggressive Parliament, could have, with little difficulty, reduced the powers, left with the State by virtue of the special provision of the Constitution of India. For Nehru, however, the period between 1947 to 1954, was an era of great idealism. He carried the Parliament with him ; displayed the judgement of a jurist and voluntarily imposed on himself the limits, he was under no obligation to accept.

Another unsatisfactory aspect of the special provisions for the State, was the complete economic isolation, the State was forced in. In fact, both the Central leaders as well as the State leaders failed to evolve a rational policy with regard to the economic problems of the State and the financial relations between the Central Government and the State. The abolition of the big landed estates and interests and the destruction of the agrarian aristocracy, the abolition of indebtedness and usury, restitution of mortgaged properties, and the rationalisation of the land tenures were progressive in content and measures of great significance. But these measures alone could not improve the economic conditions in the State: its productive potential and the economic standards of the people. Planning of agricultural and industrial development, improvement in transport, com-

munications, irrigation and production of power, and other effective economic and fiscal measures were necessary to achieve any level of economic progress in the State. The State, however, lacked in necessary resources and the financial means to make a breakthrough. The Conference leaders chose to isolate the State within the tariff barriers, which yielded the State exchequer a sum of 1.5 Crores of rupees annually, and preferred to remain out of the fiscal structure the Union had devised. Incidentally, it may be noted, that the custom receipts constituted nearly the third of the revenues of the State. It is understandable that the State leadership was not in a position to lose the custom proceeds, but it is difficult to explain how the leadership planned to raise the means and finances necessary for the economic development of the State. The reluctance of the State Government to participate in the financial structure, the Government of India had evolved, and secure the support of the allocations from national sources closed all the possibilities of any economic breakthrough in the State.

One of the basic principles, the Indian federal structure envisaged, was the construction of an integrated national economic set-up for the entire country. A specific system of allocation of financial sources between the Union Government and the State Governments was provided by the Constitution. The financial relations between the Union and the State had certain broad aspects and in all these aspects the pattern followed was generally concentric. In the first place, the Union was given precedence over the States in the allocation of the sources and the States were placed in a subservient position in relation to the Union. In the second place the planning of the economic development and determination of the planning goals was entrusted to the Union Government. The most important aspect of the economic structure, the Constitution envisaged, was the fact that the Union Government was explicitly as well as impliedly vested with the power to lay down the broad basis of economic system, the country was to have. The right to property was included in the list of fundamental rights and the Union Parliament was empowered to amend and modify it. The Union Government was, therefore, given the ultimate power to shape the property relations in the Indian Society.

The Jammu and Kashmir State could not escape the imperatives of this system. Not only that, isolation was bound to lead to economic stagnation in the State and any contest between the national pressures and local resistance, possibly generated by such isolation, was bound to be disastrous for the federal relations between the two governments. The placement of the State in the economic system which was being built in the country was inescapable. The State leadership appreciated the constitutional significance of this fundamental fact and secured statutory guarantees for the economic reforms they had undertaken, but they failed to realise its political implications.

The operational problems created by the special provisions set apart, the wide permissibility which almost bordered on isolation, was irreconcilable to the essential features of the Indian federal structure—a fact, which deepened the contradiction between the decentralisation, the special provisions presupposed, and the uniformity, the Indian Federalism was founded upon.

The post-partition politics in India was aggressively national in outlook. The federal union, the framers of the Constitution, evolved was essentially concentric in content. The process of the integration of the Indian States, undertaken and accomplished by Sardar Patel with assiduous vigour, had finally eliminated the centripetal trends in the Indian States represented, and created a powerful central authority. The politics in India had, in fact, a far reaching sociological role to play in integrating the diverse regional, cultural and social pluralism into a unified political structure. The process was an imperative necessity and more shrewd of the Indian leaders realised that well. The special status envisaged for Kashmir could hardly be reconciled to this broad movement for national integration. Curiously enough, the Indian leadership took it for granted and more than often, articulately affirmed that the movement for national integration covered the State of Jammu and Kashmir as well; in spite of the fact, however, that the Government of India had abandoned the initiative for it by virtue of the special provisions pertaining to the State and had refused themselves the political operatives, without which the State could not be brought within the pale of national integration.

Doctrine of Double Charge

The most significant aspect of the special provisions was the institution of the Constituent Assembly in the State. Provisions for the establishment of a Constituent Assembly in the State were included in Article 370 of the Constitution of India and the State Government was given the power to convene a Constituent Assembly to draft a Constitution for the State and its government. The Assembly was ordered to be convened by the Yuvraj by a proclamation issued on 20th April, 1951. Elections to the Assembly were held in September. The Assembly was inaugurated in November, 1951. The proclamation of the Yuvraj read :

“Whereas it is the general desire of the people of the State of Jammu and Kashmir that a Constituent Assembly should be brought into being for the purpose of framing a Constitution for the State ;

Whereas it is commonly felt that the convening of the Assembly can no longer be delayed without detriment to the future well-being of the State ;

And whereas the terms of the proclamation of the Maharaja dated 5 March, 1948 in regard to the convening of a national assembly as contained in clauses 4 to 6 of the operative part thereof do not meet the requirements of the present situation ;

I, Yuvraj Karan Singh, do hereby direct as follows :

- (i) A Constituent Assembly consisting of representatives of the people, elected on the basis of adult franchise, shall be constituted forthwith for the purpose of framing a constitution for the State of Jammu and Kashmir.”²⁹

In November, the Assembly enacted the Constitution Act of 1951, by virtue of which the powers of the government were vested with the Council of Ministers and the ruler was reduced to the position of a constitutional head. The enactment further provided that the powers of the legislative assembly could be exercised by the Constituent Assembly until other provisions were made by or in accordance with any law made by the Constituent Assembly.

29 Proclamation dated.

The Constituent Assembly was established within the framework of the special provisions made under Article 370 of the Indian Constitution.³⁰ The Assembly was, obviously, charged with the power to lay down statutory provisions to regulate the area of autonomy reserved for the State. The scope of its competence and its placement within the constitutional set-up was determined by the Constitution of India. Subject to the provisions of the Constitution of India, the Assembly was vested with the power to advise the President of India to redefine the extent of the applicability of the Constitution of India to the State. Difficulties, however, cropped up immediately after the Assembly was convened. Though the Constituent Assembly of the State was constituted by an instrument of the Constitution of India and drew powers from the same source, the National Conference leaders claimed for the Assembly, inherent powers and powers original to it. The Conference leaders, therefore, evolved a doctrine of double charge. The concept of double charge did not only violate the fundamental principles of the Indian Constitution, it prejudiced the sovereignty of India. Accordingly, the Conference leaders sought for the Constituent Assembly, powers, not only to frame the Constitution for the State, but also the power to decide the final disposition of the State. In his inaugural address to the Constituent Assembly, Sheikh Mohamad Abdullah said :

“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 the French Constitutions 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

30 Constitution of India, Art. 370.

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.

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 generations 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 to the dark homes of the peasantry ; both 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 hands lies the power of this decision.

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

Unfolding the alternatives before the Assembly, Sheikh Mohamad Abdullah pointed out :

"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 the 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 groups and creeds are absent."³¹

Concluding the address Sheikh Mohamad Abdullah said :

"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 future."

The stand taken by the State leaders in the Constituent Assembly and the enunciation of the doctrine of double charge instantly undermined the accession of the State to the Indian Union. In fact, the Indian leaders, in consternation, had to hurry to clarify the confusion and reiterate the fact that the Constituent Assembly of the State was vested with no charge except to reaffirm the accession of the State to the Indian Union. The State of India was constituted of one integral charge which had been vested in the Constituent Assembly of India. The Constituent Assembly of the State was subservient to the instruments created by the Constituent Assembly of India and drew powers from these instruments.

The doctrine of double charge accosted the Government of India with another problem, more anomalous than the first. In case a separate charge was recognised in the Constituent Assembly of the State, the competence of Union and the applicability of the Constitution of India, would be suddenly

31 Inaugural Address of Sheikh Mohammad Abdullah, Constituent Assembly of Jammu and Kashmir.

limited to the terms specified in Article 370; a position which would not only be prejudicial to the Constitution of India in the sense that the Constituent Assembly of the State would, by the provisions it made, exclude any jurisdiction of the Union Government, but close for ever any possibility of modifying the provisions in regard to the State in future. The recognition of any inherent powers in the Constituent Assembly of the State would also destroy the precedence of the Constitution of India over the provisions made by the Assembly and reduce the Government of India to utter helplessness, even in case the Constituent Assembly of the State, transgressed its limit and violated the Constitution of India. In view of the fact that the original jurisdiction of the Supreme Court of India was not accepted by the State, conflicts which involved constitutional precedence, were bound to arise and prove catastrophic and ultimately lead, either to the termination of the special provisions for the State, or to the disintegration of the Indian Federation. The Supreme Court of India, has to the exclusion of all other Courts, original jurisdiction in inter-governmental disputes which involve questions of law or fact, affecting rights and constitutional interests of the Union Government and the State Governments.

Delhi Agreement

The events came to a head when the Basic Principles Committee of the Constituent Assembly of the State started deliberations to finalize the principles, on which the proposed Constitution of the State would be based. The area of autonomy, for which the Constituent Assembly would devise statutory provisions, required to be defined in order to eliminate any possible conflict and inconsistency between the provisions, the Assembly would make, and the provisions the Constitution of India included. The Government of India had indicated their preference for the extension of the other provisions of the Constitution of India to the State, at least in regard to Citizenship, Fundamental Rights, jurisdiction of the Supreme Court of India, Emergency powers of the President and the division of powers between the State and the Union. The existing arrangements had proved unworkable beyond doubt and had not only led to the unnecessary conflict in the operatives of the two

governments, but had also created many legal anomalies and political deviations. Besides, the Basic Principles Committee had already recommended the abolition of the hereditary rule of the Dogra Princes and decisions had to be reached with regard to the appointment and the tenure of the chief-executive that would replace the Maharaja.³² The issue was of fundamental importance in the sense that the chief-executive of the State was to be placed within the framework of the political control, the Constitution of India established. Nehru clarified the position in the Parliament.

"Now this position might well have lasted some time longer, but for the fact that the Constituent Assembly of Kashmir came into existence and came into existence with our goodwill and with our consent. Now it is sitting down to draw up its Constitution. When it is drawing up its Constitution, it has to be in some precise terms; it cannot be fluid. Therefore, the question arose that nothing should be done by the Constituent Assembly of the Jammu and Kashmir State which does not fit in with our Constitution, which in no sense is contrary to it or conflicts with any part of it. That is why this question arose now to consider."³³

It was against this background that the representatives of the two governments met in Delhi to settle their differences on some of these issues which had now assumed pronounced dimensions. An agreement was finally drawn up by the representatives which covered many of the constitutional problems including those related to the abolition of the Princely rule, the application of the provisions of the Constitution of India with regard to citizenship, Fundamental Rights, the original jurisdiction of the Supreme Court and the division of powers between the Union and the State. Agreement was also reached with regard to the flag of the State and its official language. It was agreed that the State Government would place the stipulations, the agreement envisaged, before the Constituent Assembly of the State, in order that the Assembly made recommendations to

32 Report of the Basic Principles Committee, Constituent Assembly of Jammu and Kashmir State.

33 Nehru, J. L. Speech, Council of States, August 5, 1952.

the President of India, to order the necessary modifications in the existing constitutional provisions pertaining to the State. The agreement was finalised on 14th of July, 1952.

Agreement was reached between the two governments with regard to the extension of the provisions of the Constitution of India dealing with citizenship. In accordance with Art. 5 of the Indian Constitution, the persons who had their domicile in the State were to be the citizens of India. The State Legislature was, however, reserved the right to define and regulate the rights and privileges of the 'Permanent Residents' of the State in regard to the acquisition of property and the appointment to services. The 'Permanent Residents' were the State-Subjects who had been declared so under the proclamation of the Maharaja dated 27th June, 1932. Special provisions were to be made in the law governing the citizenship, to provide for the return of those 'Permanent Residents' of the State who had gone over to Pakistan in 1947, and returned with the intention to settle in the State. Nehru lucidly explained the position in the Parliament.³⁴

"The point was raised by the representatives from Kashmir that certain old privileges dating from several generations past attached to what used to be the State-Subjects. These are especially in regard to the acquisition and holding of immovable property, appointment to services, scholarships and the like. Now Honourable Members know that Kashmir is supposed to be one of the beauty spots of the world. And apart from its being a beauty spot, there are many other things which attract people there. And from olden times the old Maharajas, who succumbed to many things that came from the then British Government, did not succumb to one thing. They were afraid that the climate of Kashmir and its other attractive features being what they are, that Kashmir might become a kind of colony of the British if they came and settled down there in large numbers. They were afraid of that. So they stuck to one thing—that no foreigner could acquire

34 Nehru, J. L. Speech, Council of States, August 5, 1952.

property in Kashmir and they did keep them out. They made rules to the effect that only State-Subjects could acquire property. . . In fact, they have made four different classes of state-subjects for that purpose. Property was given to class I and Class II. These rules in regard to property still subsist. These are the rules in regard to property in Kashmir, and every body in Kashmir, to whatever group or community or region he belongs, wants to uphold these rules. Naturally, because they are for the benefit of the residents of Kashmir, whether Hindus or Muslims. They are afraid that people from India or elsewhere, rich people and others might come and buy up property there and thereby gradually all kinds of vested interests would grow up in property in Kashmir on behalf of the people from outside. We thought that this was only the existing law there and the existing law prevails under Article 370 of the Constitution, which I have just read. We thought it was a perfectly justifiable feeling on their part, and that acquisition of property in Kashmir State should be protected on behalf of the people there."

Agreement was also reached between the two governments with regard to the application of the fundamental rights embodied in the Constitution of India. The Government of Kashmir desired that the Fundamental Rights could be made applicable to the State with modifications and exceptions in order to save the Land Reforms that had been undertaken in the State and also safeguard the autonomy, the State had been secured, under the Constitution of India. Sheikh Mohamad Abdullah reported to the Constituent Assembly of the State :³⁵

"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 Jammu and Kashmir State

35 Statement of Sheikh Mohamad Abdullah. Constituent Assembly 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 harmonise 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 or that of the Union Constitution.”³⁶

Settlement was also made with regard to the extension of the original jurisdiction of the Supreme Court of India. It was agreed upon that the jurisdiction of the Supreme Court in regard to the enforcement of the fundamental rights be extended to the State. While the negotiations were in process the Government of India had recommended that the ‘Board of Judicial Advisers’ in the State be abolished and the appellate jurisdiction of the Supreme Court be extended to the State. The State Government, however, was not ready to countenance the proposals and asked for time to consider the issue. Sheikh Mohamad Abdullah said in the Constituent Assembly :

“On behalf of the Government of India, it was recommended that the Board in the State designated ‘His Highness’s Board of Judicial Advisers’ 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.”

³⁶ Ibid. Statement of Sheikh Mohammad Abdullah, Constituent Assembly, Jammu and Kashmir State, 1952.

With regard to the division of powers between the Union and the State, the two governments agreed that the residuary powers would continue to remain vested with the State. In his statement to the Constituent Assembly, Sheikh Mohammad Abdullah said :

“It was agreed that while under the present Indian Constitution, the Residuary Powers vested in the Centre in respect of all the States other than Jammu and Kashmir, in the case of our State, they rested 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 upto the people of Kashmir through this Assembly to transfer more powers for mutual advantage to the custody of the Union.”³⁷

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

Agreement was also reached with regard to the extension of the powers of the President of India to the State to grant reprieve and commutation of punishments. No agreement was, however, reached with regard to the provisions of the Constitution of India dealing with the emergency powers of the President, though the Government of India had desired that provisions with regard to the emergencies arising out of war, aggression and internal disturbance be made applicable to the State. The Government of India had offered to make an exception with regard to emergencies arising out of internal disturbance, but the Government of the State expressed its inability to accept the proposals made by the Government of India.

³⁷ Ibid.

"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 I 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."⁴⁰

Another issue, that was settled by the Delhi Agreement, was that regarding the Head of the State. It was agreed upon that the Head of the State was to be recognised by the President of India on the recommendations made by the State Legislature. He was to hold office during the pleasure of the President, enjoy a tenure of five years, and continue to remain in office till his successor was appointed.

Agreement was also reached with regard to the flag of the State and the official language in the State. The two governments agreed that the State would retain its flag but the Union flag would have a supremely distinctive place in the State. Urdu was recognised the official language in the State.

Political Crisis

In November, 1952, the Constituent Assembly took up for consideration the report of the Basic Principles Committee which recommended the abolition of the hereditary rule of the Dogras and its replacement by a chief-executive who would be elected to his office. The Committee recommended :

"It is the considered view of the Committee that sovereignty does and must reside in the people and that all power and authority must flow from the expression of their free will. The State and its Head, respectively symbolise this sovereignty and its centre of gravity. The Head of the State represents the authority vested in him by the people for the maintenance of their rights. The promotion of this vital principle of constitutional progress

makes it imperative that this symbol of State power should be subject to the vote of the people. The Committee therefore strongly feels that, consistent with the democratic aspirations of the people of the State, the office of the Head of the State, should be based upon the elective principle and not upon the principle of heredity. This would afford opportunities to all citizens to rise to the highest point of authority and position, with the support and confidence of the people. The spirit of equality and fraternity required by democracy demands that in no sphere of State activity should a citizen be debarred from participating in the progress of his country and the advancement of its ideals and traditions. It is clear that the hereditary principle in the appointment to any office of power curtails the people's choice and to that extent, restricts their right to elect a suitable person of outstanding merit and personal qualities to that position. The process of democratisation will not be complete till the highest office of the State is thrown open to the humblest of the land and in this manner the Head of the State will be repository of the unbound respect, confidence and esteem of people."

In view of these considerations the Committee feels that there must be a sense of finality about the decision in regard to this fundamental issue. Accordingly, the Committee recommends that :

- (a) the form of the future Constitution of Jammu and Kashmir shall be wholly democratic ;
- (b) the institution of hereditary Rulership shall be terminated ;
- (c) the office of the Head of the State shall be elective.⁴¹

The Committee also made recommendations with regard to the flag of the State and its official language. These recommendations were in conformity with the principles embodied in the Delhi Agreement. The Constituent Assembly accepted the recommendations of the Basic Principles Committee and hereditary rule of the Dogras was abolished in November, 1952.

40 Ibid.

41 Basic Principles Committee Report.

The Chief executive of the State was designated Sadar-i-Riyasat. He was to be elected to his office and later confirmed by the President. The Sadar-i-Riyasat was to remain in office during the pleasure of the President and subject to that, was to enjoy a term of five years.

Though these provisions of the Delhi Agreement were implemented, the other provisions of the Agreement were not taken up for consideration. As a matter of fact, the Agreement had established the precedence of the instruments created by the Constitution of India and had reorganised the division of powers between the two governments into a more coordinated and integrated adjustment. It was evident that Government of the State was not ready to abandon their claim to an independent orbit of sovereign authority and insisted on the assumption of the separate charge, they had evolved in the Constituent Assembly. In the months that followed, the relations between the two governments deteriorated again. Inside the State, new political alignments took shape. In Jammu province a virulent movement for the complete integration of the State in the Indian federal structure and abrogation of the special provisions for the State was in full swing. The movement had started in the wake of the abdication of Maharaja Hari Singh and represented a strong reaction against the policies followed by the National Conference. The Conference pushed itself into a direct confrontation with the movement. The confrontation did not take long to assume a regional bias; a development which proved of considerable harm to the Government of the State. Rumbblings of similar reaction were heard in the frontier district of Ladakh also.⁴² Dissensions and factional alignments spread in the leadership cadres of the National Conference as well and on the issue of centre-state relationships, split it, into diametrically opposite groups.

The percolation of the doctrine of double charge in the politics of the State had far-reaching effects on the political relations between the Union Government and the State. The indiscriminate interpretation, the different sections of the State leadership gave to the special provisions of the Constitution of

India, sought to link up autonomy of the State and the safeguards it involved, with the issue of accession. The supporters of special status as well as the supporters of complete integration of the State in the Indian federal structure helped to confuse the situation further. The impression was gradually created that the Instrument of Accession was conditioned by the provisions of the Constitution of India. In fact, the State leaders, consciously or otherwise, perpetrated the myth that the special position the State enjoyed in the Indian federal structure, constituted a condition for the future disposition of the State. These assumptions directly led to the conclusion that the special provisions of the Constitution with regard to Kashmir were destructive of the accession of the State. That such a position was neither legally valid nor politically permissible, has been discussed above. No instrument of the State Government, constitutional or legal, could be vested with a separate charge or a charge other than that vested in it by the Constitution of India. The emphasis which the State leaders came to place on the division of powers between the two governments and the applicability of the provisions of the Constitution of India to the State put an undue premium on the autonomy which the State was granted. At no time, while the special provisions with regard to the State were on the anvil, did the Constituent Assembly of India link them with the issue of accession or render accession of the State subservient to these provisions. In case any such position was admitted, the Instrument of Accession was undermined. The central government was alive to this fact and as the tone of the State leaders crystallised, the Government of India realised the difficult position it was put in. Pandit Nehru, in an attempt to cut the confusion short, declared in unequivocal terms in the Parliament that the special provisions pertaining to the State did not constitute a condition for accession.

“While all this was happening in Kashmir,—war and other things,—in the rest of India, the process of integration went further. Mind you, the process of integration went further. The accession of every State was complete. This fact I go on repeating because

there is some confusion. The accession of every State was complete when it first acceded in 1947."⁴³

Probably the leniency in approach and the wide area of discretion, the State leaders had been given, had created a belief in them that the placement of the State in the Indian federal structure, was subject to their veto. For this, however, the wild commitments, the Indian leaders had made from time to time, were more responsible. The impression was strengthened by the commitment given by the Government of India to the Security Council that when the aggression by Pakistan was cleared, a reference would be made to the people of the State with regard to accession. The State leadership identified the two commitments. In this respect the autonomists and the integrationists fought on identical grounds but both failed to realise that there was a fundamental difference between the two commitments. The commitments given to the Security Council created obligations of a dubious nature with doubtful legality and perfidious sanction and could be terminated by the Government of India at any time it was deemed feasible. But the commitments made under the Constitution of India could only be modified or terminated in due process of law laid down by the Constitution.

Sheikh Mohamad Abdullah and his close associates made no secret of their bitterness against the hardened attitudes of the Government of India. Possibly there was disillusionment on both sides. In fact a tragedy of great magnitude in the outlook of both the Congress leaders and the leaders of the National Conference was that, after the accession of the State, they were unable to adjust their political objectives and coordinate their political operatives. Underneath the stable political facade there lurked simmering discontent and disappointment upon each other's performance. Nehru had a fancy for illusions and he had led the State leaders to thrive on many. The stark realities were, however, harsh. Though the Congress leadership and the leadership of the National Conference had found identification in their approaches and objectives in so far as the struggle for national independence was concerned and had

43 Nehru, J. L. Speech, Council of the States.

adopted more or less identical tactics to achieve freedom, yet the leaders had hardly evolved a similarity of views and strategies with regard to the politics of the government. Sheikh Mohamad Abdullah earnestly believed that the Indian federation was, in the ultimate analysis, the expression of the long struggle for freedom in the British India and the Princely States. Perhaps, Nehru too contributed to the same ideology. The Indian federalism, however, was an expression of the peculiar content of the Indian society : the pluralist composition of the Indian people, the political vivisection the British colonialism had foisted on the sub-continent, regional and cultural dissimilarities and the assortment of the vested interests ranging from Princes to petty peasantry. This cleavage caused the great divide between the two leadership levels and drove them to assume reckless extremes. The structural compulsions of the Indian politics overwhelmed the expressions and the principles of Abdullah's historical struggle. The divergence in the outlook between the leadership levels is reflected in the statement issued by Maulana Mohamad Sayeed Masoodi, Member of the Parliament and the General Secretary of the National Conference, to press on 6th August, 1953, three days before the Ministry headed by Sheikh Mohamad Abdullah was dismissed. The statement read :

"The fact of the matter is that there is a deliberate attempt on the part of those who do not view Kashmir's present position with favour to cloud the real issue so as to escape responsibility for the harm that has been caused to the Indo-Kashmir relationship by the support given to the recent agitations for Kashmir's merger with India. The real issue, it should be realised, is that there are people in India, who are not prepared to see Kashmir maintain its existing position. They are angry that Kashmiris should remain aloof both from India as well as Pakistan ; one should not work oneself up necessarily to see this view being expressed. Instead it should be examined dispassionately. Then only can there be possible a correct appraisal of the situation in Kashmir. If Kashmiris rose as one against Pakistan it was because they saw that that country wanted to

force them into a position which they were not prepared to accept. If today demands are made in India which endanger the present autonomous position of the State and, realising this danger, the people of Kashmir feel inclined towards a third alternative, it is not they who should be blamed for it but those who are the root cause of it. It will not do to point out the defects of this or that alternative. What is required is to remove the causes which have led to this line of thinking. All those people in India who are honestly interested in seeing Kashmir and India thrive together on the basis of a willing, not forced association should come into the field and organise the Indian public opinion against the movement for merger of the State. The communal and reactionary forces within the State who have made Sheikh Abdullah's task difficult should be exposed and no quarter given to them. The difficulties referred to by Sheikh Sahib in his recent speeches should be appreciated clearly and honest efforts made to remove them. Above everything else those who are thinking in terms of solving the difficulties by creating dissensions within the National Conference should realise that the people of Kashmir, whom the National Conference has the privilege to represent, will not countenance any such move from any quarter. Such tactics as these are not going to help a solution of the problems confronting India and Kashmir. Never before has there been a greater need for a clear understanding of the Kashmir problem as it is today. I would earnestly appeal to all patriotic people to realise this fact and rise to the occasion by strengthening the hands of Sheikh Abdullah. Thus alone can the problem be solved.⁴⁴

Many of the senior leaders of the Conference went to farther extremes and frantically sought to establish a categorical balance between the autonomy, the State was ensured under the Indian

44 Statement issued by Maulana Masoodi, General Secretary, National Conference.

Constitution, and the accession of the State to the Union. In fact, their reckless postures proved disastrous to both: the accession as well as autonomy. On 8th August, 1953, the Ministry, headed by Sheikh Mohamad Abdullah was dismissed and Bakshi Ghulam Mohamad was asked to form a new government.

In October, 1953, the Constituent Assembly of the State was convened to consider the provisions of the Delhi Agreement and finalise the principles on which the Constitution of the State would be based. The Basic Principles Committee of the Assembly and the Advisory Committee on Fundamental Rights and Citizenship were reconstituted by a resolution of Constituent Assembly on 20th October, 1953. The clauses of Delhi Agreement were referred to the Basic Principles Committee and on Fundamental Rights for report and recommendations a Sub-Committee of the Constituent Assembly was set up on January 4, 1954, to prepare the draft proposals to be presented to the two Committees for their consideration and recommendation. The Sub-Committee submitted its report to a Joint Session of the two Committees on 22nd January, 1954. The joint meetings of the two Committees approved the provisions of the Delhi Agreement. On 27th January, a high power Committee which was led by the Prime Minister of the State, and which included, among others leaders of the National Conference, Ghulam Mohamad Sadiq, President of the Constituent Assembly, and Syed Mir Qasim, the Chairman of the Basic Principles Committee and the Advisory Committee on Fundamental Rights and Citizenship, went down to Delhi to finalise the provisions of the Delhi Agreement and find a settlement pertaining to some of the problems, which had not been finally resolved when the Delhi Agreement was formalised. An important issue which was still pending decision was the placement of the State in the economic structure, the Constitution of India devised. The financial integration of the State meant for it the loss of the customs duties, toll taxes, the excise duties and the income tax returns which amounted to one and a half Crores of rupees a year. The loss could not be met by any means as there were few possible sources to raise the revenues inside the State.

On 3rd February, 1954, Syed Mir Qasim presented the report of the Basic Principles Committee and the report of the

Advisory Committee on Fundamental Rights and Citizenship to the Constituent Assembly. The Committee inter alia, recommended that the directives be issued to the Drafting Committee to frame the proposals redefining the sphere of the Union jurisdiction in the State with such modifications and amendments, which were deemed necessary in the existing relations between the State and the Union Government. With regard to the citizenship of the people of the State the Advisory Committee recommended :

“The State having acceded to the Union of India, every state subject and every person having his domicile in the State is a Citizen of India under the provisions of the Constitution of India. It is, however, recognized by the Government of India that this position would not affect the existing State Subject definition, while the Committee adheres to principle underlying this definition, it feels that the definition should be liberalised in keeping with the changed times. The Committee therefore recommends that all the three classes of State Subjects provided in the definition be removed and a uniform class of permanent residents be established. Accordingly, every person residing in the State who is a State Subject of Class I or class II or who after having acquired immovable property in the State has been ordinarily residing there for a period of not less than ten years, prior to the date of enforcement of this provision shall be a permanent resident of the State.

The Advisory Committee also recommended the extension of the provisions of the Constitution of India pertaining to the Fundamental Rights, with certain modifications and reservations which were found necessary. The Committee recommended the application, to the State, of the provisions envisaging the right to equality, the right against exploitation, rights for women and children, the right to freedom, the right to personal liberty, the right to freedom of religion, the right to conserve culture and education and the right to property. The Committee also recommended the application of the right to constitu-

tional remedies provided for, by the Constitution of India. The Committee reported :

The Committee feels that a declaration of Fundamental Rights would be more effective if suitable judicial remedies for the enforcement of these rights are provided and therefore it is proposed that the citizens shall have the right to Constitutional Remedies. In order to ensure the fullest protection in regard to enjoyment of these rights the citizens shall be allowed to seek redress from the highest court, *i. e.*, the Supreme Court of India.

In order to avoid any possibility of conflict of the Fundamental Rights proposed above and those contained in Part III of the Constitution of India, the Committee feels that the former rights in so far as they vary in certain respects from the provisions of the Fundamental Rights of the Union should be reflected in Part III of the Constitution of India. The Government of India has already agreed to provide appropriate modifications or exceptions in Part III of the Constitution of India to suit the requirements of the State.

The Constituent Assembly conveyed its recommendations to the President of India and on 14th May 1954, the President of India proclaimed the Constitution (Application to Jammu and Kashmir) Order, 1954, incorporating the recommendations of the Constituent Assembly and amending the special provisions, envisaged by Article 370 to that effect.⁴⁵

President's Proclamation

The provisions pertaining to the Union and its territories were declared applicable to the State with the exception that the powers of the Parliament to increase and diminish the area of the State or alter its name, were restricted to the extent that the consent of the State Government was to be secured before any change was made by the Parliament.⁴⁶

45 Constitution (Application to Jammu and Kashmir) Order, No. C.O. 48 dated 14.5.1954.

46 *Ibid.*, Para 2.

Provisions pertaining to citizenship were also declared applicable to the State subject to the condition that the 'Permanent Residents' of the State who had migrated to the territories now under the occupation of Pakistan, but returned to the State for settlement, were reserved the right to acquire Indian Citizenship on a 'permanent return', issued to them by or under the authority of any law made by the Legislature of State. The State Legislature was reserved the right to define the 'Permanent Residents' and confer on them special rights or privileges or impose on other persons restrictions in regard to employment in the State, settlement in the State, and right to scholarship and other forms of aid provided by the State Government.⁴⁷

The most significant changes introduced in the applicability of the Indian Constitution by the Presidential order, were those pertaining to the extension, to the State, of the provisions envisaging the fundamental rights and related legal remedies.⁴⁸ Rights envisaging equality before law, prohibition of discrimination on grounds of religion, race, caste and place of birth and rights embodying equality of opportunity in regard to public employments were extended to the State without any reservations. The application of the provisions of the Constitution of India with regard to rights to freedom and personal liberty, was also extended to the State, subject, however, to a number of stringent restrictions. The State Legislature was vested with the arbitrary power to impose restrictions on the right to freedom and personal liberty on certain grounds, not specified otherwise in the Constitution of India. The rights against exploitation providing for the prohibition of traffic in human beings, 'begar' and other forms of forced labour, employment of children, below fourteen years in age, in factories and on other hazardous occupations, were also made applicable to the State. Rights, envisaging freedom of conscience and religion and the rights to the management of religious affairs were also made applicable to the State. Provisions with regard to the protection of the minorities and their rights to manage educational institutions were also extended to the State. The right to property was also extended to the State, subject, however, to certain limitations.

47 Ibid., Para 3.

48 Ibid., Para 4.

State Legislature was not required to reserve any Bill, pertaining to the acquisition of property, for the consideration of the President. Under the Constitution of India, the other Indian States are required to reserve a Bill for acquisition of property for the consideration of the President. The application of the provisions did not affect any existing laws regarding property, nor could these provisions affect the right of the State, to impose any levy or tax or penalty or make any law for the promotion of public health or prevention of danger to life or property or the evacuee property. The instruments of the State Legislature were also saved from the effect of the extension of the right to property to the State for a period of five years and no such instruments could be deemed to be void on the ground that the instruments infringed any of the fundamental rights.⁴⁹

Provisions of the Constitution of India with regard to the Government of India were made applicable to the State with the following exceptions:⁵⁰

- (a) the representatives of the State for the House of the People were to be appointed by the President on the recommendations of the State Legislature ;
- (b) the power of the Parliament, to extend the appellate jurisdiction of the Supreme Court, was limited to the extent that any such extension could only be made on the request of the State Legislature ;
- (c) the Supreme Court was not vested with any power to issue directions, orders and writs, for purposes not pertaining to the enforcement of the Fundamental Rights ; and
- (d) The powers of the Auditor and Comptroller General were not made applicable to the State.

The provisions of the Constitution of India envisaging the division of powers between the Union and the State were not extended to the State. The scheme of the division of powers between the Union Government and the State was not altered

49 Subsequently the period was extended to fifteen years.

50 Constitution (Application to Jammu and Kashmir) Order, 1954, Para 5.

and the residuary powers continued to remain vested with the State. But the competence of the Union Parliament was extended to most of the subjects in the Union List, except Central Bureau of Intelligence and Investigation, Preventive Detention, Courts of Wards, High Court and extension of its jurisdiction, trading and other Corporations, Weights and Measures, mines, mineralogy, regulation of labour, safety in mines and oil fields, Ancient Monuments, Census, inter-State migration, elections to the Parliament, Election Commission, Audit and Accounts, etc. These, with the other subjects, enumerated in the Concurrent List and the State List were reserved for the State.⁵¹ In regard to the administrative powers of the Union, the provisions of the Constitution of India imposing administrative obligations on the States were made applicable to the State with certain reservations. The obligations require the States to exercise their executive power to ensure compliance with the laws made by the Parliament and the operation of the executive power of the Government of India, ensure compliance with directions given by the Government of India in this regard and give full faith and credit to the public acts, records and judicial proceedings of the Union. The State was, however, reserved the right to determine the manner in which and the conditions under which the acts, records and proceedings of the Union would be proved. An additional obligation was assumed by the State in so far as it undertook to acquire and requisition property on behalf of the Union.⁵²

The provisions of the Constitution of India pertaining to the official language of the Union were extended to the State to the extent of :

- (i) the official language for communication ;
- (ii) the official language for communication between one State and another and between the States and the Union ; and
- (iii) Proceedings of the Supreme Court.⁵³

51 Constitution (Application to Jammu and Kashmir) Order, 1954, Para 6.

52 Ibid.

53 Ibid., Para 12.

Provisions of the Constitution of India pertaining to the proclamation of Emergency due to war and external aggression were extended to the State, but provisions pertaining to emergencies arising out of internal disturbance and constitutional breakdown were saved application in relation to the State.⁵⁴ Provisions of the Constitution of India, pertaining to the amendment of the Constitution were extended to the State subject, however, to the condition 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 370.⁵⁵ Provisions of the Constitution, with regard to the Supreme Court, its original and appellate jurisdiction, were applied to the State with the exception that Parliament was not vested with the power to extend the criminal jurisdiction of the Supreme Court in regard to the State. The provisions of the Constitution of India with regard to the elections to the Parliament and to the offices of the President and the Vice-President, were also made applicable to the State.⁵⁶

The Last Phase

A serious limitation, the Government of the State, faced in reaching a financial adjustment with the Government, was the financial loss, the State was bound to suffer by the removal of the tariff barriers and the surrender of the income tax returns. The customs and excise duties yielded an annual income of approximately one and a half crores of rupees to the State, which constituted nearly one third of its annual revenues. On January 14, 1956, agreement was finally reached between the Government of the State and the Government of India on the financial adjustment between the State and the Union. According to the agreement the State was to receive 55% of the net proceeds of the income tax, 40% of the duties of excise on matches, tobacco and vegetable products and the entire proceeds of the estate duty levied and collected by the Government of India in the State. The Government of India also agreed to grant to the State financial assistance to bring up the total

54 Ibid., Para 13.

55 Ibid., Para 15.

56 Ibid., Para 10.

revenues from these sources to Rs. 250 lakhs a year. By the agreement proportional rights in respect of properties and assets of the Post and Telegraph departments, air transport, railways and State Forces were taken by the Government of India. The provisions of the Constitution of India with regard to the financial relations between the Union and the State were extended to the State in January 1958.⁵⁷

Agreement was also reached between the two governments with regard to the extension of the provisions of the Constitution with regard to the Audit and Accounts of the Union. A resolution was passed by the Constituent Assembly on 14th November, 1956, recommending to the President of India to order the application of the provisions of the Constitution with regard to Audit and Account. The President promulgated the Amendment Order on 15th February, 1958.⁵⁸

In May, 1957, the integration of the State services with the Central Service cadres, came up for discussion between the representatives of the Kashmir Government and the Government of the State. In pursuance of the agreement the Parliament enacted measures to extend the operation of the Indian Administrative Service and the Indian Police Service to the State, ensuring the participation of the State in the All India Services.

In 1964, the provisions of the Constitution of India pertaining to emergencies arising out of Constitutional breakdown were extended to Jammu and Kashmir State.⁵⁹ Before the amendment, the powers to proclaim a state of emergency due to constitutional break-down and to assume the powers of the Government in the State, were vested in the Sadar-i-Riyasat of the State. Provisions of the Constitution of India with regard to the elections, jurisdiction on the concurrent subjects and trade, commerce and intercourse were also ordered to be applicable to the State, with certain modifications and reservations. Certain other subjects, included in the Union List, but placed

57 C.O. 55, dated 6th January, 1958.

58 C.O. 56, dated 15th February, 1958.

59 C.O. 71, 1964.

within the powers reserved for the State, were also delegated to the Union in due course of time.⁶⁰

The Constituent Assembly of the State completed the task of framing the Constitution in October 1956. On 17th November the same year it was adopted by the Constituent Assembly. The Constitution of the State declared the State as an integral part of the Union of India.⁶¹ The executive powers were vested with the Sadar-i-Riyasat, whose office was elective with a term of five years. The Sadar-i-Riyasat was to be aided and advised by a Council of Ministers, jointly responsible to a Legislature, elected on the basis of the universal adult franchise. The Constitution made provisions for a High Court of Judicature in the State and included a long list of the Directive Principles of the State Policy.⁶² The Legislative and executive competence of the Government of the State extended to the powers which were not transferred to the Union Government. Article 5 of the Constitution of the State stipulated :

The executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India.⁶³

The Constitution of the State, therefore, was framed to follow the general scheme laid down under the Constitution of India.

In 1965, the Constitution of the State was amended. The powers to appoint the Governor were vested in the President and the procedure under which the State Legislature was empowered to elect the Sadar-i-Riyasat was abolished. The President was empowered to appoint the Governor by warrant under his seal and signature. The office of the Prime Minister was also abolished by the Amendment Act, and provisions were made under which the Council of Ministers in the State was headed by a Chief Minister.⁶⁴

60 C.O. 59, 1959; C.O. 80, 1967; C.O. 83, 1967, C.O. 75, 1967; C.O. 77, 1967; C.O. 85, 1969.

61 Constitution of Jammu and Kashmir State, Sec. 3.

62 Ibid., Parts IV, V, VI, VII.

63 Ibid., Section 5.

64 Constitution of Jammu and Kashmir, Sixth Amendment Act, 1965.

Chapter Three

Application of the Indian Constitution

The special constitutional provisions pertaining to the State of Jammu and Kashmir, envisage a partial application of the Constitution of India to the State. The provisions of the Constitution of India, with regard to the structure and powers of the Government of India are applicable to the State in total and without any reservations.¹ These provisions deal with the election, powers and the position of the President of India, the election and the powers of the Vice-President, the organisation and functions of the Union Council of Ministers, the organisation, powers, and the privileges of the Parliament, the legislative procedure in the Parliament, the organisation and the jurisdiction of the Supreme Court, the appointment and the functions of the Auditor and Comptroller General and the Union Public Service Commission. The provisions of the Constitution of India which deal with the territory of the Union, Citizenship, Fundamental Rights, Emergency Powers of the President, and the amendment of the Constitution, are applicable to the State with certain modifications and reservations. The provisions with regard to the structure and powers of the government in the States, Directive Principles of State Policy and public services are not applicable to the State. The State has a separate Constitution, wherein provisions are laid down for the government of the State, Directive Principles of State Policy and the services in the State. This part of the

1 The Constitution (Application to Jammu and Kashmir) Order, 1954, Part V,

study is devoted to the analysis of the provisions of the Indian Constitution which are applicable to the State. In fact, these provisions, and the reservations imposed on them are interwoven into a plethora of intricate alternatives and specifications. Curiously enough, some of the reservations imposed on the application of the Constitution of India, have by successive modifications, either lost their meaning and purpose or assumed dimensions which they were never meant to acquire. The provisions of the Constitution of the State are dealt with separately.

Union and its Territories

In unequivocal terms, the Constitution of India, declares India a 'Union of States'. The First Schedule of the Constitution defines the territories of the States which comprise the Union.² Jammu and Kashmir is listed in the Schedule and its territory is defined as "the territory which immediately before the commencement of this Constitution was comprised in the Indian State of Jammu and Kashmir". The territories of the State of Jammu and Kashmir, at the time of the framing of the Indian Constitution, included the territories which constituted the State of Jammu and Kashmir with regard to which the ruler of the State, Maharaja Hari Singh, acceded to the Indian Dominion. As such the territories of the State under the occupation of Pakistan are also brought within the definition of the territory of the State and, therefore, included in the territories of India. Article 1, of the Constitution of India, is pivotal to the entire structure embodied by the Constitution, in so far as it defines the territories of the Union of India and enunciates the basis of its jurisdiction. The State of Jammu and Kashmir is, without any reservations, brought within the territorial limits of the Indian Union and consequently within its jurisdiction. The

2 The Constitution of India, Art 1. In the Original Constitution, Jammu and Kashmir was specified as a part B State. After the States Reorganisation Act 1956, the category of the Part B States was abolished and by the Constitution (Seventh Amendment) Act, 1956, Jammu and Kashmir was included in the list of the States of the Union as enumerated in the First Schedule to the Constitution.

position, the State is ensured in the Indian constitutional structure, emanates from the basic presumptives involved in the territorial provisions enshrined in Article 1 of the Constitution. The implication, however, is not that the territories of India, not defined by Article 1, do not rightfully belong to India. Article 1, only confirms what the sovereignty of the Indian State actually performs. The State of Jammu and Kashmir which is an integral part of the State of India, is also a constituent part of the political structure, the Constitution of India creates.

The Constitution of India, vests with the Parliament the power to form new States by separating a part of territory from any State or parts of States or by uniting two or more States or parts of States or by uniting any territory to a part of any State, increase or decrease the area of any State and alter the boundaries and the name of any State.³ In their application to Jammu and Kashmir, these provisions of the Constitution of India are restricted to the extent that the Parliament cannot increase or decrease the area of the State, or alter its name or boundary without the consent of the State Legislature.⁴ In fact, no bill, providing for any change in the area, boundaries and name of the State, can be introduced in either House of the Parliament unless the consent of the Legislature of the State has been secured.⁵

Citizenship

An important feature of the Indian Constitution is the uniform and single system of citizenship, it envisages for the people of the entire country.⁶ A citizen of India enjoys the status of a citizen in every part of the country, and is entitled to all the benefits and rights available to him. In accordance with the provisions of the Constitution of India the following persons are the citizens of India.⁷

1. the persons, who at the time of the commencement of the Constitution, had their domicile in India and who

were born in India or, either of whose parents was born in India or who was a resident of India for not less than five years immediately preceding the commencement of the Constitution ;

2. the persons who migrated from Pakistan to India before 19th July 1948, provided they, or any of their parents, or any of their grand-parents, were born in India, as defined in the Government of India Act, 1935, and who resided in India since the date of their migration ;
3. the persons, who migrated to India from Pakistan after July 1948, provided they were registered in the form and manner prescribed by the Government of India ; and
4. the persons, who migrated to Pakistan but returned to India for permanent settlement in India, on the 'Special Permit' issued by the Government of India.

The provisions of the Constitution of India are applicable to the State with certain modifications. The residents of the State, who after having migrated to "the territory now included in Pakistan" return to the State for permanent settlement, are entitled to assume Indian citizenship under a permit for settlement or on a 'Permanent Return' issued by or under the authority of any law made by the State Legislature.⁸ The provisions of Article 7 of the Indian Constitution, which lay down the procedure for the resettlement of emigrants from the territories included in Pakistan, is, in its application to the State, modified to the extent that the State Legislature is empowered to issue permits and 'permanent returns' to the residents of the State, who return from territories included in Pakistan. Under the provisions of Article 7, the powers to grant permits and 'permanent returns' are vested with the Government of India. In regard to Jammu and Kashmir, however, the powers to grant permits and 'permanent returns' are

3 The Constitution of India, Art. 3.

4 The Constitution (Application to Jammu and Kashmir) Order, 1954, proviso, para 2.

5 Ibid., Proviso to Art. 3.

6 Constitution of India, Art. 5.

7 Ibid., Art. 6.

8 The Constitution (Application to Jammu and Kashmir) Order, 1954, Para 3 (b). The laws of citizenship made by the Parliament under Art. 11, are applicable to the State. The Citizenship Act, 1955, is therefore applicable to the State ; D. D. Basu, *Commentary on the Constitution of India*, p. 89. See also Entry, 17, List I, Seventh Schedule.

vested with the Government of the State. Residents of the State, who after having migrated to the territories now included in Pakistan, return to the State, can settle in the State and assume Indian Citizenship, on a permit for resettlement issued under the law made by the State Legislature.⁹ A special feature of the constitutional provisions regarding the citizenship is that the Constitution of the State further classifies the citizens of the State as the 'Permanent Residents' of the State.¹⁰ The redefinition of the citizens of the State into 'Permanent Residents' purports to the creation of a class of citizens, vested with special rights and privileges which are guaranteed by the Constitution of the State. The Constitution of the State, defines the 'Permanent Residents' of the State, as those citizens of India :

- (i) who, on 14th May, 1954, were the State Subjects of Class I or Class II, or who having lawfully acquired immovable property in the State were ordinarily residing in the State for not less than ten years, prior to that date ; and
- (ii) who were State Subjects of Class I and Class II, but after having migrated to the territories now included in Pakistan returned to the State under a permit for resettlement issued under the authority of any law made by the State Legislature.¹¹

The expression, 'State-Subjects, Class I and Class II' defines the persons which were proclaimed State-Subjects by a special notification issued by the Government of the State in 1927.¹² The relevant sections of the notification read :

"The term State-Subject means and includes :

Class I. All persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Gulab Singh Sahib Bahadur, and also persons who settled therein before

the commencement of Samvat year, 1942 and have since been permanently residing therein.

Class II. All persons other than those belonging to Class I, who settled within the State before the close of Samvat year 1968 and have since permanently resided and acquired immovable property therein."

The 'Permanent Residents' of the State, therefore, include :

- (a) the persons, who were born and were residing in the territories of the State when it was founded by Maharaja Gulab Singh ;
- (b) the persons who settled in the State before the year 1885 ; and
- (c) the persons who settled in the State before 1911, and acquired immovable property in the State ; the persons who acquired immovable property in the State and settled in the State for permanent residence before 14th May 1945, and the persons who were the State-Subjects and migrated to Pakistan but returned to the State for permanent settlement.

Precisely, therefore, every 'Permanent Resident' of the State of Jammu and Kashmir is a citizen of India, whereas every citizen of India is not a 'Permanent Resident' of the State. Since the State Legislature has reserved the right to define the classes of the 'Permanent Residents' and confer special rights and privileges on them in regard to settlement for residence in the State, acquisition of immovable property and employment, the provisions of the State Constitution operate to the exclusion of the other citizens of India from the rights and privileges granted to them by the Constitution of India. The position created by the State Constitution is not, however, more anomalous than that created in the other Indian States by the so-called 'Domiciliary Rules'. The domiciliary practices¹³ lead to gross discrimination between citizens and in effect operate to exclude classes of the Indian citizens from the rights that the Constitution of India confers on all the citizens alike.

9 Constitution (Application to Jammu and Kashmir) Order, 1954. Proviso added to Art. 7 of the Constitution of India.

10 The Constitution of Jammu and Kashmir, Part III.

11 *Ibid.*, Sec. 6.

12 Notification No. IB-L/1989, issued by Maharaja Hari Singh on 27th June, 1932.

13 Pylee, M. V. *India's Constitution*, see Ed. 1967, p. 77.

Fundamental Rights

The operation of the provisions regarding fundamental rights enumerated in the Constitution of India, were extended to the State by the Constitution (Application to Jammu and Kashmir) Order, of 1954. When the Constitution of the State was promulgated in 1957, provisions were also included in it, stipulating and confirming the availability of the fundamental rights provided for, by the Constitution of India, to the people of the State. Section 10, of the Constitution of the State stipulates :

“The permanent residents of the State shall have all the rights guaranteed to them under the Constitution of India”.

It needs to be emphasised here that the fundamental rights are not available to the people of the State by virtue of the provisions of the Constitution of the State, but by virtue of the provisions made by the Constitution of India. The Constitution of the State merely reiterates the provisions of the Constitution of India. It does not confer on the people of the State the rights created by the Constitution of India. The provisions of the State Constitution merely stipulate that the rights guaranteed by the Constitution of India are available to the ‘Permanent Residents’ of the State. The rights are enumerated and defined within the meaning of the provisions of the Constitution of India and are enforceable in the State by the instrumentalities created under the Constitution of India.¹⁴ Even if the Constitution of the State did not include the provisions regarding the fundamental rights, the fundamental rights would all the same be available to the people of the State, and if the Constitution of the State placed any restrictions on the fundamental rights provided by the Constitution of India, the restrictions would be redundant. In fact, the fundamental rights, as provided for, by the Constitution of India, are applicable to the State with a number of reservations, and these

reservations are enumerated as well as defined by the Constitution of India. The fundamental rights are available to the people of the State, as they are construed to be so under the Constitution of India and not only to the people defined as the ‘Permanent Residents’. The Constitution of the State reserves the State Legislature, the power to ‘make any law defining the classes of persons who are, or shall be, ‘Permanent Residents’ of the State, conferring on them special rights and privileges and regulating and modifying any special rights and privileges enjoyed by them.”¹⁵ These restrictives do not prejudice the rights conferred on the people of the State by the Constitution of India. Article 13, of the Constitution of India is applicable to the State without any modification and secures the right granted to the people of the State against any violation of the rights guaranteed to them, by any political authority, including that created by the Constitution of the State.¹⁶ The obligation cast on political authority is, therefore, expressly universal. The provisions of Article 13, invalidate all laws inconsistent with the fundamental rights and impose a prohibition on the State to make any law in contravention with these rights.¹⁷

Right to Equality

The Constitution of India guarantees to every person the right to equality before law and the right to equal protection of laws.¹⁸ Equality before law underlines the absence of any special privilege in favour of any person. The right to equal

14 The Constitution of India, Act. 12, Art. 32 Election Commission of India Vs Venkata Rao, AIR 1953 SC 210; The Constitution (Application to Jammu and Kashmir) Order, 1954, para 32 (2) a.

15 The Constitution of Jammu and Kashmir, Part III, Sections 8 and 9.

16 The Constitution of India, Art. 13. The Constitution (Application to Jammu and Kashmir) Order, 1954, Part III, para 13; In its application to the State of Jammu and Kashmir, in Art. 13, references to the commencement of the Constitution are deemed references to the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954.

17 Constitution (Application to Jammu and Kashmir) Order 1954, Para 4. Basu, D. D. *Commentary on the Constitution of India*, pp. 121-126, 127.

18 Basu, D. D. *Commentary on the Constitution of India*, p. 261. Jennings, Sir Ivor. *Law of Constitution*, p. 49.

protection of law is a guarantee that equal protection of law is secured for the people in the enjoyment of their rights without any discrimination. This general principle of equality before law is further fortified by the express prohibition imposed on any discrimination on the grounds of race, religion, caste, sex and place of birth. On the basis of these grounds no one can justifiably be denied access to shops, public restaurants, wells, bathing ghats and places of public resort, maintained wholly or partly out of state funds, and places dedicated to the use of general public. The Constitution imposes prohibition on the discriminatory practices of private individuals also and abolishes untouchability and all other caste disabilities. Article 16, of the Constitution guarantees equality of opportunity in matters of public employment. Employment under the state is open to all citizens and the state is prohibited from showing any discrimination against any citizen on grounds of race, religion, caste, sex and the place of birth.

The right to equality is subject to two limitations.¹⁹ In the first place the Constitution empowers the state to make special provisions for women and children and socially and educationally backward classes of citizens, Scheduled Castes and tribes and reserve appointments and posts for the backward sections of society which are not adequately represented in the services offered by the state. In the second place the Parliament is empowered to impose qualifications of residence in case of certain appointments and posts offered by the state.

The provisions of the right to equality embodied in the Constitution of India are applicable to the State of Jammu and Kashmir, with the reservation that the provisions empowering the Parliament to impose qualifications of residence for posts and appointments, are not applicable to the State.²⁰

19 Basu, D.D. *Commentary on the Constitution of India*, vol. I, p. 260; V. N. Shukla, *The Constitution of India*, p. 53. Janki Prasad Parimoo V. State of Jammu and Kashmir, I. S. C. C., p. 43. Makhani Lal Waza V. State of Jammu and Kashmir, 1971 I. S. C. C. 749. Triloki Nath V. State of Jammu and Kashmir, ISCR 1969.

20 Constitution (Application to Jammu and Kashmir) Order, 1954, para 4 (c).

Right to Freedom

The right to freedom is envisaged in Article 19, of the Constitution of India and secures the citizens of India, seven fundamental freedoms to which they are entitled in all parts of India. These freedoms are :

1. Freedom of speech and expression.
2. Freedom of assembly.
3. Freedom of association.
4. Freedom of movement.
5. Freedom of residence and settlement.
6. Freedom of property.
7. Freedom of profession, occupation, trade or business.

These freedoms are of fundamental importance to the entire scheme of rights guaranteed under the Constitution of India. The freedoms institutionalise the basic relationship between the government of India and the people, defining the limits of authority and the claims of the individual against it.²¹ The freedoms, however, are not recognised absolute by the Constitution, for each of the rights enumerated, is subject to reasonable restrictions in the interest of general public, security of the state, public order, decency, morality and for other reasons set out in the Constitution. The 'reasonable restrictions' are determined by the Courts and are thus subject to judicial review.²²

The right to freedom of speech and expression is subject to reasonable restrictions which can be imposed for the following reasons :

- (i) Security of the state;
- (ii) Friendly relations with foreign states;
- (iii) Public order;
- (iv) Decency and morality;
- (v) Contempt of court;
- (vi) Defamation;

21 Shukla, V. N. *The Constitution of India*, p. 58.

22 Basu, D. D. *Commentary on the Constitution of India*, Vol. I, p. 503; Shukla, V. N. *Constitution of India*, p. 58; Babu Ram V. Brijnath AIR 1962 SC 1476; Chintamani Rao V. State of M.P., AIR 1951 SC 118; Kuchuni V. State of Madras and Kerala AIR 1960, SC 1080.

- (vii) Incitement to offence; and,
 (viii) Sovereignty and integrity of India.²³

The right to freedom of assembly is subject to the limitation that the assembly must be unarmed and must not be riotous in character. The riotous and disorderly assemblies are not protected.²⁴ The state is empowered to impose reasonable restrictions on the freedom of assembly in the interest of public order and the sovereignty and security of India.²⁵ The right to freedom of association is subject to reasonable restrictions which can be imposed for public order, morality and the sovereignty and the security of India. Public order means peace, safety and tranquillity.²⁶ The right to freedom of movement is subject to restrictions in the interest of the general public and for the protection of the interests of the Scheduled Tribes. The interests of the general public embrace public security, public order, and public morality.²⁷ The right to freedom of residence is subject to reasonable restrictions which the state can impose in the interests of the general public and the protection of the Scheduled Tribes.²⁸

With regard to the right to acquire, hold and dispose off property, the state is empowered to impose reasonable restrictions on each of the three constituent elements of property: that is, to acquire property, hold it and dispose it off.²⁹ The restrictions can be imposed in the interests of the general public and for the protection of the Scheduled Tribes. The state is empowered to impose reasonable restrictions on the freedom to carry on any occupation, trade or business. The limitations and restrictions can be imposed in the interests of the general public. The state is also empowered to prescribe professional or technical qualifications necessary for carrying on any profession and trade and itself

carry on any trade or business to the exclusion of the other citizens.

The provisions envisaging the right to freedom are applicable to the Jammu and Kashmir subject to two severe limitations.³⁰ The limitations are transitory in character and are meant to remain in operation for a period of twenty years from the date on which the Constitution Application Order, 1954, was promulgated.³¹ In the first place the right to freedom of assembly, the right to freedom of association, the right to freedom of movement, the right to freedom of residence and the right to acquire, hold and dispose of property, is subject to the additional limitation according to which the Legislature of the State is empowered to impose restrictions on these freedoms in the 'interests of the security of the state.'³² The State Legislature is thus empowered to determine the circumstances and compulsions which may warrant the imposition of additional restrictions on these freedoms. The right to freedom of speech and expression and the right to freedom of profession, occupation, trade or business are not subject to this limitation.³³

The second limitation, imposed on the application of the right to freedom to the State, is that the State Legislature is empowered to determine the content and scope of the 'reasonable restrictions' to which the various freedoms are subject. In its application to the state, Article 19 is appended with a new clause.

"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."³⁴

23 Shukla, V.N. *The Constitution of India*, p. 63.
 24 Shukla, V.N. *The Constitution of India*, p. 79.
 25 Constitution Sixteenth Amendment Act, 1963.
 26 D. K. Gosh V.E.X. Joseph, AIR 1963 SC 812; Kameshwar Singh V. State AIR 951, Pat. 91.
 27 Gurudut Sharma V. State of Bihar, AIR 1961, SC 1684.
 28 Shukla, V. N. *The Constitution of India*, p. 71.
 29 Kochuni V. State of Madras, AIR 1960 SC 1080 Rustum Cavasji Cooper V. Union of India 1970 I Sec. 248.

30 Constitution (Application to Jammu & Kashmir) Order 1954, para 4.
 31 The Constitution (Application to Jammu and Kashmir) Second Amendment Order, 1969.
 32 Constitution (Application to Jammu and Kashmir) Order, 1954, para 4 (d) iii and para 4 (c).
 33 Ibid.
 34 Constitution (Application to Jammu and Kashmir) Order, 1954, para 4 (d) iii and para 4 (e).

The provisions of the new clause are widely restrictive in nature and virtually subject the fundamental freedoms to the control, whim and the prejudice of the State Legislature. Under the Constitution of India, reasonableness is expressly created into an objective expression and its objectivity is determined by the judiciary. In fact, the powers to determine the reasonableness of the restrictions create a jurisdiction and there is no limit placed on this jurisdiction.³⁵

"It being the duty of the court to safeguard the fundamental rights, the obligation falls upon it to scrutinise the restrictions placed by the law on the citizen's freedom as carefully as possible. It should according to well settled common sense construction lean in favour of fundamental rights and should permit the placing of restrictions in as narrow an ambit as possible."³⁶

A reasonable restriction must be supported by reason and must be justifiable for its underlying purposes; the extent and urgency of the evils sought to be remedied, propriety, conditions prevailing and the duration for which the restrictions are required to be imposed. The restrictions should not be excessive, penal and unjust. In fact, the standard of restrictions imposed on freedom must be acceptable to a reasonable man.³⁷ Ultimately, it is a value judgement, but in making the judgement, the accepted forms of social regulation, existing conditions, the legislative intent, and the extent, duration and nature of restrictions are kept in consideration. What is more important, the value judgement is made by the judiciary and not by the appropriate legislature. As such, the power vested in the State Legislature to determine the reasonableness of the restrictions, which may be imposed on the right to freedom, robs it of its entire content. Judicial review of laws restricting the exercise of freedoms, acts as a limitation on the power of the legislature and therefore, is of great constitutional significance. By vesting the State Legislature with arbitrary

authority to determine the nature and significance of the reasonableness of the restrictions, the constitutional imperative that restrictions must be reasonable, is rendered meaningless.

Protection in Respect of Conviction of Offences

Under the Constitution of India, protection is guaranteed to the people against arbitrary or excessive punishments.³⁸ No person is liable to be convicted for an offence which is not an offence under law at the time it is committed. No person can be subject to a heavier penalty than that, he is liable to receive under the law, in force, at the time the offence was committed. No person can be prosecuted and punished more than once for the same offence. No person can be compelled to be a witness against himself. These provisions are aimed to protect the people against retrospective legislation and application of law, double punishment and self-incrimination. These provisions are applicable to the Jammu and Kashmir State without any modifications or reservations.³⁹

Right to Life and Liberty

The most important provisions of the Constitution of India pertaining to the fundamental rights are those regarding the protection of life and personal liberty. These provisions stipulate in general that no person shall be deprived of his life and liberty except in accordance with the procedure established by law. These provisions envisaging safeguards against arbitrary arrest and detention are embodied in Article 22, of the Constitution. The Constitution guarantees to every person arrested, the right to be informed of the cause of his arrest; the right to be defended by a lawyer of his choice and the right to be produced before a magistrate within a period of twenty-four hours after his arrest. The Constitution also imposes express prohibition on the executive to detain a person in custody beyond twenty-four hours without the authority of a Court. These rights are, however, subject to two limitations and are not available in case of:

35 Basu, D. D. *Commentary on the Constitution of India*, Vol I, p. 498.

36 Kagzi, M. C. J. *The Constitution of India*, p. 366.

37 Ibid.

38 Constitution of India, Art. 20.

39 Constitution (Application to Jammu and Kashmir) Order, 1954, para 4.

- (a) persons who are enemy agents, and,
- (b) persons arrested and detained under a law providing for preventive detention.⁴⁰

The object of preventive detention is not to punish a person for an act not permitted by law, but to intercept him before he accomplishes the act and to prevent him from doing it. Ordinarily, preventive detention is tantamount to the negation of the protection provided for, by the Constitution against arbitrary arrest and detention. The Constitution, however, provides for certain safeguards against any arbitrary use of the preventive detention. In the first place, the preventive detention must be authorised by law. Secondly, preventive detention must not exceed a period of three months and whenever its operation is extended beyond three months, it must be authorised by an Advisory Board, constituted of the judges of the High Court or persons qualified to be appointed as the judges of the High Court. The Parliament is empowered to prescribe the procedure to be followed by the Advisory Board conducting an enquiry. Thirdly, no person can be detained indefinitely. There must be a maximum period of detention prescribed by law made by the Parliament. Fourthly, the detaining authority must communicate to the detenu, the grounds on which his detention has been effected. Finally, the detenu must be given an opportunity to make a representation against his detention at the earliest.⁴¹

The provisions with regard to fundamental rights of personal liberty and protection against arbitrary arrest and detention are applicable to the State of Jammu and Kashmir with certain drastic modifications. The Constitution of India gives the Parliament exclusive power to make provisions for preventive detention for the reasons of defence, foreign affairs and the security of India. The Parliament is also vested with concurrent jurisdiction to legislate in regard to preventive detention for reasons of the security of the State, the maintenance of public order and the maintenance of supplies

40 Constitution of India, Art. 22.

41 *Ibid.*, 22 (4) and 7, *Shibapada Mukherjee V. State of West Bengal*, AIR 1972 SC 1357.

and essential services. In accordance with the division of powers between the Jammu and Kashmir State and the Union, preventive detention is included in the residuary subjects and is therefore placed within the competence of the State Government. The Parliament is not vested with any concurrent jurisdiction to provide for preventive detention in the State for reasons of the security of the State, maintenance of public and the maintenance of the supplies and essential services in the State.⁴² The laws made by the Parliament with regard to preventive detention for reasons of security and public order and the maintenance of supplies and essential services, therefore, do not apply to the State.

The provisions of the Indian Constitution, in their application to the State, suffer another, and in fact, a more drastic modification. Whereas the State Legislatures are ensured the concurrent powers to provide for preventive detention, the period of detention, the conditions under which a person may be detained and the procedure to be followed by the Advisory Boards instituted to review the detention of a person are to be determined by the Parliament. The procedure laid down in parliamentary legislation over-rides the procedure established by a State law. The idea is to prevent, as far as possible, hazardous and unjust procedure being laid down under State enactments.⁴³ These provisions of the Constitution of India, however, do not apply to the Jammu and Kashmir State. The powers to determine the period of detention, the conditions under which a person is detained and the procedure to be followed by the Advisory Boards, are vested with the State Legislature. The State Legislature is, therefore, armed with considerable power or arbitrary decision in matters of preventive detention. By vesting the power to provide for preventive detention in the Parliament, the framers of the Indian Constitution ensured that the vital issue of preventive detention was not left to the whims and caprices of the local political majorities and the strains and influences of the State politics did not undermine the rights against arbitrary detention. Obviously, the Parlia-

42 Seventh Schedule, Entry 29.

43 *Shukla, V. N. The Constitution of India*, p. 116; *Constitution (Application to Jammu and Kashmir) Order 1954*, para 3 (c).

ment of India is likely to visualise the issues of preventive detention from the point of view of national security and not from the narrow focus of the petty and often parochial interests of the political parties in power.

Right Against Exploitation

Fundamental Rights to freedom against exploitation envisaged by the Constitution of India are applicable to the Jammu and Kashmir State without any reservation. Traffic in human beings, 'Begar' and all other forms of forced labour are prohibited. Employment of children of less than fourteen years in age in factories, mines and in other hazardous occupations is forbidden.⁴⁴

Freedom of Religion

Right to freedom of faith and religion and the rights of the religious and other minorities to propagate their religion and conserve their culture, envisaged by the Constitution of India, are also available to the people in the State without any reservation and restriction. Subject to public order, morality and health, all people are equally entitled to freedom of conscience and faith and the right to propagate their religion. Every religious denomination is secured the right to establish and maintain religious and charitable institutions, manage its own religious affairs, own and acquire immovable property and to administer such property according to law. No person is liable to be compelled to pay taxes for the promotion or maintenance of any particular religion or religious denomination. Religious instructions are not to be given in any educational institution maintained out of state funds. Religious and linguistic minorities have also been secured the right to establish and administer their educational institutions and prohibition is imposed on the State to discriminate against any such educational institution in matters of Grants-in-Aid, on the ground that it is under the management of religious or linguistic minority. No citizen can be denied admission into any educational institutions maintained by the State or receiving aid out of the State funds on grounds of religion, race, caste or language.⁴⁵

44 Constitution of India, Arts, 23, 24.

45 Ibid.

Right to Property

The right to property, provided for under the Constitution of India, underlines the general principle that no person is liable to be deprived of his property save by authority of law.⁴⁶ Property can be acquired for public purposes alone and by authority of law, "which provides for acquisition or requisition of property for an 'amount' which may be fixed by such law or which may be determined in accordance with such principles and given in such manner as may be specified in such law.⁴⁷ No law providing for the acquisition of property, and the fixation of the 'amount' payable against such acquisition, can be called in question in any court on the ground that the 'amount' fixed is inadequate or paid otherwise than in cash.⁴⁸ The Union Legislature has the power to provide for the acquisition of property for public purposes and determine the 'amount' payable in lieu of the property acquired. The Parliament is competent to determine the manner in which the 'amount' is to be paid for the property acquired.⁴⁹ The State Legislatures are also vested with the power to provide for the acquisition of property and the fixation of the 'amount' to be paid in return, subject, however, to the condition that such legislation assumes effect, only after it has been reserved for the consideration of the President and has received his assent.⁵⁰

The state is also reserved the power to undertake legislation providing for :

- (a) acquisition of estates in land;
- (b) takeover of the management of any property for a limited period;
- (c) amalgamation of two or more corporations;
- (d) extinguishment or modification of the rights of persons interested in corporations; and
- (e) extinguishment or modification of rights acquired under agreement of lease to any mineral or mineral oil.⁵¹

46 Ibid., Art. 31 (A).

47 Constitution (25th Amendment) Act, 1971.

48 Ibid.

49 Constitution (25th Amendment) Act, 1971.

50 Constitution of India, Article 31, clause 3.

51 Ibid., Art. 31-A Constitution (4th Amendment) Act 1955.

The Union Legislature is competent to acquire landed estates, take over management of any property, amalgamate two or more corporations, extinguish or modify property interests in corporations and extinguish and modify interests in mining and mineral oils. The State Legislatures are also empowered to acquire estates, take over interests in corporations, mining and mineral oil, subject to the condition that legislation pertaining to such measures, comes into effect only after it is reserved for the consideration of the President and receives his assent.⁵²

An overall limitation is imposed on the general right to property envisaged by Articles, 19 and 31 of the Constitution and the state is empowered to undertake legislation to implement the Directive Principles of State Policy. Any such legislation is not liable to be declared null and void on the ground that the legislation violates the provisions of the Constitution embodying the right to property.⁵³

The provisions of the right to property envisaged by the Constitution of India are applicable to the State of Jammu and Kashmir with certain modifications. In the first place, the State Legislature is vested with unrestricted powers to undertake legislation providing for acquisition of property, the mode and manner of the payment of the compensatory amounts, the acquisition of landed estates, extinguishment and modification of interests in corporations and mining and mineral products, without having to reserve such legislation for the assent of the President.⁵⁴ The State Legislature is also vested with wide authority to undertake legislation to implement the Directive Principles of the State Policy envisaged by the Constitution of the State. No such legislation is required to be reserved for the consideration of the President of India.⁵⁵ In the second place, estates have been redefined in their application to the State, as the land which is occupied or has been let for agricultural

52 Ibid.

53 Ibid., 31-Constitution (25th Amendment) Act, 1971.

54 Constitution (Application to Jammu and Kashmir) Order, para 4 (f).

55 Ibid.

purposes or for purposes subservient to agriculture or for pastures and which include :

- (i) building sites on such land;
- (ii) trees standing on such land;
- (iii) forest land;
- (iv) wooded waste;
- (v) areas under fields floating over water;
- (vi) sites of Jandars and Gharats; and,
- (vii) jagirs, inams, mafuis, mukararies and other land grants, excluding building sites near towns or villages and land reserved for municipalities, notified areas or town planning.⁵⁶

Constitutional Remedies

The Constitution of India provides for the constitutional remedies to safeguard the various fundamental rights it envisages. The provisions of the Constitution guarantee the right to move the Supreme Court in accordance with appropriate procedure for the protection and the enforcement of the rights. The Supreme Court is empowered to issue orders and writs including the writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo warranto and Certiorari for the enforcement of the rights. The remedial right to move the Court for the enforcement of these rights, ensures protection against their infringement.

The Constitutional provisions envisaging these safeguards are applicable to the State of Jammu and Kashmir with certain modifications. The Parliament is not vested with the right to empower any other court to exercise jurisdiction in regard to fundamental rights, in case of the state.⁵⁷ Instead, a special clause is appended to Article 32, of the Constitution of India, and the High Court of the state is vested with powers to exercise jurisdiction for the enforcement of the fundamental rights. Without prejudice to the powers conferred on the Supreme Court of India, the High Court of the State is empowered to issue orders and writs for the enforcement of the funda-

56 Ibid., para 4 (j).

57 Ibid., para 4 (b).

mental rights.⁵⁸ This is not an extraordinary power, exclusively vested with the High Court of the State. In fact, the High Courts of the other Indian States are also empowered to exercise jurisdiction in regard to fundamental rights.⁵⁹ The difference is that, whereas the High Courts of the other Indian States are vested with the power to enforce rights under Article 226 of the Constitution of India, the High Court of the State enjoys the jurisdiction under Article 32 of the Constitution. The reason is only technical and not substantial. The provisions of the Constitution of India with regard to the government in the States are not applicable to Jammu and Kashmir. The state government is organised under the Constitution of the State and the High Court of the State is, therefore, a part of a separate constitutional frame. Since the fundamental rights do not constitute a part of the Constitution of the State, the High Court cannot ordinarily, exercise jurisdiction in regard to these rights. The Constitution of the State cannot confer a power on the High Court which it is not competent to define. The High Court of the State has therefore, been vested with the powers, specifically, under the Constitution of India, in order to exercise jurisdiction in regard to the fundamental rights.

The Union Government

The provisions of the Constitution of India with regard to the Union Government are applicable to the State of Jammu and Kashmir with certain minor modifications. The legislative power and the executive authority of the Union Government extends over the subjects which are transferred to the Union Government in accordance with the scheme of the division of powers between the Union Government and the Jammu and

58 Ibid., para 4 (b) : In its application to the State of Jammu and Kashmir, cl. (3) of Art. 32 is omitted and after cl. (2) the following new clause is inserted : "(2-A) Without prejudice to the powers conferred by clauses (1) and (2) the High Court shall have power throughout the territories in relation to which it 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."

59 Constitution of India, Art. 226.

Kashmir State. Ordinarily, therefore, the authority of the Union Government and the jurisdiction of its instrumentalities operates throughout the State within the specified limits without any reservations and modifications. A small modification has been accepted in regard to the constitutional provisions with regard to the representation of the State in the Lok Sabha, the procedure of the allocation of seats in the House and the procedure for the delimitation of the constituencies for the election to the House. A fixed number of six seats in the Lok Sabha is allotted to the State and the delimitation of the constituencies is made by the Delimitation Commission under the Delimitation Commission Act, 1962.⁶⁰

The jurisdiction of the Supreme Court extends to the State in all its aspects including the authority to enforce fundamental rights and the power of judicial review. The two reservations imposed upon the jurisdiction of the Court in its application to the State, are : that the appellate jurisdiction of the Court cannot be enlarged by the Parliament without having received a request to that effect from the State Legislature and the Court is not empowered to exercise the jurisdiction of the Federal Court in regard to the State.⁶¹ The power of judicial review, the Court exercises in general, involves implications, more pronounced than they apparently look. The power of review does not only extend to the legislation undertaken by the State Legislature and the other administrative agencies of the State; it extends to the decisions of the High Courts also. The Court, since it is vested with the ultimate authority to interpret the Constitution, is also authorised to interpret the special provisions of the Constitution with regard to Jammu and Kashmir, including the Presidential Orders, amending the special provisions and also the Constitution of the Jammu and Kashmir State. It is empowered therefore to review laws and administrative actions undertaken in the State. In interpreting the Constitution of the State, the Court has also the power to ascertain whether any provisions of the Constitution of the State, or any amendments made to the Constitution are inconsistent with the Constitution of India and therefore void.

60 Constitution (Application to Jammu and Kashmir) Order, 1954, para 5.
61 Ibid., para 5 (2) d.

Emergency Powers

The Constitution of India empowers the President of India to proclaim a State of emergency in case :

- (i) the security of India is threatened by war, aggression or internal disturbance ; or,
- (ii) the constitutional government in the States suffers a breakdown ; or,
- (iii) the financial stability and credit of the country is threatened.

Whenever a proclamation of emergency is made in consequence to war, aggression or internal disturbance, the Union Government immediately assumes the power to issue administrative directions to the States and the Union Legislature acquires authority to legislate on the subjects included in the State List. In case of the constitutional breakdown in any of the States, the President is empowered to assume to himself all or any of the functions of the State, declare that the powers of the State Legislatures be exercised by the Parliament and make any other provision to implement the proclamation. Both, in case of the emergency caused by war, aggression and internal disturbance and in case of constitutional breakdown in the States, the state is empowered to suspend the right to freedom guaranteed under Art. 19, of the Indian Constitution. Further, the President is empowered to suspend the right to move the court for the enforcement of fundamental rights. During a financial emergency, the Union Government is authorised to give directions to the States to "observe such canons of financial propriety as may be specified in the directions."

The emergency provisions of the Constitution of India apply to Jammu and Kashmir with one modification.⁶² The President is not empowered to proclaim an emergency on the ground of internal disturbance or threat of internal disturbance

⁶² Ibid., Para 13(a). The following clause is added to Art. 352 in its application in regard to Jammu and Kashmir State :

"No proclamation of Emergency made on grounds of internal disturbance or imminent dangers 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 the Government of the State."

in relation to the State, except in case, the concurrence of the State Government is sought or a request is made by the State Government to the President for such a proclamation. The implication is obvious that the area of autonomy secured for the State is not exempted from the operation of the emergency and the special federal relations that exist between the State and the Union are placed under the overall purview of the central authority during the time the emergency is in process. The Union Government assumes the power to issue administrative directions to the State and the Union Legislature acquires the power to legislate on the residuary subjects reserved for the State.

The Constitutional Amendment

The Constitution of India underlines three distinctly different processes of amending the Constitution. The provisions pertaining to the creation of the new States and the reorganisation of the existing States, creation and abolition of the second chambers in the States and the administration of Union Territories, are amended in the same manner as the ordinary laws are amended. The procedure for the amendment of the remaining provisions is embodied in Article 368, of the Constitution. The provisions categorised below are amended when the two Houses of the Parliament pass an amendment Bill by a majority of their total membership with a two-thirds majority present and voting on the Bill and the Bill is ratified by more than half of the State Legislatures.

- (i) manner of the election of the President ;
- (ii) extent of the executive power of the Union and the States ;
- (iii) the Union and the State judiciary and the High Courts in the Union territories ;
- (iv) the division of legislative powers ;
- (v) the representation of States in the Parliament ;
- (vi) Seventh Schedule to the Constitution ; and
- (vii) provision pertaining to amendment.

The remaining provisions of the Constitution are amended by the Parliament, when an Amendment Bill is passed by a majority of the total membership of both the Houses with two-thirds majority of the members present and voting on the Bill.

The Constitutional provisions providing for the amendment of the Constitution apply to the State with two modifications. In the first place, the provisions pertaining to the upper chambers and the administration of Union Territories are not applicable to the State. In the second place, a proviso has been appended by the Presidential Order, 1954, to Article 368, according to which no 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". The amendments to the Indian Constitution, therefore, are rendered applicable to the State only by an enabling order made by the President in accordance with procedure laid down in Article 370.⁶³

Official Language

The main provisions of the Constitution of India, dealing with the Official Language are :⁶⁴

- (i) Hindi, written in Dev-Nagri script is the official language of the Union ;
- (ii) English is to continue to be used for all official purposes of the Union for a period of fifteen years after the promulgation of the Constitution.
- (iii) the Indian Parliament is empowered to authorise continued use of English for any specific purpose even after fifteen years.
- (iv) the language authorised for use in the Union for official purposes is to be the official language for communication between the Union and the States or among the States themselves.
- (v) the proceedings in the Supreme Court and the High Courts, texts of the Bills, Acts, Ordinances, Orders, Rules, etc. are to be issued in English for a period of 15 years after the promulgation of the Constitution. The Parliament is empowered to retain the use of English after that period also.
- (vi) the state is to provide adequate facilities for instruction in the mother tongue, at the primary stage, to the

63 Ibid., Para 15.

64 Ibid., Para 15.

children of linguistic minorities. The President is authorised to appoint a Special Officer for linguistic minorities to report on the safeguards provided for them.

- (vii) the State Legislatures are empowered to adopt one or more languages in the States for official purposes.

The provisions of the Constitution with regard to Official Language apply to the State of Jammu and Kashmir only in so far as they relate to :

- (i) official language of the union ;
- (ii) official language for communication between the Union and the States and among the States ; and
- (iii) the language of the proceedings in the Supreme Court.⁶⁵

The Constitution of the State makes provisions for the official language of the State. Urdu is recognised as the official language of the State, though English is to continue to be used as the official language until the State Legislature provides otherwise. The regional languages recognised by the Constitution of the State are, Kashmir, Dogri, Balti, Dardi, Punjabi, Pahari and Ladakhi.⁶⁶

65 Constitution (Application to Jammu and Kashmir) Order, 1954, Para 12.

66 Constitution of Kashmir, Sec. 145 read with the Sixth Schedule.

Chapter Four

State Government

The provisions of the Constitution of India with regard to the Government in the States are not applicable to the State of Jammu and Kashmir and the State Government is not organised in accordance with the provisions of Part VI of the Constitution of India. At the time the Constitution of India was framed, the State was reserved the right to frame a Constitution for its government and the provisions were included in Article 370 which envisaged the institution of a Constituent Assembly, to frame a Constitution for the State. The Constituent Assembly was convened in 1951. In 1952, the Assembly voted for the abolition of the hereditary rule of the Dogras. In 1954, the Assembly appointed a Drafting Committee to prepare a preliminary draft Constitution. The draft Constitution was adopted by the Assembly on 17th November, 1956. On 26th January, 1957, the Constitution came into force.

In its broad aspects, the State Constitution is similar to the constitutional structure provided for the States under the Constitution of India. The Constitution provides for a parliamentary form of Government. The State Government is headed by the Governor and constitutionally, all the executive authority is vested in him. In practice, however, the Governor does not exercise the powers given to him. The task of formulating and executing the policies of the government, is actually entrusted to a Council of Ministers, which is constituted from among the members of the State Legislature and formally appointed by the Governor. In the selection of the Ministers, the Governor has little choice, because in the mechanism of party politics, he is always obliged to appoint the Ministers

from the majority party in the Legislature. The leader of the majority party is appointed as the Chief Minister and the other Ministers are appointed on his recommendations. The essence of the parliamentary government is the collective responsibility of the executive to the legislature. The Council of Ministers is collectively responsible to the State Legislature and actually executes the laws proposed by it. The State Legislature is bicameral and its lower house, the Legislative Assembly, is elected on the basis of universal adult franchise.

A noteworthy feature of the State Constitution is that it provides for an independent judicial set-up with the State High Court at the apex. The Constitution ensures the separation of the judiciary from the executive and the legislature. Independence of judiciary is secured by express constitutional provisions in regard to the appointment, tenure and the removal of the Judges. The Judges of the High Court cannot be removed except on the grounds of proved misbehaviour or incapacity in accordance with the constitutionally sanctioned procedure. The High Court is vested with original and appellate jurisdiction in civil and criminal matters, and the power to secure the enforcement of the fundamental rights guaranteed to the people of the State under the Constitution of India.

The provisions of the Constitution of India with regard to the administrative services are not applicable to the State. The Constitution of the State, therefore, includes provisions to regulate the public services in the State. In accordance with the provisions of the State Constitution, the State Legislature is empowered to regulate by law, the recruitment of administrative cadres to public services, conditions of their service and their removal.

The Constitution of the State also vests the State Legislature with the powers to amend the Constitution of the State. Under the Constitution of India, the power to amend the constitutional provisions including those which govern the administration in the States, is vested with the Parliament and not in the State Legislatures. The Constitution of the State can be amended by an amendment bill initiated by the Legislative Assembly of the State and passed by a two-thirds majority of both the Houses of the State Legislature. The power to amend the Constitution,

however, does not extend to the provisions of the Constitution of India applicable to the State, and the division of powers between the State Government and the Government of India.

Another characteristic feature of the Constitution of the State is that it embodies a long and radically progressive list of Directive Principles of State Policy for the guidance and the instruction of the government in power. These Principles aim to secure readjustment in property relations in order to secure a wider and more equitable distribution of wealth; social legislation, social security and social insurance; uplift of the backward sections of the society, rehabilitation of the renowned crafts and cottage industries of the State and the expansion of educational facilities. Like the Directive Principles of the State Policy included in the Constitution of India, the Directive Principles of State Policy, enshrined in the State Constitution are not justiciable and cannot be enforced by the courts of law.

A noteworthy feature of the Constitution of the State is that it defines the people of the State into a general category of citizens called the "Permanent Residents". The 'Permanent Residents' of the State include persons, who were born and were residing in the territories of the State when it was founded by Maharaja Gulab Singh; the persons who settled in the State before the year 1885; the persons who settled in the State before the year 1911 and acquired immovable property in the State; the persons who acquired immovable property and settled in the State for permanent residence before 14th May, 1944, and the state-subjects who migrated to Pakistan but returned to the State for permanent settlement. The Legislature of the State retains the power "to make any law defining the classes of the persons who are, or shall be, permanent residents of the State." Obviously, the State Legislature is vested with the power to bring sections of people living in the State within the ambit of the definition of 'Permanent Residents' which are not covered by it or deprive sections of the 'Permanent Residents' of their right to be 'Permanent Residents' in the State. Though the option is apparently intended to cover wider sections of the people in the State within the purview of the definition of the 'Permanent Residents', the State Legislature is

reserved the power to terminate the right to permanent residency of any class or classes of 'Permanent Residents' of the State. The severity of this pernicious provision, is mitigated to some extent by the fact that the Constitutional provisions require a two-thirds majority of the total membership of the either House of the State Legislature to :

- (i) redefine or alter the definition of the classes of persons who are, or shall be, 'Permanent Residents' of the State;
- (ii) confer on 'Permanent Residents' any special rights or privileges; and
- (iii) regulate or modify any special rights or privileges enjoyed by the 'Permanent Residents' of the State.

Governor

The Constitution of the State lays down that the Governor of the State is appointed by the President of India and holds office during the pleasure of the President. Ordinarily, the Governor remains in office for a period of five years, unless he resigns earlier.¹ The salary of the Governor is fixed at Rs. 5,500/- per month, besides other allowances and emoluments. His salary and allowances cannot be reduced during the term he is in office. Both his salary and his allowances are charged on the Consolidated Fund of the State and are therefore, non-votable. The Constitution prescribes certain qualifications for the appointment as the Governor of the State.² The person, to be appointed the Governor, must be a citizen of India. He must have completed thirty years of his age. He must not be in possession of any office of profit. He must not be a member of the State Legislature or the Union Parliament. In case he is, he will be deemed to have vacated his seat on the day he assumes the office of the Governor. On the assumption of his office, the Governor has to make and subscribe, in the presence of the Chief Justice of the High Court of the State, an oath or affirmation to devote himself to the service and well-being of the State

1 Constitution of Jammu and Kashmir, Sec. 28.

2 Ibid., Sec. 29.

and to "preserve, protect and defend the Constitution and the law."³

The executive power of the State is vested with the Governor and is exercised by him directly or through his officers.⁴ The executive power of the State extends to all the matters which are not transferred to the Union Government and are reserved for the State Government. The legislative and the executive powers of the State extend to the residuary powers which are retained by the State Government. All executive action of the Government is taken in the name of the Governor. The Chief Minister of the State and the other members of the Council of Ministers are appointed by him and they hold office during his pleasure. He allocates the business of the government among the Ministers and is empowered to make rules for the more convenient transaction of such business.⁵ He appoints the Advocate General of the State and the Chairman and the other members of the State Public Service Commission.

In the legislative field the Governor wields many powers. In fact, he is an integral part of the State Legislature. He is empowered to summon and prorogue the legislature and dissolve the Legislative Assembly. He is also empowered to nominate eight members to the Legislative Council from among the persons belonging to socially and economically backward classes in the State and the persons having special knowledge or practical experience in respect of matters such as literature, science, art, cooperative movement and social service. The Governor is entitled to address the either House of the Legislature or both Houses assembled together. He is also entitled to send messages to the two Houses of the Legislature with respect to a Bill pending for consideration. All Bills passed by the Legislature are presented to the Governor for his assent.⁶

The Governor is vested with the power to promulgate Ordinances during the recess of the Legislature if he finds that circumstances exist which necessitate immediate action. The Ordinances promulgated by him have the same force and effect

that the Acts of State Legislature have. Every Ordinance, however, must be laid before the State Legislature when it reassembles. In case the Ordinance is not upheld by the Legislature, it is automatically invalidated.⁷

The Governor is vested with certain financial powers also.⁸ He causes to be laid before the Legislature the "Annual Financial Statement" of the State showing the annual estimated receipts and expenditures. No demand for any grants can be made except on the recommendations of the Governor. The Governor also causes to be laid before the Legislature, statements for supplementary grants and additional expenditure.

The Governor is also empowered to grant pardons, reprieves and remissions of punishments and suspend, remit or commute the sentence awarded to any person convicted of any offence against any law relating to matters over which the executive powers of the State extend.⁹

Council of Ministers

The State Constitution provides for a Council of Ministers to aid and advise the Governor in the exercise of his functions.¹⁰ The Council is headed by the Chief Minister. The Chief Minister is appointed by the Governor and the other Ministers are appointed by the Governor on the recommendations of the Chief Minister. The Ministers hold office during the pleasure of the Governor. The Constitution lays down unambiguously that the Council of Ministers is collectively responsible to the Legislative Assembly of the State.¹¹ It is obvious that the Council of Ministers retains its office so long as it enjoys the confidence of the majority in the Legislature. The Council constitutes an independent political executive which is installed in office by the party which is in majority in the Legislature and remains in office so long as the party is pleased to keep it there. The Governor only confirms the process. Ordinarily, the Governor will not involve himself in the constitution of the Council and will also hesitate to tamper with it. In case, he loses his guard, circumstances

3 Ibid., Sec. 31.

4 Ibid., Sec. 35.

5 Ibid., Sec. 43.

6 Ibid., Sec. 78.

7 Ibid., Sec. 91.

8 Ibid., Sec. 79.

9 Ibid., Sec. 34.

10 Ibid., Sec. 35.

11 Ibid., Sec. 35.

will follow, which will inevitably lead to a constitutional deadlock with the Legislature arraigned in hostility against him, and prejudice his political impartiality and his position as the head of the State. The Constitution of the State expressly provides for a parliamentary government and clearly underlines the principle of collective responsibility. Though the Governor is the executive head and is entrusted with powers, which at their face value are extensive and important, his powers are exercised by the Council of Ministers which constitutes the political executive. Few of the powers entrusted to the Governor are substantial in nature. The Council of Ministers aids and advises the Governor in the exercise of his powers and the Constitution, specifically stipulates that the Governor shall exercise his powers only on the advice of the Council of Ministers.

"All the functions of the Governor except those under sections 36, 38, 92 shall be exercised by him only on the advice of the Council of Ministers."¹²

The limitation on the Governor is, therefore, absolute and it is interesting to note that this provision is original to the Constitution of the State and is not found in the Constitution of India. There is a marked difference in this respect between the position, the Governors of the other Indian States enjoy and the position that is enjoyed by the Governor of Jammu and Kashmir. Under the Constitution of India, no obligation binds the Governor to accept the advice tendered to him by his Council of Ministers and there is no constitutional remedy available against the inability of the Governor to accept the advice of the Council. The question whether any, and, if so, what advice was tendered by the Council to the Governor is not liable to be inquired into by any court.¹³ The Governor acts on the aid and advice of the Council because the system of the Government he heads is based on the convention that he will not flout the advice tendered to him by his ministry and the constitutional propriety

12 The Constitution of Jammu and Kashmir, Sec. 36 and 38 deals with the appointment of the Ministers and the Deputy Ministers. Section 92 deals with the breakdown of the Constitutional machinery of the State.

13 Basu, D. D. *A Commentary on the Constitution of India*, pp. 243-245.

demands that he upholds the convention. But that is an extra-constitutional implication, not a legal guarantee. Besides, the technical position the Governor enjoys, bestows on him the prestige of the prerogative. The Constitution of the State on the other hand declares in unequivocal terms that the Governor will always function on the advice of his ministry. The State Governor is denied the power and prestige that could accrue to him from the constitutional provisions vesting in him the technical authority to determine whether ministerial advice given to him was acceptable to him. In fact, no options are available to him. The Constitution denies him the power to act except on the advice of his ministers. The Council of Ministers is, therefore, vested with a wider orbit of power and enjoys a more sacrosanct position than that enjoyed by the ministers in the other Indian States. The Governor of the State is relegated to the position of a mere figure-head less dignified than even a nominal constitutional entity.

As a constitutional head, the Governor is given the right to be informed of all the decisions the Council takes with regard to the administration of the State and proposals for legislation. He is also ensured the right to call for any information from the Council which he deems necessary with regard to the administration of the State. In order to preserve the principle of collective responsibility he is also empowered to return any decision taken by a Minister to the Council for its consideration, in case he deems it necessary that such a decision should receive the consideration of the Council.¹⁴ These functions are constitutionally recognised and apparently give the Governor the authority to influence the decisions of his Government. However, since the Governor is subject to the severe limitation that he is always bound to function on the advice of his ministers, he is hardly left with any initiative to put his authority to any purposeful use.

The only field, in which the Governor has the initiative to exercise certain defined powers without the aid and advice of his Council of Ministers, is that pertaining to his discretionary powers. There are two sets of circumstances in which the Governor is entitled to exercise powers in his discretion. In

14 Constitution of Jammu and Kashmir, Sec. 43, 44.

the first place, the State Constitution explicitly empowers the Governor to act in his discretion when the Chief Minister and the other members of the Council of Ministers are to be appointed,¹⁵ and when in consequence of the constitutional breakdown in the State, a declaration of emergency is warranted.¹⁶ The discretion to select and appoint the Chief Minister and the other ministers has little significance in a parliamentary structure based on party system as the Governor is bound to appoint the leader of the majority party in the Legislative Assembly as his Chief Minister and the other members of the Council of Ministers on the recommendations of the Chief Minister. But the situations might arise, in which a stable majority is not precipitated in the legislature or the majority party suffers a split and the splinters and alliances which usually crop up in consequence, claim to constitute a majority in the legislature. In such circumstances the Governor has an important role to play in the selection of the leader who could probably be expected to constitute a stable ministry. In regard to the constitutional breakdown in the State, the powers vested with the Governor are more decisive.¹⁷ The power to decide whether Presidential intervention is necessitated, rests squarely in the hands of the Governor. The Governor is, in fact, the President's adviser on the spot. Obviously, though the Governor of the State will have the advice of the ministry available to him, he is not obliged to follow it. The ministry in power may be vehemently opposed to the declaration of an emergency, but the power to take the final decision lies with the Governor.

Apart from the discretionary powers, which the Constitution of the State explicitly vests in the Governor, there are certain functions, which by their very nature cannot be undertaken by him, except in his discretion. These functions are :

- (i) the dismissal of the ministry ;
- (ii) the dissolution of the Legislative Assembly ;
- (iii) seeking information from the Chief Minister in regard to legislative and administrative matters ;

15 Ibid., Sec. 35.

16 Ibid., Sec. 36, 38.

17 Ibid., Sec. 92.

- (iv) asking the Chief Minister to submit for the consideration of the Council of Ministers, matters on which a decision has been taken by a Minister but which has not been considered by the Council ; and
- (v) the refusal to give assent to a Bill passed by the Legislature and its return to the Legislature for reconsideration.

In regard to the discretionary powers as well, the Governor of the State does not enjoy the position, the Governors of the other Indian States are secured under the Constitution of India. The orbit of the discretionary powers enjoyed by the Governors of the Indian States under the Constitution of India, is distinctly wider than that of the discretionary powers given to the Governor of the State. Under the Constitution of India, the State Governor is vested with the crucial authority to determine whether he is required, by, or, under the Constitution, to act in his discretion. The Council of Ministers is powerless in case of any difference of opinion with the Governor on this vital issue. The Governor of the State is vested with no such authority and no such provision is incorporated in the Constitution of the State. As such, the Governor's power to act in his discretion flows from restricted permissibility, determined by the exigencies of specific situations.

The State Legislature

The Constitution of the State provides for a bicameral legislature vested with the function of legislation on subjects reserved for the State Government under the Constitution of India. The two Houses are known as the Legislative Council and the Legislative Assembly. The Legislative Council consists of, indirectly elected members, giving representation to functional groups, local bodies, and other unorganised social interests. The Legislative Assembly is composed of members chosen by direct election on the basis of universal adult franchise.

The Legislative Council is composed of thirty six members.¹⁸ Of these, eleven members of the Council are elected by the members of the Legislative Assembly from among the residents of

18 Ibid., Sec. 50.

the Kashmir Province, at least one each being elected to represent the districts of Ladakh and Skardu. Eleven members of the Council are elected by the Legislative Assembly from among the residents of the Jammu province, at least one each being elected to represent the districts of Doda and Poonch. None of the standing members of the Legislative Assembly can be elected to the Council. The Council offers special representation to local bodies, socially and economically backward classes in the State and outstanding people who have acquired special knowledge and experience in science, literature, art, cooperative movement, social services and other specialised fields. One member, each for the two provinces is elected to the Council by electorates constituted of the members of the Municipal Councils, Town Area Committees, and Notified Area Committees of each of the two provinces. Two members, for either of the two provinces, are elected to the Council by the electorates constituted of the members of Panchayats and such other local bodies in each of the two provinces as the Governor may specify. The Governor is empowered to nominate eight members to the Council, not more than three of whom represent the socially and economically backward classes in the State. The remaining members are appointed from among the persons who have made outstanding contribution to art, science, literature, cooperative movement and social service. The elections to the Council are held in accordance with the system of proportional representation with single transferable vote. The Council is a permanent chamber which is not subject to dissolution. The members of the Council are elected for six years, one-third retiring after every two years.

The Legislative Assembly is composed of one hundred members.¹⁹ Twenty-five seats in the Assembly are reserved for the people inhabiting the territories of the State still under the occupation of Pakistan. The occupied territories are not included in the delimitation of the Constituencies for the elections to the Assembly and the reserved seats are not taken into account for reckoning the total membership of the Assembly till the seats are not filled. Seats are also reserved in the Assembly for

19 Ibid., Sec. 47.

the 'Scheduled Castes' in a ratio "which shall bear as nearly as may be, the same proportion to the total number of seats in the Assembly as the population of the Scheduled Castes bears to the population of the State." The reservation for the Scheduled Castes is, however, to cease at the expiration of a period of twenty three years from the commencement of the Constitution of the State. Provisions are also made in accordance with which the Governor of the State is empowered to nominate one or two women to the Assembly if he is convinced that women are not adequately represented in the Assembly.

The Constitution of the State lays down the following qualifications for the membership of the Legislature.²⁰ A candidate for the election to the Legislature :

- (i) must be a permanent resident of the State ;
- (ii) must subscribe before an authority, commissioned by the Election Commission of India, an oath of affirmation to the Constitution of the State and the Union of India ;
- (iii) must have attained twenty five years of age in case of the election to the Assembly and thirty years in case of election to the Council ;
- (iv) must not be the member of both the Houses of the State Legislature ;
- (v) must not hold any office of profit under the Government of India or the Government of the State or any Government within the Union of India ;
- (vi) must not be of unsound mind ;
- (vii) must not be an undischarged insolvent ;
- (viii) must not be disqualified by any law made by the State Legislature ; and,
- (ix) must possess such other qualifications as are laid down by the State Legislature.

The Legislature of the State is the highest law-making body, vested under the Constitution of the State, with the powers to legislate on all matters "except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India."²¹ In the scheme of the

20 Ibid., Sec. 51.

21 Ibid., Sec. 5.

division of powers between the Union and the State of Jammu and Kashmir, the residuary powers have been retained by the State. This is in contrast to the pattern of the relations between the Government of India and the other Indian states, where the scope of the legislative power of the States is defined by a detailed enumeration of the state subjects in the State List and the residuary powers are reserved with the Centre. The Legislature of the State is, therefore, empowered to legislate on all matters which have not been transferred to the Union Government and the subjects defined in the Concurrent List.

The provisions of Article 249 of the Constitution of India which empower the Parliament to legislate on matters specified in the State List on a resolution of the Council of States, do not apply to the State. Therefore, the Parliament cannot assume any such right to legislate on the residuary powers vested with the state. However, the Parliament is empowered to legislate on the residuary subjects reserved for the State while a proclamation of emergency is in operation. Besides, wherever, the law made by the State Legislature is repugnant to, or inconsistent with, the law made by the Parliament, which the Parliament is competent to enact or a law made on matters enumerated in the Concurrent List, the law made by the Parliament finds precedence over the law made by the State Legislature.

The State Legislature exercises control over the finances of the State.²² Every year the Annual Financial Statement or the Budget is laid before both Houses of the Legislature. The Budget shows the statement of the estimated receipts and expenditures of the State for the current financial year. The expenditure embodied in the Budget is divided into two parts : the expenditure 'charged upon the Consolidated Fund of the State' and the sums required to meet the other expenditure from the Consolidated Fund. The expenditures charged on the Consolidated Fund include :

- (a) "the emoluments and allowances of the Governor and other expenditure relating to his office;
- (b) the salaries and allowances of the Speaker and the Deputy Speaker of the Legislative Assembly and of the

22 Ibid., Sec. 79.

Chairman and the Deputy Chairman of the Legislative Council;

- (c) the debt charges for which the State is liable, including interest, sinking fund charges and redemption charges, and other expenditure relating to the raising of the loans and the service and redemption of debt;
- (d) the expenditure in respect of the salaries and allowances of the Judges of the High Court;
- (e) any sums required to satisfy any judgement, decree or award of any court or arbitral tribunal; and,
- (f) any other expenditure declared by the Constitution, or by Legislature by law, to be so charged."

These funds are not subject to the vote of Legislative Assembly, though the Constitution does not bar a discussion on any of them by the two Houses of the Legislature. The other expenditures drawn from the Consolidated Fund are subject to the sanction of the Legislative Assembly. The estimates are submitted in the form of demands for grants to the Assembly and the Assembly has the power to assent, reduce or reject the demands. The demand for grants is made only with the recommendation of the Governor. No taxes can be levied without the consent of the Legislative Assembly.²³

The Constitution of the State embodies a parliamentary system of government. Consequently, the real executive powers of the State are vested in the political executive, *i.e.*, the Council of Ministers, which is collectively responsible to the State Legislature, or precisely the Legislative Assembly. The Legislature, therefore, exercises supreme control over the political executive. The Ministry remains in office so far as it enjoys the confidence of the Legislative Assembly. The moment it loses the confidence of the Assembly, it has to relinquish office. The Legislature exercises supervision and vigilance over the political executive through questions asked in either of the two Houses of the Legislature to elicit information regarding the policies and the actions of the government, supplementaries and adjournment motions.

23 Ibid., Sec. 80.

Powers are also vested with the State Legislature to amend the Constitution of the State.²⁴ The State Legislature is empowered to amend the Constitution by an amendment bill initiated by the Legislative Assembly and passed by a two-thirds majority of the two Houses of the Legislature. The power to amend the Constitution is, however, subject to the limitation that the Legislature is barred to initiate amendments in :

- (i) the provisions of the Constitution of India applicable to the State;
- (ii) the provisions of the Constitution of the State confirming the accession of the State to the Indian Union;
- (iii) the provisions of the Constitution of the State which define the powers of the State government; and,
- (iv) the provisions dealing out the procedure for the amendment of the State Constitution.

Although the collaboration of both the Houses of the Legislature is necessary for all legislative activities, the Constitution of the State has recognised the pre-eminence of the Legislative Assembly. The powers exercised by the Council are mostly revisory. In matters of ordinary legislation, if any Bill passed by the Assembly is rejected by the Council or retained for more than three months, the Bill is deemed to have been passed by both the Houses of the Legislature if the Assembly passes it a second time and after it is transmitted to the Council for reconsideration, the Council again rejects it or retains it for more than one month. In case a Bill passed by the Assembly is modified or amended by the Council, it is also deemed to have been passed by both the Houses if the Assembly passes it a second time with or without taking into consideration the modifications and amendments made by the Council.²⁵ In financial matters also the Council does not enjoy any substantial powers. All Money Bills are introduced in the Legislative Assembly. The Constitution of the State clearly stipulates that no taxes and levies are imposed except by authority of law and no expenditure can be imposed save by the consent of the people's representatives. Money Bills passed

24 Ibid., Sec. 147.

25 Ibid., Sec. 75.

by the Assembly and sent to the Council must be considered by the Council within fourteen days failing which the Bills are deemed to have been passed by the Council. In case a Money Bill is amended by the Council, the Assembly is competent to accept or reject the amendments made by the Council.²⁶ The Legislative Council does not exercise any control over the Ministers who are, in effect individually and collectively responsible to the representative House of the Legislature, the Legislative Assembly. The Council has every right to keep itself fully informed of the policies and the function of the Government but it cannot initiate and effect censure against the ministry in power.

High Court

The Constitution of the State provides for a High Court of Judicature.²⁷ The High Court consists of the Chief Justice and two more other judges. The Constitution provides for the appointment of additional judges for a period, not exceeding two years, to cope with any temporary increase in the business of the High Court or to clear any pending arrears of work. Provisions are also made for the appointment of duly qualified persons to act as the Judges of the Court in case a permanent Judge is unable to perform the duties of his office. The Chief Justice of the High Court is appointed by the President after consultation with the Chief Justice of India and the Governor of the State. The other Judges of the High Court are appointed by the President in consultation with the Chief Justice of the Supreme Court, the Governor of the State and the Chief Justice of the State High Court. In actual practice the Judges of the High Court of the State are appointed according to the same procedure that is adopted in the appointment of the Judges of the High Courts in the other Indian States. The Chief Justice of a High Court forwards his recommendations to the Chief Minister of the State who after having consulted the Governor, forwards the recommendations to the Ministry for Home Affairs. The Home Ministry consults the Chief Justice of India and thereafter advises the President, who formally makes the appointments.²⁸

26 Ibid., Sec. 76.

27 Ibid., Sec. 93.

28 Ibid., Sec. 95.

The Chief Justice and the Judges of the High Court hold office till they attain sixty two years of age in case they do not resign their office earlier. The Constitution of the State makes no provision for the removal of the Judges of the High Court. However, Article 218 of the Constitution of India applies to the State and Judges of the High Court of the State are liable to be removed from office in the same manner as the Judges of the Supreme Court and the High Courts of the other States in India. The Judges of the Supreme Court and the High Courts in the State are removed in accordance with the special procedure laid down in Article 124 of the Constitution of India. The Judges of the High Court are liable to be removed from office by the President on the grounds of proved mis-behaviour or incapacity and on an address presented by the two Houses of the Parliament to the President. This provision is aimed to secure the independence of the High Court Judges in the States by providing that they are removed from office in the manner, the Judges of the Supreme Court are removed under the procedure laid down by the Constitution of India and are not left at the whim and mercy of either the State executive or the State legislature.⁸⁹

The minimum qualifications for the appointment of the Judges of the High Court are :

1. Indian citizenship ;
2. ten years' experience as a judicial officer in the State or any other part of India or ten years' standing as an advocate of the State High Court or any other High Court in India.

In computing the ten years' period for the purpose of appointment, experience as an advocate can be combined with the experience accumulated in the capacity of a judicial officer.⁹⁰

The Chief Justice is paid a salary of Rs. 4,000/- per month and the other Judges draw a salary of Rs. 3,500/- per month. In addition they are also entitled to allowances and a pension on retirement. The salaries and the allowances of the Judges

29 The Constitution (Application to Jammu and Kashmir) Order, 1954, 5 (A). Constitution of India, Articles 124, 218.

30 The Constitution of Kashmir, Sec. 96.

are not changed to their disadvantage after their appointment. The emoluments paid to the Judges are charged on the Consolidated Fund of the State and as such are included in the grants not subject to the vote of the State Legislature. The Constitution of India imposes certain restrictions on the Judges of the High Courts. These provisions are applicable to the State and therefore, cover the Judges of the High Court of the state as well.⁸¹ According to these provisions the Judges of the High Court are barred to practise before any Court except the Supreme Court and the High Courts, other than those in which they had been judges. The restrictions are intended to secure and safeguard the independence of the State High Courts.

The Constitution of the State does not attempt a detailed classification of the various aspects of the jurisdiction of the High Court, because there was already a High Court in the State functioning with a well defined jurisdiction at the time the Constitution was brought into force.⁸² Provisions with regard to the High Court were included in the Civil Courts Act 1925, and later in the Constitution Act of 1934, which marked the first major landmark in the Constitutional development of the State.⁸³ The Constitution Act of 1934, was repealed in 1939, and replaced by the Constitution Act of 1939, and provisions regarding the High Court were embodied in the new Constitution Act also. The new Constitution Act, however, made provisions for the appointment of a Board of Judicial Advisers and the High Court was superseded by the Board in respect of its appellate jurisdiction.⁸⁴ After independence and the transfer of power, the Board of Judicial Advisers was revived every year by an order of the Maharaja till it was finally abolished in 1954 and the High Court retrieved its position as the highest judicial authority in the State.

In 1957, when the Constitution of the State was framed, provisions were made to preserve the jurisdiction, the High

31 The Constitution (Application to Jammu and Kashmir) Order, 1954, para 5 (A). Article 220 of the Constitution of India is made applicable to the State. The bar against practice before a Court is imposed on the permanent Judges of the High Court only.

32 Constitution of Jammu and Kashmir, Sec. 102.

33 Jammu and Kashmir Constitution Act, 1934.

34 Jammu and Kashmir Constitution Act, 1939.

Court enjoyed, subject to the general provisions of the new Constitution and the law, for the time being in force. Under the provisions of the Constitution, the jurisdiction of the High Court and the law administered by the High Court remained unaffected and the same as immediately before the commencement of the Constitution.³⁵ At the time the Constitution was brought into force, the High Court was vested with original jurisdiction in civil cases of the value of more than ten thousand rupees and probates of wills and testaments, letters of administration of assets of persons dying intestate, and extraordinary jurisdiction, to remove for its adjudication suits falling within the jurisdiction of any subordinate court subject to its superintendence. The Court was also vested with the power to dispose of appeals and revisions in revenue and criminal cases in accordance with the provisions of the enactments in force in the State.³⁶

Apart from its original and appellate jurisdiction the Constitution explicitly vests in the High Court powers to :

- (i) issue writs or orders for the enforcement of the fundamental rights ;
- (ii) issue writs and orders for the purposes other than those connected with the fundamental rights ;
- (iii) transfer cases to itself from the subordinate courts for adjudication ;
- (iv) superintend and control the subordinate Courts ;
- (v) control its staff ; and,
- (vi) function as a court of record.

The High Court is empowered to issue writs or orders in the nature of Habeas Corpus, Mandamus, Prohibition, Quo warrant and Certiorari for the enforcement of the Fundamental Rights.³⁷ The jurisdiction of the High Court of the State with

35 The Constitution of Jammu and Kashmir, Sec. 102.

36 The Constitution of Jammu and Kashmir, Sec. 102.

37 Constitution (Application to Jammu and Kashmir) 1954, Para 4 (2). A new clause is appended to Art. 32 of the Constitution of India which provides that the High Court of the State shall have the power throughout the territories in relation to which it exercises jurisdiction to issue to any person or authority, including in appropriate cases any government within the territories, directions or

respect to the enforcement of the Fundamental Rights is, concurrent with the jurisdiction, the Supreme Court exercises under the Constitution of India. The High Courts in the other Indian States have been given the role of the protector of the Fundamental Rights guaranteed under the Constitution of India and in this respect the Constitution of Jammu and Kashmir State follows, in principle, the provisions that have been laid down by the Constitution of India in regard to the High Courts in the other Indian States.

“The jurisdiction under article 226 is exercised by the High Court in order to protect and safeguard the rights of the citizens and whenever the High Court finds that any person within its territories is guilty of doing an act which is not authorised by law or is violative of the Fundamental Rights of the citizens, it exercises that jurisdiction in order to vindicate his rights and redress his grievances and only conditions of its exercise of that jurisdiction are :

- (i) the power is to be exercised throughout the territories in relation to which it exercises jurisdiction, that is to say, the writs issued by the Court do not run beyond the territories subject to its jurisdiction ;
- (ii) the person or authority to whom the High Court is empowered to issue such writs must be within those territories which clearly implies that they must be amenable to its jurisdiction either by residence or location within territories.”³⁸

The power to issue writs is not confined to the enforcement of the Fundamental Rights only. Art. 103 of the Constitution of the State reads :

“The High Court shall have power to issue to any person or authority, including in appropriate cases any Government within the State, directions, orders or writs, including writs in the nature of Habeas Corpus,

orders or writs, including writs in the nature of Habeas Corpus, Mandamus, Prohibition, Quo warrant and Certiorari, for the enforcement of the Fundamental Rights provided for under the Constitution of India.

38 Kasuliar, V. M. V. Potti, A. I. R. 1956 S. C. 256.

Mandamus, Prohibition, Quo Warranto and Certiorari, or any of them, for any purpose other than those mentioned in clause (2-A) of Article 32 of the Constitution of India."

Whenever the High Court finds that any person within its jurisdiction acts in a way not authorised by law or violates the rights of the citizens it issues orders and writs to vindicate his rights and redresses his grievances. The High Courts are thus empowered to examine the validity of the various acts of the administrative officials whether of the State Government or of other public bodies and give appropriate relief to the aggrieved party.

The High Court is also vested with the power to withdraw cases from the subordinate courts if it is satisfied that the cases involve substantial questions of law as to the interpretation of the Constitution.³⁹ The Court is vested with the power to dispose of the cases after having determined the constitutional issue and return it to the subordinate Court for final disposal. The purpose clearly is to enable the High Court to interpret the Constitution and save the multiplicity of the constitutional interpretation at the level of the subordinate courts. This is aimed to ensure uniformity and adequate standards in the interpretation of the provisions of the Constitution. Two basic conditions must, however, be fulfilled before a case is transferred from a subordinate court to the High Court for adjudication. First, the High Court must be satisfied that the case involves a substantial question of law as to the interpretation of the Constitution. Secondly, the High Court must be satisfied that the determination of the question involved is necessary for the disposal of the case.

The Constitution also vests in the High Court the power of superintendence, over all the subordinate Courts within its territorial jurisdiction.⁴⁰ The High Court is empowered,

- (a) to call for returns from the subordinate courts;
- (b) to make and issue general rules and prescribe forms for regulating the practice and proceedings of the subordinate courts;

39 Constitution of Jammu and Kashmir, Sec. 105.
40 Ibid., Sections 104, 109, and 111.

- (c) to prescribe forms in which books, entries and accounts are kept by the officers of the subordinate courts;
- (d) to settle the fee to be allowed to the sheriffs and all clerks and officers, attorneys, advocates and pleaders practising in the subordinate courts;
- (e) to control the district courts and the subordinate courts, including the postings and promotions and the grant of leave to the personnel of the judicial service of the state holding any post inferior to the post of the district judge. However, the Court is not authorised to deal with them otherwise than in accordance with the conditions of their service prescribed under the law regulating the conditions of their service and such personnel are not deprived of any right to appeal which they have under laws regulating their service.

The High Court is further vested with the power to control its own staff and regulate the conditions of the service of such staff.⁴¹ The Chief Justice is empowered to appoint the officers and the servants of the Court. In this regard the Governor is empowered to require the Court to consult the Public Service Commission of the State. The Chief Justice is also vested with the power to regulate the conditions of service of the staff, subject to laws made by the Legislature in this respect. The approval of the Governor is required for any rules that the Court may make with regard to the salaries, the allowances, leave and the pension of its officers. All the administrative expenses of the Court are charged on the Consolidated Fund of the State.

The High Court is a court of record and therefore has all the powers a Court of record enjoys including the power to punish for contempt.⁴² In India, it is recognised that the power to institute proceedings for contempt, is inherent in all courts of record. The power to punish for contempt is unambiguously and directly vested in the High Court by the Constitution as well. Article 94 of the Constitution reads :

"The High Court shall be a Court of record and shall have all the powers of such a Court including the

41 Ibid., Sec. 108.

42 Ibid., Sec. 94.

power to punish for contempt itself or of the Courts subordinate to it.”

In matter of contempt the High Court can, therefore, deal with cases summarily and adopt its own procedure. But the procedure must be fair and the contemnor must be informed of the charges levelled against him and must be given a reasonable opportunity to defend himself.

Services

The provisions of the Constitution of India with regard to services are not applicable to the Jammu and Kashmir State. The Constitution of the State, therefore, includes provisions regarding the regulation of the public services in the State. The importance of the public services in the parliamentary system of government cannot be under-estimated. In a parliamentary government the political executive is representative in character and must therefore enter and leave office as the people determine. The efficiency and the standard of administration in such a system, depends ultimately on the calibre and integrity of the people, permanently in the office, who are charged with the difficult task of executing the policies laid down by the political executive. The political detachment is thus an imperative necessity for the services. In order, however, that a high standard of policy implementation is achieved, the administrative cadres need to work with a sense of commitment to the policies which they are asked to carry out by the government they serve. In fact, greater emphasis has now come to be put on the commitment of the administrative cadres in countries like India, which are economically and socially backward, and where planning of social and economic goals and social legislation have a vital role to play in the overall social and political development.

Under the provisions of the Constitution the State Legislature is empowered to regulate by law the recruitment to the public services of the State and the conditions of service of the personnel recruited. The members of the State services hold office during the pleasure of the Governor.⁴³ The power of the Governor in this regard is not absolute and he is not in a

43 *Ibid.*, Sec. 125.

position to deal with the public servants arbitrarily. Besides, the fact that a less judicious treatment is bound to undermine the quality and capacity of the public servants, the ‘pleasure of the Governor’ is subject to two vital limitations.⁴⁴

- (i) The members of the Civil Service of the State are not liable to be removed or dismissed by an authority subordinate to that by which they are appointed.
- (ii) The members of the public service are not liable to be dismissed or removed or demoted until they have been informed of the charges against them, an enquiry is instituted against them, they are given a reasonable opportunity to defend themselves and in case a penalty is imposed on them, they are given an opportunity of making representation on the proposed penalty. These safeguards are not available in cases :
 - (a) where the public servant is dismissed or demoted for the conduct which led to his conviction on a criminal charge ;
 - (b) where the Governor is satisfied that it is not expedient to hold an enquiry for reasons, which must be put in writing ; and
 - (c) where the Governor is satisfied that it is not expedient to hold an enquiry into a case for reasons of the security of the state.⁴⁵

Public Service Commission

To secure the public services from influence and favouritism and ensure the recruitment of efficient and able personnel the Constitution makes it obligatory for the State to constitute a Public Service Commission.⁴⁶ The members of the Public Service Commission are appointed by the Governor of the State and he determines the number of the members of the Commission.⁴⁷ As nearly as may be, one half of the members of the Commission must be the persons who at the time of their appointment had held office for at least ten years under the Government

44 *Ibid.*, Sec. 126.

45 *Ibid.*

46 *Ibid.*, Sec. 128.

47 *Ibid.*, Sec. 129.

of the State. The tenure of the members of the Public Service Commission is fixed at five years or until a member attains the age of sixty five years, whichever is earlier. The members of the Commission are not eligible for any appointment under the State Government except that a member other than the Chairman may become the Chairman of the Commission. A member of the Commission or its Chairman is liable to be removed from office by the Governor on the ground of misbehaviour, after the High Court, on reference made to it by the Governor has, after an enquiry, reported that the Chairman or the member ought to be removed. The Governor is empowered to remove the Chairman or any other member of the Commission if the Chairman or the member is adjudged insolvent, has taken any other paid employment or in the opinion of the Governor is unfit to continue in office due to infirmity of body and mind. The Chairman and the members of the Commission are also liable to be removed in case they get interested in any agreement involving the Government of the State or Union Government or assume profits arising of such an agreement.⁴⁸

The Public Service Commission is empowered to advise the State Government on :

- (a) all matters relating to method of recruitment to civil services ;
- (b) the principles to be followed in making appointments, promotions and transfers from one service to another and on the suitability of the candidates for such appointments, promotions and transfers ;
- (c) all disciplinary matters affecting the public servants including the memorials or petitions relating to such matters ; and
- (d) any other matter specifically referred to the Commission by the Governor.⁴⁹

The Legislature of the State is empowered to extend the scope of the functions of the Commission to matters in respect of the services of the State and matters connected with the services of public institutions such as the local bodies or public

48 Ibid., Sec. 130.

49 Ibid., Sec. 133.

corporations under the State Government.⁵⁰ This provision assumes significance in view of the fact that public corporations and other institutions are assuming wider role in the national development and as such involve the employment of an ever-increasing number of personnel.

The Commission submits to the Governor an annual report on the work done by it. The report is accompanied by a memorandum explaining the action taken by the State Government on the recommendations of the Commission. The memorandum explains the reasons for the inability of the Government to accept the recommendations of the Commission, if there are any such cases.⁵¹

A severe limitation has been imposed on the competence of the Commission as the Government has been empowered to make provisions for "the reservation of appointments or posts in favour of any class of Permanent Residents which in the opinion of the Government is not adequately represented in the services under the State."⁵² With regard to the reserved appointments and posts the Government is not required to consult the Commission. Not having specified the scope of the authority of the State Government in this regard the Government has been vested with very wide discretion to fix the quantum of the appointments and posts to be reserved and determine the content of the classes not adequately represented in the services of the State. The Government is also vested with absolute discretion to make appointments to the reserved posts from among the classes not adequately represented in the service without having to make any reference to the Commission. In other words the Government is vested with unfettered authority to lay down the principles and determine conditions in which such classes would be recruited to the reserved posts.

Directive Principles

In its preamble, the Constitution of the State embodies two fundamentally basic principles : Liberty and social justice. The preamble reads :

50 Ibid., Sec. 135.

51 Ibid., Sec. 137.

52 Ibid., 133 (3); Triloki Nath and another V. State of Jammu and Kashmir, Writ Petition No. 1107 of 1965. Lalita Shuri Tiklu Vs. State of Jammu and Kashmir, Writ Petition No. 66 of 1965.

"We the people of the State of Jammu and Kashmir, having solemnly resolved, in pursuance of the accession of this State to India which took place on the twenty-sixth day of October, 1947, to further define the existing relationship of the State with the Union of India as an integral part thereof, and to secure to ourselves—

- Justice, social, economic and political ;
- Liberty, of thought, expression, belief, faith and worship ;
- Equality, of status and of opportunity; and to promote among us all ;
- Fraternity, assuming the dignity of the individual and the unity of the Nation."

The Preamble is obviously symbolic of the policy design, the Constitution is framed to carry out. It qualifies every provision of the Constitution and every single stipulation assumes its right meaning in the light of the ideals embodied in it. The constitutional rights and the related legal guarantees pertaining to these principles are envisaged in the provisions regarding the fundamental rights that the Constitution of India embodies which apply with certain reservations to the State of Jammu and Kashmir as well. The operatives of this policy design, however, are embodied in Part IV of the Constitution of the State, wherein are enumerated the Directive Principles of the State Policy. These principles cannot be treated as a mere part of the constitutional frame. They must be visualised as the culmination of the long struggle for freedom and national emancipation and an expression of the long struggle for freedom and national emancipation and an expression of the aspirations of the people subject for centuries to misrule, oppression and slavery. The Directive Principles are therefore the instruments which give to the Constitution a living spirit. They are not only the instruments of instruction detailed out for the Government of the State, but constitute the compulsive power over the State to work out the instructions they embody.

The Constitution lays down the form of political democracy. The Directive Principles lay down the ideals of economic demo-

cracy and also the prescriptives that every government in power must strive to bring about economic democracy. The Basic Principles Committee of the Constituent Assembly of the State reported :

"The governing features of the State Constitution would be based on democracy, equality and social and economic justice. The guiding principle of the State policy would be to ensure the rebuilding of the State by harnessing all its resources for the purpose of securing a better and prosperous life for the people. In order to achieve that the entire economic activity of the State will be conducted in accordance with plans envisaged in New Kashmir."⁵³

The Directive Principles are an integral part of the foundations of the national movement and reflect the objectives, the movement idealised. In August, 1938, when the national struggle in the State was entering the most decisive phase of its evolution, in over five hundred meetings, held all over the State for responsible government, the following resolution was passed by the people :

"This meeting of the people places on record its complete repudiation of the present system of irresponsible government, and wishes to express its faith in the establishment of complete responsible government which alone can cure the ills of the people. Therefore, this gathering appeals to all patriotic persons to muster under the banner of freedom and to be prepared for the coming struggle, alone would usher in a period of complete political, economic and social emancipation."

In 1943, a Commission of Enquiry was instituted by the then Government of the State to examine the conditions and affairs in the State and recommend measures for reconstruction. The National Conference, which spear-headed the national movement in the State, prepared an elaborate scheme for social, economic and political reforms. The report was not submitted to the Commission but was adopted by the Conference as its

53 Report of the Basic Principles Committee of the Constituent Assembly of the State.

manifesto.⁵⁴ The manifesto, which was later published as the programme of 'Naya Kashmir' visualised the reconstruction of the social and economic forces in the State to establish a social order based on freedom and social justice. The Directive Principles as they came to be included in the Constitution were evolved by the framers of the Constitution in terms of the frame of reference, 'Naya Kashmir' laid down. Section 13 of the State Constitution reads :

"The prime objective of the State consistent with the ideals and the objectives of the freedom movement envisaged in "New Kashmir" shall be the promotion of the welfare of the mass of the people by establishing and preserving a socialist order of society wherein all exploitation of man has been abolished and wherein justice—social, economic and political—shall inform all the institutions of national life."

A distinctive feature of the Directive Principles is that they clearly and unambiguously stipulate that the State shall promote the welfare of the people by establishing and preserving a socialist order of society. The framers have, therefore, added a technical dimension to the entire policy design, the principles embody. The Directive Principles enumerated in the Constitution of India are not qualified by any such technical definitions. The Directives simply stipulate that the state shall endeavour to establish a 'social order' which ensures the welfare of the people. The stipulation is a blanket cover to legitimise any pattern of social development. Not content with the construction of the constitutional framework and the location of national objectives, the framers of the State Constitution defined the operatives of the envisaged constitutional framework and detailed out institutional processes for the realisation of the national goals. Section 14 of the Constitution provides :

"The State shall develop in a planned manner the productive forces of the country with a view to enriching the material and cultural life of the people and foster and protect :

54 Resolution of the Working Committee of the National Conference, dated 26th Feb. 1944.

- (a) the public sector where the means of production are owned by the State ;
- (b) the cooperative sector whose means of production are cooperatively owned by individuals ; and,
- (c) the private sector where the means of production are owned by an individual or corporation employing labour provided that the operation of this sector is not allowed to result in concentration of wealth or of the means of production to the common detriment."

The Directive Principles, therefore, envisage a readjustment in the economic structure at its very base. On the one hand the Principles provide for the State ownership of a portion of the means of production and on the other, they put a heavy embargo on private ownership by stipulating that the "operation of this sector is not allowed to result in the concentration of wealth or the means of production to the common detriment." The words "or the means of production" are specifically significant. They clearly indicate that the framers of the Constitution were not content with adjustment in the property-relationship at the income level, for if it were so, the words "concentration of wealth" would have been sufficient to carry that meaning. As a matter of fact the Directive Principles provide for the structural reorganisation and the functional reorientation of the entire economy of the State. The fathers of the constitution, in unequivocal language, voted for the drastic regulation of prevailing property relationships. In fact, the stipulations they made have a deep and revolutionary import.

The Directive Principles also include provisions regarding social legislation and social welfare.⁵⁵ Social legislation and social welfare are extremely important and useful instruments of social reconstruction in a society which is fast emerging out of atrophied feudal forms. Such communities are faced with various challenges arising out of modernization and political and cultural change. The evolution of positive social attitudes, aimed to meet the exigencies of rapid economic transformation and the strains of a boiling transition, ruthlessly dissolving values, norms and institutions, without replacing them with

55 Constitution of Jammu and Kashmir State, Secs. 20 and 21.

alternatives, therefore, becomes an imperative necessity. According to the Directive Principles the State is to strive :

- (i) to secure right to work, that is, the right to receive work with payment for labour in accordance with its quantity and quality subject to a basic minimum and maximum wage established by law ;
- (ii) to secure just and humane conditions of work with leisure and other social and cultural opportunities and emancipation from abuse, economic necessity and compulsion to enter unsuitable avocations and employment ;
- (iii) to secure all permanent residents adequate maintenance in old age, sickness, disablement, unemployment and other cases of undeserved want by providing social insurance, medical aid, hospitals, sanatoria and health resorts at state expense ;
- (iv) to secure to the people, free education upto the University standard within a period of ten years from the commencement of the Constitution, compulsory education for all children upto fourteen years and adequate facilities for adult education and part time technical and professional training for all workers and employees ;
- (v) to secure all children, adequate medical care and attention, equal opportunity in education and employment and protection against exploitation and against moral and material abandonment ;
- (vi) to secure all women right to equal pay for equal work, right to maternity benefits and medical care in all employments, right to reasonable maintenance in abandonment, right to equality in all social and political matters and special protection against discourtesy, defamation, hooliganism and other forms of misconduct ;
- (vii) to secure the socially and educationally backward sections of the people, special care in the promotion of their educational, material and cultural interests and protection against social injustice ;

- (viii) to safeguard and promote the health of the people by public hygiene and prevention of disease and "by ensuring wide-spread, efficient and free medical services throughout the State particularly in its remote and backward regions";
- (ix) to organise and develop agriculture and animal husbandry by bringing the cultivator the benefits of modern and scientific research and techniques to ensure speedy improvements in the living standards and the prosperity of the rural masses ;
- (x) to organise Village Panchayats and vest them with such powers and authority as may be necessary to enable them to function as units of self-government ;
- (xi) to rehabilitate and guide and promote the renowned crafts and cottage industries of the State and initiate programmes for refining and modernising the techniques of their production, including the employment of cheap power, "so that unnecessary drudgery and toil of the workers are eliminated and artistic value of products is enhanced, while the fullest scope is provided for the encouragement and development of individual talent and initiative" ;
- (xii) to separate judiciary from the executive in public services and "secure a judicial system which is humane, cheap, certain, objective and impartial" and further strive to ensure efficiency, impartiality and incorruptibility of various organs of justice, administration and public utility ;
- (xiii) to combat ignorance, superstition, fanaticism, communalism, racialism and cultural backwardness and foster "brother-hood and equality among all communities under the aegis of a secular state."⁵⁶

It has been seen that the Constitution embodies the reorientation of the basic concepts of State functions with a fundamental aim, that of fostering a social order which seeks to secure the welfare of the people in general. The State is thus set on way towards a welfare state. A significant question, however,

crops up here. What is the sanction behind a policy design laid down for the future development of the society? This assumes fresh importance in view of the fact that the Directive Principles of State Policy, the very backbone of that policy design, are not enforceable in courts of law.⁵⁷ In fact, it is often argued that lacking legal sanction, the Directive Principles of State Policy get reduced to an idle expression of pious wishes. It is, however, evident that the most potent guarantee behind, not only the Directive Principles of State Policy but the entire set of privileges and rights, the Constitution stipulates, is the people's will and the way it is represented in the constitutional set-up. Under the Constitution, political power is derived from the people and is vested in them. The Constitution is democratic in outlook as well as representative in content. It envisages the termination of the state of distrust between the government and the people, which though, inherent in an absolutist political set-up, was enhanced by the unhappy turns the history of the State took during the nineteenth century and which was consciously or unconsciously perpetrated by the Dogra rulers throughout the hundred years of their rule. It also envisages over-all changes in the organisation of the government and other political institutions for the incorporation of people's will in their working. It is basically this fact, that stands the most potent sanction behind the Directive Principles of State Policy. The Principles are "like an instrument of instruction to the state issued by the people." All political imperatives must have their justification in the capacity of the state to carry out these instructions, for it is historically evident that none of the imperatives can operate, at this stage of human development, on the mere habit of obedience.

Amendment

The procedure to amend the Constitution of the State is embodied in part XII of the Constitution.⁵⁸ A Bill to amend the Constitution can only be introduced in the Legislative Assembly of the State. If it is passed by a two-thirds majority of the total membership of the Assembly, the Bill goes to the Legis-

57 Ibid., Sec. 12.

58 Ibid., Sec. 147.

lative Council for consideration. If the Bill is passed by a two-thirds majority of the total membership of the House, it is sent to the Governor for his assent. When the Governor gives his assent to the Bill the Constitution stands amended in terms of the Bill. A Bill to amend the Constitution seeking the abolition of the Legislative Council is also introduced in the Assembly but requires to be passed by the Assembly by a simple majority of the total membership with a two-thirds majority of the members present and voting.

No Bill to amend the Constitution can be moved in either house of the legislature in regard to the following matters.⁵⁹

- (i) provisions of the Constitution of India applicable to the State.
- (ii) provisions of section 3 of the Constitution of the State which stipulate that "the State of Jammu and Kashmir is and shall be an integral part of the Union of India."
- (iii) provisions of Section 5 of the Constitution of the State which stipulate that "the executive and legislative power of the State extends to all matters except those with respect to which Parliament has power to make laws for the State under the provisions of the Constitution of India."
- (iv) provisions pertaining to the procedure of the amendment of the Constitution.

59 Ibid.

Chapter Five

The Division of Powers

The Indian federal structure envisages a clearly defined division of powers between the Union and the State Governments. The powers, the Union Government exercises, as well as the powers the State Governments exercise, are plenary and derived from this Constitution and cannot be taken away or abrogated by either of the two authorities. Except under certain defined circumstances, the Union and the State Governments exercise power within their respective limits which are specified by the Constitution. This division of powers is embodied in an elaborate scheme under which the legislative, administrative and financial powers of the Union Government and the State Governments are enumerated in detail. The Constitution allows a concurrent field of jurisdiction in the legislative sphere, subject, however, to the limitation that the authority of the Parliament to legislate on the subjects in the concurrent field is recognised paramount. A characteristic feature of the distribution of powers, the Indian federal structure embodies, is that all the residuary powers are secured to the Union Government. The Constitution explicitly vests in the Parliament the exclusive right to legislate in regard to any matter in addition to the enumerated heads of the Union List, which is not enumerated in the State List or the Concurrent List.¹

The division of powers between the State of Jammu and Kashmir and the Union Government is determined within the provisions of Article 370 of the Constitution of India as amen-

ded and modified by the various Constitution (Application to Jammu and Kashmir) Orders, promulgated by the President of India from time to time. Article 370, in its original and un-amended form did not provide for the application of the provisions, the Constitution of India, underlined for the Centre-State relations, to the Jammu and Kashmir State. According to its provisions the powers of the Parliament to make laws for the State were limited to :

- (i) those matters in the Union List and the Concurrent List, which in consultation with the Government of State, were declared by the President to correspond to matters specified in the Instrument of Accession as the matters with respect to which the Dominion Legislature had the power to legislate for the State, and,
- (ii) such other matters in the Union List and the Concurrent List, as were specified by the President of India with the concurrence of the Government of the State.

Obviously, the powers not transferred to the Union Government, in other words, the residuary powers, were retained by the State. This scheme of the distribution of powers between the two Governments was drastically changed in 1954, when the President of India promulgated the Constitution (Application to Jammu and Kashmir) Order, 1954 and Part XI of the Constitution of India, together with the Seventh Schedule, was made applicable to Jammu and Kashmir with certain reservations and modifications.² The provisions of Part XI of the Indian Constitution deal with legislative, administrative and financial relations between the Union Government and the States. The application of these provisions to the State, unmistakably brought the division of power between the Union and the State, in line with the federal principle envisaged by the Constitution of India. The later Presidential Orders further defined the two orbits of authority, pruning and modifying the reservations imposed on the application of the provisions of the Constitution of India to the State. These reservations and modifications pertain to save certain subjects in the Union List and the

1 Constitution of India, Seventh Schedule.

2 Constitution (Application to Jammu and Kashmir) Order, 1954.

Concurrent List from the jurisdiction of the Union Government and reserve these subjects for the State Government; reserve the residuary powers of legislation and taxation for the State; and, secure the State, in the legislative and administrative spheres, powers which are otherwise vested with the Union Government under the Constitution of India.³ The powers transferred to the Union Government for its exclusive operation are specified in the Union List as the subjects with regard to which the provisions of the Seventh Schedule are applicable to the State. The powers kept within the concurrent sphere of the two Governments are specified in the Concurrent List as the subjects with regard to which the provisions of the Seventh Schedule are applicable to the State. The powers not included in these two categories are retained by the State in residuum. This is, in fact, the most characteristic feature of the division of powers between the Union Government and the State and the only factor that portends a difference for Jammu and Kashmir in the Indian federal structure.⁴

The Legislative Relations

The Constitution of India envisages a well defined division of legislative powers between the Union Government and the State Government in accordance with which the Union Government is vested with the powers to legislate on subjects of national importance and the State Governments are vested with the powers to legislate on the subjects of local and provincial interest. The Constitution runs into elaborate enumeration of the legislative powers delimiting subjects for the legislative competence of the Union and the States. Besides the exclusive legislative powers that the Union and the State Legislatures are given, concurrent powers of legislation are given to both the Union Government and the State Governments over a number of other subjects. The scheme of the distribution of powers is embodied in Part XI of the Constitution together with the Seventh Schedule of the Constitution. The Seventh Schedule categorises the legislative subjects in three separate lists, the Union List, the State List and the Concurrent List. The Union

³ Ibid., para 6.

⁴ Ibid.,

List enumerates as many as ninety seven items comprising the subjects which affect the Union and which are placed within the exclusive competence of the Parliament. The State List enumerates sixty six subjects which concern the States and which are placed within the legislative competence of the State Legislatures. The Concurrent List enumerates as many as fortyseven subjects in respect of which both the Union Government and the States are given concurrent powers to legislate.

The legislative relations between the State of Jammu and Kashmir and the Union are also determined under the same scheme of the division of powers which governs the legislative relations between the Union and the other States with certain reservations and modifications. The provisions of the Seventh Schedule are applicable to the State in regard to the Union List and the Concurrent List with certain exceptions. The Parliament is competent to legislate in relation to the State of Jammu and Kashmir on the following subjects in the Union List :⁵

1. Defence of India and every part thereof including preparation for defence and all such acts as may be conducive in times of war to its prosecution and after its termination to effective demobilisation.
2. Naval, military and air forces; any other armed forces of the Union.
3. Administration of the Cantonments.
4. Naval, military and air force works.
5. Arms, fire-arms, ammunition and explosives.
6. Atomic energy and mineral resources necessary for its production.
7. Industries declared by Parliament by law to be necessary for the purpose of defence or for the prosecution of war.
8. Foreign affairs; all matters which bring the Union into relation with any foreign country.
9. Diplomatic, consular and trade representations.
10. United Nations Organisation.

⁵ Ibid., Para 22 (a).

11. Participation in international conferences, associations and other bodies and conventions with foreign countries.
12. War and peace.
13. Foreign jurisdiction.
14. Citizenship, naturalization and aliens.
15. Extradition.
16. Admission into, and emigration and compulsion from India, passports and visas.
17. Pilgrimages to places outside India.
18. Piracies and crimes committed on the high seas or in the air ; offences against the Law of Nations committed on land or the high seas or in the air.
19. Railways.
20. Highways declared by or under law made by Parliament to be national highways.
21. Shipping and navigation on inland water-ways, declared by Parliament by law to be national water-ways, as regards mechanically propelled vessels ; the rule of the road on which water ways.
22. Maritime shipping and navigation, including shipping and navigations and tidal waters, provisions of education and training for the mercantile marine and regulation of such education and training provided by States and other agencies.
23. Light-houses, including light-ships, beacons and other provisions for the safety of shipping and aircraft.
24. Ports declared by or under law made by the Parliament or existing law to be major ports, including their delimitation and the constitution of port authorities therein.
25. Port quarantine, including hospitals connected therewith; seamen's and marine hospitals.
26. Airways, aircraft and air navigations ; provision of the aerodromes, provision for aeronautical education and training and regulation of such education and training provided by the States and other agencies.

27. Carriage of passengers and goods by railways, sea or air, or by national water-ways in mechanically propelled vessels.
28. Posts and telegraphs, telephones, wireless, broadcasting and other like forms of communication.
29. Property of the Union and the revenue therefrom, but as regards property situated in a State subject to legislation by the State, save in so far as the Parliament by law otherwise provides.
30. Public debt of the Union.
31. Currency, coinage and legal tender; foreign exchange.
32. Foreign loans.
33. Reserve Bank of India.
34. Post Office Savings Bank.
35. Lotteries organised by the Government of India or the Government of a State.
36. Trade and commerce with foreign countries ; import and export across custom frontiers; definition of custom frontiers.
37. Inter-State trade and commerce.
38. Incorporation, regulation and winding up of trading corporations, including banking, insurance and financial corporations, but not including cooperative societies.
39. Incorporation, regulation and winding up of corporations, whether trading or not, with objects not confined to one State, but not including Universities.
40. Banking.
41. Bills of exchange, cheques, promissory notes and other like instruments.
42. Insurance.
43. Stock exchange and future markets.
44. Patents, inventions and designs ; copyrights ; trade marks and merchandise marks.
45. Establishment of standards of weights and measures.
46. Establishment of standards of quality for goods to be exported out of India or transported from one State to another.

47. Industries, the control of which by the Union is declared by Parliament by law to be expedient in the public interest.
48. Regulation and development of oilfields and mineral-oil resources ; petroleum and petroleum products ; other liquids and substances declared by Parliament by law to be dangerously inflammable.
49. Regulation of mines and mineral development to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.
50. Regulation of labour and safety in mines and oil-fields.
51. Regulation and development of inter-State rivers and river valleys to the extent to which such regulation and development under the control of the Union is declared by Parliament by law to be expedient in the public interest.
52. Fishing and fisheries beyond territorial waters.
53. Manufacture, supply and distribution of salt by Union agencies, regulation and control of manufacture, supply and distribution of salt by other agencies.
54. Cultivation, manufacture and sale for export of opium.
55. Industrial disputes concerning Union employees.
56. The institutions known at the commencement of this Constitution as the National Library, the Indian Museum, the Imperial War Museum, the Victoria Memorial and the Indian War Memorial and any other like institutions financed by the Government of India wholly or in part and declared by Parliament by law to be an institution of national importance.
57. The institutions known at the commencement of this Constitution as the Banaras Hindu University, the Aligarh Muslim University, the Delhi University and any other institution declared by Parliament by law to be institutions of national importance.
58. Institutions for scientific or technical education financed by the Government of India wholly or in part and declared by the Parliament by law to be institutions of national importance.
59. Union agencies and institutions for :
 - (a) professional, vocational or technical training, including the training of police officers ; or
 - (b) the promotion of special studies or research ; or
 - (c) scientific or technical assistance in the investigation and detection of crime.
60. Coordination and determination of standards in institutions for higher education or research or scientific or technical institutions.
61. Ancient and historical monuments and archaeological sites and remains declared by Parliament by law to be of national importance.
62. The Survey of India, the Geological, Botanical, Zoological and Anthropological Surveys of India ; Meteorological Organisations.
63. Census.
64. Union Public Services, All India Services ; Union Public Service Commission.
65. Union pensions, that is to say, pensions payable by the Government of India or out of the Consolidated Fund of India.
66. Elections to Parliament, to the Legislatures of the States and to the offices of President and Vice President ; the Election Commission.
67. Salaries and allowances of the members of the Parliament, the Chairman and the Deputy Chairman of the Council of States and the Speaker and Deputy Speaker of the House of the People.
68. 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 or producing document before the Committee of Parliament or Commissions appointed by the Parliament.

69. Emoluments, allowances, privileges and rights in respect of leave or absence, of the President and Governors, salaries and allowances of the Ministers of the Union; the salaries and allowances and rights in respect of leave and other conditions of the service of the Comptroller and Auditor General of India.
70. Audit of the accounts of the Union and the States.
71. Constitution, organisation, jurisdiction and powers of the Supreme Court including contempt of such Court, and the fees taken therein; persons entitled to practise.
72. Constitution and the organisation of the High Courts, except provisions as to officers and servants of the High Courts; persons entitled to practise before the High Courts.
73. Extension of the powers and jurisdiction of members of a police force belonging to any State or to any area outside that State, but not so as to enable the police of one State to exercise powers and jurisdiction in any area outside that State without the consent of the Government of the State in which area is situated; extension of the powers and the jurisdiction of members of a police force belonging to any State to railway areas outside that State.
74. Inter-State quarantine.
75. Taxes on income other than agricultural income.
76. Duties of custom including export duties.
77. Duties of excise on tobacco and other goods manufactured or produced in India except alcoholic liquors for human consumption and opium, Indian hemp and other narcotic drugs.
78. Corporation tax.
79. Taxes on capital value of assets, exclusive of agricultural land of individuals and companies; taxes on capital of companies.
80. Estate duty in respect of property other than agricultural land.

81. Duties in respect of secession to property other than agricultural land.
82. Terminal taxes on goods or passengers, carried by railway, sea or air; taxes on railway fares and freights.
83. Taxes other than stamp duties on transactions in stock exchanges and futures markets.
84. Rates of stamp duty in respect of bills of exchange, cheques, promissory notes, bills of lading, letters of credit, policies of insurance, transfer of shares, debentures, proxies and receipts.
85. Taxes on the sale and purchase of newspapers and on advertisements published therein.
86. Taxes on sale and purchase of goods other than newspapers, where such sale or purchase takes place in the course of inter-State trade or commerce.
87. Offences against laws with respect to any of the matters in this List.
88. Inquiries, surveys and statistics for the purpose of any of the matters in this List.
89. Jurisdiction and powers of all Courts, except the Supreme Court with respect to any of the matters in this List; Admiralty jurisdiction.
90. Fees in respect of any of the matters in this List but not including fees taken in any Court.
91. Prevention of activities directed towards, disclaiming, questioning or disrupting the sovereignty and the territorial integrity of India or bringing about cession of a part of territory of India or secession of a part of territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and this Constitution.⁶

In the Concurrent List the powers enumerated for the concurrent jurisdiction of the Union Government and the State of Jammu and Kashmir are the following.⁷

- 6 Substituted for Item 97 of the Union List vesting the residuary powers of Legislation in the Union Government.
- 7 Constitution (Application to Jammu and Kashmir) Order, 1954, Para 22 (c).

1. Removal from one State to another State of prisoners, accused persons and persons subjected to preventive detention for reasons specified in Entry 3 of this List.
2. Administrators-general and official trustees.
3. Lunacy and mental deficiency, including places for the reception or treatment of lunatics and mental deficient.
4. Adulteration of food-stuffs and other goods.
5. Drugs and poisons, subject to the provisions of entry 59 of Central List with respect to opium.
6. Trade Unions ; industrial and labour disputes.
7. Social security and insurance ; employment and unemployment.
8. Welfare of labour including conditions of work, provident funds, employer's liability, workmen's compensation, invalidity and old age pensions and maternity benefits.
9. Vocational and technical training of labour.
10. Legal, medical and other professions.
11. Vital statistics including registration of births and deaths.
12. Trade and commerce in, and the production, supply and distribution of :
 - (a) the products of any industry where the control of such industry by the Union is declared by Parliament by law to be expedient in the public interest, and imported goods of the same kind as such products ;
 - (b) food-stuffs, including edible oil-seeds and oils ;
 - (c) cattle fodders, including oil cakes and other concentrates ;
 - (d) raw cotton, whether ginned or unginned, and cotton seed ; and
 - (e) Raw Jute.
13. Price Control.
14. Mechanically propelled vehicles including the principles on which taxes on such vehicles are to be levied.

15. Factories.
16. Newspapers, books and printing presses.
17. Inquiries and statistics for the purposes of any of the matters specified in this List.
18. Jurisdiction and powers of all Courts, except of any of the matters specified in this List.
19. Fees in respect of any of the matters in this List, but not including fees taken in any Court.

In relation to the State of Jammu and Kashmir, the Union has exclusive authority to legislate on a specific field of subjects included in the Union List and the concurrent power to legislate on a specifically enumerated list of subjects included in the Concurrent List. The subjects included in the Union List and the Concurrent List, which are saved application in relation to Jammu and Kashmir with all other residuary powers, are reserved for the State Government. The enumeration of subjects in the State List of the Seventh Schedule does not apply to the State.⁸ Nor is entry 97 of the Union List, vesting the residuary powers of the legislation in the Parliament, applicable to the State. The powers reserved for the State Government, therefore, include :

- (i) the powers enumerated in the Union List but saved application in regard to Jammu and Kashmir, *i.e.*, Central Bureau of Intelligence and Investigation, preventive detention connected with defence, the security of India and persons subject to such detention ; Courts of Wards for the estates of the Rulers of the Union Princes ; sanctioning of cinematograph films for exhibition ; extension of the jurisdiction of High Courts and inter-State migration.
- (ii) Powers enumerated in the Concurrent List but saved application with regard to Jammu and Kashmir, *i.e.*, criminal procedure, including all matters included in the Code of Criminal Procedure at the commencement of this Constitution ; preventive detention for reasons connected with the security of a State, the maintenance of

⁸ *Ibid.*, Para 22 (b).

public order, or the maintenance of supplies and services essential to the community ; marriage, divorce, infants and minors, adoption, wills, intestacy and succession ; joint family and partition and personal law, transfer of property other than agricultural land ; registration of deeds and documents ; contracts including partnership, agency contracts of carriage and other special forms of contracts, but not including contracts relating to agricultural land ; actionable wrongs ; bankruptcy and insolvency ; trusts and trustees ; evidence and oaths, recognition of laws, public acts and records and judicial proceedings ; civil procedure ; contempt of Courts except the contempt of the Supreme Court ; vagrancy, nomadic and migratory tribes ; prevention of cruelty to animals ; economic and social planning, commercial and industrial monopolies, combines and trusts ; relief and rehabilitation of persons displaced by setting up of India and Pakistan ; charities and charitable institutions ; charitable and religious endowments and religious institutions ; prevention of the infectious or contagious diseases and pests affecting men, animals or plants ; ports ; shipping and navigation, inland waterways as regards mechanically propelled vessels ; boilers ; electricity ; archaeological sites and remains ; management and disposal of evacuee property ; recovery of claims in respect of taxes and other public demands, and arrears of land revenue ; and stamp duties other than judicial stamps.

(iii) Subjects enumerated in the State List.

(iv) All other residuary powers.⁹

The division of the legislative powers envisaged by the Constitution of India is conclusive and neither the Union Government nor the State Governments can change or modify it except by a constitutional amendment. In case, any of the State Governments overstep the limits of their authority or the Union Government oversteps the limits of its authority, such

⁹ Entry 97 of the Seventh Schedule is not applicable to the State.

acts are ultra vires of the powers of the two Governments and therefore void. There are, however, certain circumstances under which the Parliament is empowered to legislate on the subjects enumerated in the State List and these circumstances are specifically defined by the Constitution. The Parliament is empowered to legislate on the subjects in the State List :

1. When the Council of States declares, by a resolution, supported by two-thirds majority of the members, present and voting, that it is in the national interest to do so ;
2. When by a resolution, the houses of the legislatures of two or more States voluntarily authorise the Parliament to do so ;
3. When the Union Government finds it necessary to legislate on the State List to implement treaty obligations undertaken by the Government of India ; and
4. When a state of emergency is in operation.

The Legislative competence of the Jammu and Kashmir State is subject to the precedent powers of the Union, with two exceptions. In the first place Article 249 does not apply to the State and Parliament cannot assume powers to legislate on residuary powers vested with the State.¹⁰

An important aspect of the division of the legislative powers between the Union and the Jammu and Kashmir State is that though the State is reserved the residuary powers, the precedence of the Union legislation is recognised. Article 246 and Article 254 of the Constitution of India are applicable to the State without any reservation. With regard to the laws made by the Parliament in its exclusive powers to legislate in respect of the Union List, the precedence of the Parliament is presumed. What is however, significant to be noted here is that in case there is a conflict between the laws made by the Parliament and State Legislature on a subject placed within the concurrent jurisdiction of the Union and the State, the law made by the Parliament prevails. Legislation undertaken by

¹⁰ Constitution (Application to Jammu and Kashmir) Order, 1954, Para 6 (bb).

the State legislature, whether anterior to, or, posterior to the Union legislation, becomes void to the extent of inconsistency.

It is obvious that the essential principles of federalism that underline the Indian federal structure, govern the federal relations between the Union and the Jammu and Kashmir State as well. The division of powers does not vest with the State Government more substantial powers than those vested with the other State Governments, or leave a large number of subjects in the residuum. The subjects of the Union List which are left out for the State are neither significant in content nor important in nature. The only feature and the most distinct, that could perhaps be presumed to give a slightly different shape to the legislative relations between the Union Government and Jammu and Kashmir State, is that the residuary subjects are reserved for the Government of the State. However, within the Indian Constitutional frame the residuary powers do not carry the weight, residuary powers have in a federal structure. In fact, the Constitution has made the enumeration in the various Lists so exhaustive that little or nothing is left in the residuary field and it is doubtful whether the categories in the Lists would ever be exhausted.

There is plausible ground to believe that the residuary powers, vested as they are with the Union Government by the Constitution of India, could be used as a last resort by the Union Government if and when the necessity was felt. The location of the residuary powers with the Union Government is a characteristic feature of the Indian federal structure. It is, however, doubtful, whether a State Government could meaningfully utilise the residuary powers to any advantage within the complex federal relationship the Constitution envisages.

Administrative Relations

Under the Constitution of India, the administrative competence of the States extends to the entire field, over which their legislative powers extend. This undoubtedly ensures for the State Governments exclusive and independent orbit of administrative activity. However, since the administrative operation involves delegation of powers in decision-making, with ramifications far wider than those involved in legislation, the Cons-

titution has devised techniques of the Union control over the administrative authority of the States.

"... The Constitution has devised techniques of control over the States by the Union to ensure that the State Governments do not interfere with the legislative and executive policies of the Union and also to ensure that the efficiency and strength of each individual unit which is essential for the strength of the Union.¹¹

The pattern is aimed to ensure smooth and satisfactory functions of the administrative processes of the Union and the States and their coordination at the two levels. The Constitution underlines the following provisions :

- (a) The executive powers of the States are so exercised as to ensure compliance with the laws made by the Parliament.
- (b) The Union is empowered to issue directions to the State Governments to ensure that their administrative operations do not impede and prejudice the executive powers of the Union.
- (c) The Union Government is empowered to issue directions to a State Government to remove any obstacles and difficulties for a Union agency to function in the State.
- (d) The Union Government is empowered to issue special directions in the construction and maintenance of the means of communication which are of national and military importance and the protection of the railways.
- (e) Full faith and credit is given to public acts, records and judicial proceedings of the Union and the States in all parts of the Indian territory.
- (f) The Union Government is empowered to deal with the waters of inter-State rivers and river-valleys.
- (g) The Union Government is empowered to settle inter-State disputes.

¹¹ Basu, *Comments on the Constitution of India*, Vol. IV, Fourth Edition, pp. 200-201.

The provisions of the Constitution of India are, without any significant variation, applicable to the State of Jammu and Kashmir. The administrative competence of the State Government extends to all the subjects which are within the ambit of its legislative authority and therefore, spread over a slightly wider field. The administrative powers of the State Government are, however, subject to almost the same limitations of the Union Control, which the administrative powers of the other State Governments in India are.

The State Government is required to exercise its executive power in such a way that compliance with the laws made by the Parliament is ensured. The Union Government is empowered to give the State Government directions considered necessary for this purpose. By a specific modification to the provisions of the Constitution of India, in its application to the Jammu and Kashmir State, the State Government is required to exercise its executive power so as to facilitate the function of the Union Government in the State and whenever required by the Union Government, to acquire and requisition property on behalf of the Union and transfer property to the Union if it belongs to the State. Article 256 of the Constitution of India in its application to the State of Jammu and Kashmir is appended with a new clause by the Constitution (Application to Jammu and Kashmir) Order, 1954.

"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 expenses of the Union, or in default of agreement, as may be determined by an arbitrator appointed by the Chief Justice of India."

In addition to the general powers of the Central Government to issue directions to the State Government to ensure compliance with the Central laws, the State Government is also subject to the specific obligation to refrain from acts which impede and hamper the executive power of the Union. The Union Govern-

ment is empowered to give directions to the State Government to ensure that the administrative operations in the State do not impede and obstruct the exercise of the Union power in the State. The Union Government can specifically give directions to the State Government in regard to :

1. the construction and maintenance of the means of national or military importance.
2. protection of railways within the state.

The Union Government is also empowered to declare highways or water-ways as national highways. The Union Government is also authorised to construct and maintain means of communication as a part of its function with respect to naval, military and air-force works.

The Constitution of India provides for drastic remedial measures in case a State Government declines to carry out the directions it receives from the Union Government. Whenever a State Government fails to comply with the Central directives, the President is empowered to declare that the constitutional government in the State has failed and in consequence impose a State of emergency on the State. During the operation of the emergency, the President is entitled to assume all or any powers of the State Government and also order that the powers of the State Legislature are exercised by or under the authority of the Parliament. Article 365 of the Constitution of India is not applicable to Jammu and Kashmir and, therefore, these remedial measures are not available to the Union Government in case of Jammu and Kashmir. Obviously, such drastic remedial measures are meant for situations of grave and serious constitutional conflict between the Centre and the States and, therefore, their application must be very rare. Besides, the dissolution of a State Government on the ground that it has refused to carry out the central directives may lead to many delicate issues and political consequences. The remedial measures must be always used as a last resort. Nevertheless, the Central Government is armed with powers, which, it can effectively use to enforce its directives in the States.

The Constitutional provisions applicable to the Jammu and Kashmir, empower the Union Government with the consent of

the State Government, to entrust the State Government and its officials the executive functions of the Union. The Union Government is entitled to impose duties on State Officers through any of its laws which are applicable to the State. The consent of the State is not necessary for this purpose. The Governor of the State with the consent of the Government of India, is also entitled to entrust State functions to the Union Government or its officers. This can be done in relation to any matter to which the executive power of the State extends.

In compliance with the provisions of Article 261 of the Constitution of India, full faith and credit must be given to public acts, records and judicial proceedings of the Union and the States in all parts of India. The manner, in which these acts and records are proved and these effects determined, is provided by parliamentary enactments. This is not so in case of Jammu and Kashmir. Article 261 as it is applicable to the Jammu and Kashmir State reads :

- (i) Full faith and credit shall be given throughout the territories of India to public acts, records, and judicial proceedings of the Union and of every State.
- (ii) The manner in which and the conditions under which the acts, records and proceedings referred to in Clause (i) shall be proved and the effect thereof determined shall be as provided by law.
- (iii) Final judgements or orders delivered or passed by Civil Courts in any part of the territory of India shall be capable of execution within that territory according to law.¹²

In relation to the Jammu and Kashmir State, therefore, the manner, in which the public acts, records and proceedings are proved and their effect determined, is to be provided by law and not the "law made by Parliament." The power to determine the manner in which these acts, records and proceedings are proved and their effect determined is consequently vested in the Courts and not the Union Legislature.

12 Constitution (Application to Jammu and Kashmir) Order, 1954, Para 6(b).

To regulate the administrative machinery of the country and also to ensure coordination of policy and action between the central administration and the administration in the States, the Constitution of India, empowers the President to appoint an inter-State Council, whenever the necessity is felt. The State of Jammu and Kashmir is also placed within the ambit of these provisions and therefore, is subject to the powers of the President in this regard and the operatives adopted by the Council from time to time. The Council is entrusted with the following functions :

- (i) to enquire into and advise upon disputes between the States ;
- (ii) to investigate and discuss the subjects which are of common interest between the Union and the States; and,
- (iii) to recommend measures for the better coordination of policy and action with respect to these subjects of common interest.

Financial Relations

The Constitution of India makes elaborate provisions in respect of the financial relations between the Union and the States. The powers of the Union Government and the State Governments to levy taxes, are separately defined and made mutually exclusive. No area of concurrent jurisdiction is left though provisions are made to empower the Union to levy and collect certain taxes and share certain tax returns with the States. In the allocation of the sources between the Union Government and the State Governments the Constitution classifies the exclusive Union sources, the exclusive State sources, the duties levied by the Union but assigned to the States, the duties levied by the Union but collected and appropriated by the States, and the duties levied by the Union and distributed between the Union and the States. These allocations are enumerated in the following manner :

Union Sources

- (i) property of the Union ;
- (ii) public debt of the Union ;
- (iii) duties of customs and export duties ;

- (iv) currency, coinage and legal tender ;
- (v) foreign loans ;
- (vi) Post Office Saving Bank ;
- (vii) corporation tax ;
- (viii) duties of excise on tobacco and goods manufactured and produced in India ;
- (ix) fees in respect of any of the matters in the Union List, but not including any fees taken in any Court ;
- (x) lotteries ;
- (xi) posts and telegraphs ; telephones, wireless broadcasting and other communications ;
- (xii) railway fares and freights ;
- (xiii) stamp duty in respect of bills of exchange, cheques, promissory notes, etc. ;
- (xiv) Reserve Bank of India ;
- (xv) taxes on income other than agricultural income ;
- (xvi) taxes on capital value of the assets, exclusive of agricultural land of individuals and companies ;
- (xvii) estate duty in respect of property other than agricultural land ;
- (xviii) duties in respect of succession to property other than agricultural land ;
- (xix) terminal taxes on goods, passengers carried by railway, sea and air ;
- (xx) taxes other than stamp duties on transactions in stock exchanges and future markets ;
- (xxi) taxes on the sale or purchase of newspapers ;
- (xxii) taxes on capital value of assets exclusive of agricultural land of individuals and companies.

State Sources

- (i) land Revenue;
- (ii) taxes on agricultural income ;
- (iii) taxes on land and buildings ;
- (iv) taxes on mineral rights subject to limitations imposed by the Parliament relating to mineral development ;

- (v) duties in respect of succession to agricultural land ;
- (vi) estate duty in respect of agricultural land ;
- (vii) duties of excise on goods manufactured and produced in the States, such as alcohols, opium narcotics and narcotic drugs ;
- (viii) taxes on sale and consumption of electricity ;
- (ix) taxes on the entry of goods into a local area for consumption, use or sale ;
- (x) taxes on sale and purchase of goods other than newspapers ;
- (xi) capital taxes ;
- (xii) taxes on goods and passengers carried by road or on inland water-ways ;
- (xiii) fees in respect of any matters in the State List except the fees taken in any Court ;
- (xiv) stamp duty in respect of documents other than those specified in the Union List ;
- (xv) taxes on advertisements except those published in the newspapers ;
- (xvi) taxes on vehicles ;
- (xvii) taxes on animals and boats ;
- (xviii) tolls ;
- (xix) taxes on professions, trades, callings and employments ;
- (xx) taxes on luxuries including taxes on entertainment, amusements, betting and gambling.

Taxes Levied and Collected by the Union but Assigned to the States

- (i) duties in respect of succession to property other than agricultural land ;
- (ii) estate duty on property other than agricultural land ;
- (iii) terminal taxes on goods or passengers carried by railway, sea or air ;
- (iv) taxes on railway fares and freights ;
- (v) taxes other than stamp duties on transactions in stock exchanges and future markets ;

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- (vi) taxes on the sale and purchase of newspapers and on advertisements published therein ; and
- (vii) taxes on the sale and purchase of goods other than newspapers where such sale or purchase takes place in the course of inter-state trade and commerce.

**Duties Levied by the Union but Collected
and Appropriated by the States**

Stamp duties and duties of excise on medicinal and toilet preparations mentioned in the Union List levied by the Government of India and collected and appropriated by the State except in case where such duties are leviable within a Union territory.

**Taxes Levied and Collected by the Union but
Distributed Between the Union and the States**

- (i) taxes on income other than agricultural income ;
- (ii) Union duties of excise other than such duties of excise on medicinal and toilet preparations as are mentioned in the Union List and collected by the Government of India.

The division of financial powers underlined by the Constitution, in fact, envisages two distinctly separate schemes ; the division of the powers to tax and distribution of the revenues. The Constitution does not only envisage a plan for the division of taxable sources between the Union and the States, it envisages a pattern of distribution of the revenue return between the Union and the States. The Union and the States levy taxes within the orbit of their competence to tax but the division of revenues is based on the principle of their needs and requirements. This, in fact, accounts for the unusual constitutional provisions under which taxes included in the Union List are wholly or in part intended for the States and in certain cases their collection is entrusted to the States. The net proceeds assigned to the States are distributed among them on the principles recommended by the Finance Commission.

The division of the taxing powers and the financial resources between the Union and the Jammu and Kashmir State follows the main principles of the pattern of allocations explained

above.¹³ The sources enumerated for the Union in the Union List are demarcation for the exclusive operation of the Union Government. No tax-head, enumerated in the Union List, is reallocated to the Jammu and Kashmir and all the tax-heads enumerated in the Union List are placed within the exclusive competence of the Union Government. Provision with regard to the taxes and duties levied by the Union and collected and appropriated by the States or taxes levied by the Union and divided between the Union and the States are applicable to the State of Jammu and Kashmir as well. The reservation made in favour of the State is that entry ninety seven of the Union List is not applicable to the State and the residuary powers of taxation are not transferred to the Union but are vested with the State.

Grants-in-Aid

In the scheme of the division of powers, the distribution of the revenues is made in favour of all the States uniformly. However, due to regional disparities and economic stresses the financial needs of some of the States are more pressing than that of the others. In order to meet exigencies arising out of the regional and economic disparities, the Constitution provides for a system of Grants-in-Aid to the States chargeable on the Consolidated Fund of India. The Grants-in-Aid are given to the States in addition to the assignment of the various tax proceeds including those shared with the Union Government. The Grants-in-Aid are actually the final balancing instruments of the resources of the States with their manifold functions particularly in the fields of social utilities and services. The Parliament is empowered to make the grants every year to the extent deemed necessary. The grants are fixed in accordance with the recommendations of the Finance Commission. The State of Jammu and Kashmir is covered by the constitutional provisions pertaining to the Grants-in-Aid and in fact the Second Finance Commission in its interim report covered the financial integration of the State.¹⁴

¹³ Constitution (Application to Jammu and Kashmir) Order, 1954, para 7.

¹⁴ Chanda, Ashok. *Federalism in India*, 1965, p. 205.

Finance Commission

The Constitution of India provides for the appointment of a Finance Commission by the President every five years to advise the President with regard to the distribution of revenues between the Union and the States, Grants-in-Aid to the States and any other financial matter referred to the Commission by the Parliament. These provisions of the Constitution are applicable to the Jammu and Kashmir State as well and consequently, therefore, the financial relations between the Union and the State also come within the scope of the powers of the Commission. The Commission constitutes a chairman and four other members, all appointed by the President. The Parliament is vested with the authority to determine by law the qualifications of the members of the Commission and the manner of their selection. The Commission is required to make recommendations on the following issues :

- (i) the distribution between the Union and the States of the net proceeds of taxes, which are to be, or, may be divided between them and the allocation between the States of the respective shares of such proceeds ;
- (ii) the principles, which should govern the Grants-in-Aid of the revenues of the States out of the Consolidated Fund of India ; and
- (iii) any other matter referred to the Commission by the President in the interests of sound finance.

Immunity of Instrumentalities

In the division of financial powers between the Union and the States, the Parliament enjoys precedence. The Union Government is unmistakably entrusted with very wide powers to tax the sources, which by nature are substantial and uniform. The financial structure of the federation does not accept unqualified reciprocal immunity of instrumentalities between the Union and the States. Several prohibitions are placed on the power of the States to impose taxes on the Union activities. The immunity accorded to the States, is however, subject to a number of restrictions. In fact, with their dependence on the federal grants, the States are in reality, a shadow of the autonomy that the division of powers in the Constitution of India

apparently envisages. Viewed in this broad perspective the financial relations between the Union and the States complete the subordination of the States to the Centre.

The State of Jammu and Kashmir is also subject to the paramount power of the Union in the same manner as the other Indian States are. Even the reciprocal immunity of instrumentalities is not secured between the Union and the State Governments. Instead, the same determinatives and instruments which regulate the financial relations between the Union and the other Indian States, regulate the financial relations between the Union and the Jammu and Kashmir State. The only aspect, in which the financial relations between the Union and the State differ from financial relations between the Union and the other States, is that the residuary powers of taxation are reserved for the State Government. The other Indian States are not vested with any residuary powers of taxation. However, within the general scheme of the exhaustive enumeration of the financial powers for the Union Government and the dominant position of the Centre in the division of financial sources, the residuary powers given to the State do not augment in any substantial way the financial position of the State.

Chapter Six

Federal Principle

The analysis of the constitutional relations between the Union and the State of Jammu and Kashmir, reveals that the special position, the State was placed in, at the time, the Constitution of India was framed, has been gradually eroded and the State has been integrated into the federal structure. There is little doubt about the fact, that the pattern envisaged by Article 370 carried many inherent defects and on the basis of the provisions embodied in the Article, as it was originally devised, no stable and organic relationship, between the Union and the State, could be organised. The division of powers provided for, by the Article deprived the Central Government of its rightful sphere of legislative competence and reduced it to utter helplessness and dependence in regard to its administrative authority. With regard to the financial provisions, which governed the financial relations between the Union and the State, the Article imposed obligations on the Central Government, without assigning to it the power to check and control actions undertaken in accordance with those obligations. Obviously, not only from the point of view of the administrative opprobrium and political expediency, but from the point of view of the national sociology also, the provisions of Article 370 were untenable.

The wider area of autonomy, which included a separate constitutional structure for the State, neither affected the accession of the State to India, nor prejudiced the sovereignty of India. The fundamental issue that divided the leadership levels, was the extent to which the quantum of autonomy, the State was reserved under Article 370, could be adjusted to the

federal principle, the Constitution of India envisaged. The State leaders, sought to find a place for the State in the Indian federal structure, on the basis of a rigid balance of power. Federalism in general, however, underlines national precedence. The Indian federalism did not only underline national precedence, it envisaged a parliamentary form of government, which presupposes the sovereignty of the Parliament. The inbuilt conflict in the Constitution of India, between the sovereignty of the Parliament and the operation of federal instrumentalities, specially the power of judicial review, took quarter of a century to come to surface. The Twenty Fourth Amendment in the Constitution of India, which was passed in November 1971, finally established the sovereignty of the Parliament.

The history of federalism clearly proves that, whatever the extent of decentralisation and the orbit of autonomy a federal structure was launched with, the structure either disintegrated or the decentralisation ultimately gave way to federal supremacy. This happened with most of the federal patterns.

As a matter of fact, the federal principle is an expression of class identities and property interests. The federal polity as it evolved in America, was an outcome of the clash in the class interests that the federating units represented, with the class interests at the national level. The local authority and the residuum of the political power, were the instruments retained and sometimes even perfected to safeguard the local property interests and property relations. The basic endeavour was to restrict the growth of a national property ownership and limit the reach of the national instruments which inevitably would reflect the interests of the national property ownership. As a matter of fact, therefore, the federal polity was a political device, aimed to secure the property relations of the federating Units against the effect of the operation of the national property interests. This is amply borne out by the long and protracted struggle between the protagonists of the slave system and its opponents in the American States which ultimately ended in the Civil War. The nascent industrial middle class, with which the American national government found itself identified, vigorously advocated the abolition of slavery mainly to establish right to free contract, an essential basis of the industrial economy. The

recognition of the right to contract, however, was destructive to the agrarian property ownership particularly of the Southern States where the "Cotton Kings" had amassed fabulous fortunes from the slave labour. The Missouri Compromise made the first dent in the agrarian aristocracy but most of the States with pronounced agrarian interests were left free to continue the slave system. During the next thirty years the industrial revolution changed the whole aspect of the economic life of the country. Lincoln's struggle for the American Presidency and his eventual victory was not the mere climax of the anti-slavery movement, it was the final bid of the national middle class to subjugate local and regional property interests and property relations and destroy the political protection, the legal procedures of the United States provided for the federating units. This was inevitable. Justice Marshall had laid down the trail when he had asserted that "The Government of the United States, then though limited in its powers is supreme, and its laws when made in the pursuance of the Constitution, form the supreme law of the State to the contrary notwithstanding." The Union was paramount.

The Indian federal structure, apparently a collectivity of diverse patterns, was also founded on the fundamental basis of the constitutional and political protection, aimed to secure the regional and local property interests and property relations, against a national middle class.

Indian politics, however, presented a slightly more difficult situation. Though the provinces of the British India, had local property interests, the British India on the whole had evolved a national middle class constituted, mainly of commercial interests, the Civil Service official hierarchies and the small industrial elements. The Indian Princely States, on the other hand, represented strong and deeply vested, local property interests, which were at no time, within the purview of the national middle class. Thus, as the federal structure evolved, there obviously, was a strong pressure for a centralised political structure, and an equally strong compulsion for the recognition of local property interests and property relationships. The centralist trends were intensified by a number of other factors, the more significant among them being the agrarian sociology of the

country, the unitary administration in the British Indian provinces and the commitment of the national movement to a close political and cultural unity.

The federal structure that emerged after the independence and the integration of the Indian States, was therefore, not only unitarian in content, it assumed an aggressively nationalist bias. The widespread vested interests in land, which were avowedly provincial in outlook could not counter those influences, and in fact, did not find it necessary, as the growth of national middle class, was, at least in the near future, hardly expected to affect their operation.

The special status of Kashmir, as it was envisaged by the Constitution was obviously a political mechanism allowing a wide orbit of permissibility for localism in the State. Obviously, however, it had no concrete basis, because apart from the commercial and administrative interests of the small middle class, there were hardly any forces to resist the centralist and aggressively national influences of the Indian federal system. The Indian leadership rightly claimed that the State should be integrated with the rest of the country and justifiably pursued the policy of integrating the State with the broad frame of the Indian political structure. The resistance mustered up by the small middle class leadership of the State was futile, a fact which was amply proved by the political developments that occurred hardly two years after the special status was inaugurated.

The process which involved the ultimate reduction of the autonomy of the State was, therefore, historical in content. The Constitution of India underlined a concentric political frame and as it assumed shape, it reduced the peripheral salients one after the other. Within a few years the Princes, Provinces and the States were fused into a closely knit political fabric, with most of the identities which characterised the India of the British empire, wiped out of existence for ever. The termination of the special provisions for the State, was an inseparable part of this process. The paramountcy of the Parliament prevailed.

Right to Freedom

The special provisions for Kashmir, originally envisaged by Article 370 did, neither carry any inbuilt safeguards for freedom

nor provide for any coordinate lines for the development of a responsible political function in the State. As noted above, the position did not last long and the special provisions were drastically amended and the rights and safeguards envisaged by the Constitution of India, were declared applicable to the State. It is, however, important to be noted that the rights and remedies available to the people of the State even after the latest amendments, fall short of the rights and remedies available to the people of the country as a whole and in certain respects suffer restrictions and limitations, which to a great extent, divest them of their substance and value. The right of the State Legislature to frame and construct rules and regulations for the 'Permanent Residents', defining their rights and obligations; the unfettered power and discretion, the Legislature is vested with, to determine the "reasonability" of the restrictions which can be placed on the right to freedom; the unrestricted procedural operatives, which the Government of the State is reserved, to limit the right to personal liberty and the over-riding limitations, the jurisdiction of the courts and the due process of law is subjected to, leave the rights with scant scope. Except for its tame and meaningless stipulation that the rights and relevant safeguards, envisaged by the Constitution of India, are available to the people in the State, to the extent they are applicable to the State, the Constitution of the State provides for no alternative safeguards. The unabridged gap, therefore, deprives the people of the State, of an important and extensive measure of equality, liberty and freedom, ordinarily available under the Constitution of India.

In a democratic set-up safeguards are not provided for, against executive authoritarianism and legislative absolutism only; safeguards are deemed essential in order to regularise the operation of political power in general. There is a very thin line of demarcation between a democratic political frame and the government by patronage. Right to vote has a potent and inherent tendency to degenerate into a demand for patronage. In view of certain characteristic features of the politics in the country, the democratic processes have more than often changed places with the processes of patronage. And patronage, has its own mechanism and finds shape in pressure groups, money

monopolies, class interests and even communal, caste and regional appeasement. This is destructive not only of the democratic process in general, but the fundamental values which legitimise the total democratic structure.

The possibility for a parliamentary democracy to degenerate into a process of patronage is greater at the State level than at the national level and, in fact, an elaborate network of patronage has already replaced the representative model, which the framers of the Constitution visualised for the States. Jammu and Kashmir is no exception. Contest for the State offered employment opportunities, scramble for status, services and jobs yielding a higher measure of graft, competition for loans, doles, concessionary contracts and undertakings and financial assistance in manifold forms, establishment of the positions of patronage and authority and their distribution along pressure channels, manipulation of educational and religious trusts, social and other non-governmental organisations are the processes, the politics in the State flows into. The growth of these processes has given the operatives of the government a different political meaning. With a lower level of education and characterised by a typical social pluralism, communal and caste gradation and an agrarian economy with a widespread non-productive commercial element and with limited alternatives of employment, these processes of political patronage are bound to disturb the traditional social equilibrium and upturn the existing allocations and roles. Though necessary to a certain extent, such changes are likely to prove detrimental to the society ultimately and obstruct a healthy and organic social and political development. Readjustment in allocations and roles would get wrongly assigned in a pattern of pressure politics in case proper political and constitutional safeguards were not available. Such safeguards are an imperative necessity to save the democratic processes from degenerating into instruments of influence and corruption. More important is the necessity to streamline the machinery of the government and regulate its functions to suit and serve the new political context of the post-independence era.

Emphasis is not necessary on the issue that the constitutional safeguards are fundamental to the operation of the political instruments, whatever their type and form. Political power and limi-

tations on political power, need to be balanced, if power is required to be contained within its rightful perspective. In any pattern of political action the operative orbit of the government always requires to be restrained within the limits prescribed by the general right to freedom. This fundamental principle, in fact, gives meaning to the democratic processes, which otherwise, can hardly be distinguished from absolute forms of politics.

The framers of the Indian Constitution, conscious of the necessity of the safeguards for a general right to freedom, formulated elaborate provisions, enumerating the fundamental rights and the requisite legal remedies. A close scrutiny of the structure of these rights, clearly shows that the basic aim of the framers was to contain the operation of political power at both the Central and the State levels. The credit goes to them that they did not only provide for safeguards against any pernicious effects, the various expressions of the political system could have, on the freedom and the rights of the people. This is an extremely important dimension of the rights and remedies envisaged by the Constitution of India.

In order to avoid the extension of the remedies and rights to extremes, and save them from being used as instruments of reaction, the framers of the Constitution, however, left out a reasonably wide scope for the evolution and development of a responsible state policy in terms of planning goals and objectives, social reform and social legislation. The framers adroitly included in the constitutional set-up important directives, laying down broad and general lines on which the State politics was to be conducted. It would be misreading intentions of the framers to dismiss the directives as unnecessary adjuncts to the provisions embodied in the Constitution. To admit that the framer indulged in idle expressions of wishes is tantamount to an underestimation of their sense of history and the understanding of the Indian sociology and the perspectives of the progress of the nation. The Indian Constitution was not only committed to the people who gave it to themselves, but to the posterity as well; not only to the unsettled time that followed the independence, but also to the time bound to follow; not only to a nation at the threshold of freedom, but also to a people living through freedom.

This, however, does not mean that the general right to freedom can be conditioned by the idealised social goals, political perspectives, expedients and pressures, for in that case the right to freedom is subjected to factional interests and ultimately melts away in ambiguous slogans. In due course of time, it loses its legitimacy and executive absolutism and legislative extremism come to be regarded as norms of political action as well as political behaviour. Unlimited political control comes to be recognised as rational social process and freedom is lost. This, of course, immediately brings to surface the problem of the location and the definition of the orbit of the right to freedom, in a society, which has remained for long periods of history in a state of cultural and economic stagnation and has degenerated into atrophied hierarchical forms, involving exploitation in its worst form. Obviously, such social forms require widespread and efficient process of political engineering. Not only is it necessary to formulate for them a political policy regarding social reform and social legislation, but also to lay down processes for the readjustment of the existing property relations. The alternatives do not stand in opposition to each other, though, apparently they seem to be so. They are complementary to each other. In fact, a responsible state policy warrants a general right to freedom. Freedom presupposes social justice. Liberty to dissent is an essential condition for a legitimate state policy. The framers of the Indian Constitution, therefore, did not only devise instruments and processes of political power, they laid down the directives for the growth and evolution of a responsible state policy.

While the constitutional provisions regarding the State, were being formalised, the Indian leadership, including Nehru, was of the view that certain parts of the Indian Constitution, which included the provisions regarding the Fundamental Rights would unfailingly be applied to the State. The State leadership, however, strongly resisted the extension of any provisions and among them those provisions regarding the Fundamental Rights to the State. In fact, the Indian leadership had to resile from its position under duress. It is difficult to explain that the leadership of the State should have taken such a hard and unfavourable stand with regard to the application of the Funda-

mental Rights envisaged by the Constitution of India to the State, particularly in view of the role, the leadership had played in the National Liberation movement. The National Conference leadership had throughout its struggle against the Dogra Princedom insistently reiterated its commitment to Fundamental Rights to freedom, personal liberty and equality before law. In its Manifesto "The Naya Kashmir", the Conference leadership specially included a charter of basic rights.

The State was reserved the right to frame a Constitution for its Government and the leadership had, probably, made up its mind to draw up a bill of rights for the people of the State. There was, however, no justification in depriving the people of the State of the rights and remedies envisaged by the Constitution of India and hardly any reason to entrust the State Government with the task of drawing up a bill of rights for the people in the State. The scope of the Fundamental Rights detailed out in the Constitution of India was fairly wide and the government of the State was expected to make little improvement on it. On the other hand, if the Government of the State restricted the scope of the Fundamental Rights, which obviously, it planned to do, it would lead to the negation of Indian democracy for it would be a sacrilege to disallow the people of the State the privileges and the rights and remedies that were bestowed on the rest of the people in India. The truth must be told and it must be admitted that the Government of the State, in the absence of rights and safeguards, exercised authority indiscriminately and rule of law was undermined. The damage could not be mitigated even after the partial application of the rights and remedies, embodied in the Constitution of India, was secured.

Power has a tendency to degenerate into persecution and therefore power must be contained. There are strains in the politics of the State which warrant a more careful application of the right to freedom, but that does not imply that these strains can be used to justify a denial of the right to freedom. It may be necessary to locate these strains and isolate them for administrative and legal action. The limitations imposed on the operation of the fundamental rights in the State, leave the people of the State at the mercy of the imperatives, which

belong to the politics of transition and are therefore, dangerous as well as pernicious.

Autonomy and Accession

One of the main aspects of the special provisions envisaged by Article 370 of the Constitution of India, which deserves keen analysis and clarification, is the relevance of the special provisions to the accession of the State. Considerable confusion prevails with regard to these issues, mainly because of the impact, the dispute with Pakistan, and political developments inside the State, has had on them. The secessionist elements have continuously attempted to interpret the special provisions as the constitutional guarantee of a conditional accession and in terms of the commitments made by the Government of India in the Security Council that a reference with regard to accession would be made to the people of the State, after Pakistan had cleared out of the territories under its occupation and peace had been restored in the war-torn State. The myth gradually hardened into a political precept and in fact, many efforts were not spared to legitimise it by long drawn arguments of doubtful validity and irrelevant reference. The long and protracted constitutional wrangle that preceded the re-organisation of the constitutional relations between the Union and the State and the evolution of the doctrine of double charge in the Constituent Assembly of the State and its consequent political implications, considerably helped in the formation of these notions. The special provisions were sought to be converted into constitutional commitments, for political objectives not within the competence of the instruments established by the Constitution of India. Thereby, an extra-constitutional charge was meant to be placed in the provisions. The charge was, however, spurious. It was a political contradiction, a perfidy which a country like India alone, could carry along with. The special provisions did not constitute a commitment in terms of accession, nor did they create a separate charge.

When the Constitution of India was framed, the State of Jammu and Kashmir was brought within the definition and the ambit of Article I and Article 370 of the Constitution. In accordance with the provisions of Article I, the State was included in the Union of India and its territories were defined in the

First Schedule, appended to the Constitution. Article I of the Constitution of India, is pivotal to the entire structure embodied by the Constitution in so far as it defines the territories of the Union and enunciates the basis of its jurisdiction. The State of Jammu and Kashmir is, without any reservations brought within the territorial limits of the Indian Union and consequently within its jurisdiction. The position, the State is ensured in the Indian constitutional structure, emanates from the basic presumptives involved in the territorial provisions enshrined in Article I of the Constitution. According to Article 370, however, Article I and Article 370 are applicable to the State by virtue of Clause 1 (c) of Article 370. Clause 1 (c) of the Article stipulates :

“The provisions of Article (I) and of this Article shall apply in relation to that State”.

Obviously there is an overlapping of the provisions embodied in Clause 1 (c) of Article 370 and the provisions envisaged by Article I. The overlapping has led to considerable confusion about the main import of Article 370. The inference is often drawn that the inclusion of the Jammu and Kashmir State, in the territories of India is accomplished by Article 370. Another implication follows : in case, the provisions of Article 370 were ever abrogated the application of Article I to the State of Jammu and Kashmir would immediately cease to be effective and the State would fall out of the territorial jurisdiction, the Constitution of India describes. A new dimension is imparted to these presumptives, when the special provisions are recognised as a commitment to conditional accession. Accordingly, if the provisions embodied in Article 370 are abrogated the accession stands nullified.

There are, however, certain fundamental principles, constitutional and political, which underline the special provisions envisaged by Article 370. First, Article I of the Constitution of India determines the territories and the jurisdiction of the Union of India and brings the State within the limits of the territories defined and within the ambit of the jurisdiction established. The significance of Article I is more sacrosanct than any other provision of the Constitution and finds precedence over all the stipulations, the Constitution makes, for the

fundamental reason that Article I defines the jurisdiction of the instruments created by the Constitution and establishes a ground for their validity. Clause 1 (c) of Article 370 is redundant to that extent and reiterates the fact, Article I underlines. Article 370 is a transitional and temporary instrument of jurisdiction created by Article I.

Secondly, since Article I is applicable to the State independently, the stipulation of Clause 1 (c) of Article 370 does not prejudice its applicability and in case Article 370 is abrogated, Article I remains applicable to the State. In fact, in such a condition, the State will immediately be placed along with the other States comprising the Indian federal structure and come under the purview of all the provisions of the Constitution of India, including those pertaining to the Government in the State. In the absence of any limitation, the Constitution of the State will immediately be set aside and its instrumentalities will cease to operate in the State.

In the third place, it needs to be noted that even if Article I of the Constitution of India ceased to be applicable and operative in regard to the State, the accession of the State to the Union would remain unaffected. Article I only confirms what the sovereignty of the State of India actually performs. In fact, no Indian state became a part of the State of India by virtue of Article I of the Constitution or any other provision of the Constitution. The State of Jammu and Kashmir became an integral part of the State of India, when it acceded to the Dominion of India by virtue of the Instrument of Accession. The State of India was prior to the Constitution of India. The Constitution of India has laid down the structure of its Government, the orbit of its authority and purposes of its action ; it has not defined the State of India. The Constitution of India is not constitutive of the State of India, or the sovereignty of India. Nor does it create the territory of India ; it defines the jurisdiction of the Indian Government. The territories of India, not defined by the Article, also and rightfully belong to India. The Constitution is, therefore, only declaratory of the State of India. The State of Jammu and Kashmir, which is an integral part of the State of India is also a constituent part of the political structure, the Constitution of India creates.

Provisions of Article 370, in spite of the overlapping, they suffer with the provisions of Article I of the Constitution of India, are not relevant to the accession and do not constitute a condition for it and even if abrogated will not prejudice the territorial sovereignty of the State of India of which Jammu and Kashmir is a part.

Abrogation and Amendment

Another important aspect of the special provisions, is the procedure, which determines the amendment and the abrogation of the provisions embodied in Article 370 of the Constitution. The President is empowered to extend to the State, the application of the provisions of the constitution of India, which are not made applicable to the State. The President is also empowered to order the transfer, to the Union, of such matters in the Union List and the Concurrent List, which are still within the reserved powers of the State. In case, the President orders any such application of the constitution of India to the State, or orders any transfers of subjects included in the Union List and the Concurrent List, the concurrence of the Government of the State is required to be secured by him. Any such concurrence, given by the Government of the State for such orders, is to be placed before the Constituent Assembly of the State for approval.

With regard to provisions of Article 370, the President of India is not empowered to abrogate and amend any of the provisions embodied in the Article. He is, however, empowered to order that "the Article shall cease to be operative or be operative only with such exceptions and modifications and from such date as he may specify." The powers of the President to modify and suspend the operatives of the special provisions, embodied in the Article, are subject to an over-riding limitation : that an order suspending or modifying the special provisions, will be issued only on the recommendations of the Constituent Assembly of the State. The initiative to suspend or abrogate the operation of the special provisions is vested with the Constituent Assembly of the State. President himself, is powerless to order any modification in the operatives of the Article, even if he is faced by conditions which make any

modifications necessary. The only alternative he has, is to advise his government to move a Bill in the Parliament and secure the necessary modifications. The initiative of the Constituent Assembly is also subject to the approval of the President. Though the Assembly can initiate the modifications of the operatives, the President, armed with the power of veto, can scuttle the initiative vested with the Assembly. Obviously, the President is not under any obligation to accept the recommendations of the Assembly. The Assembly has no remedies to compel the acceptance of its initiative by the President, except that it may repeat a resolution as many times as the President is pleased to turn it down.

An important issue which comes up for consideration here is that the Article envisages a perpetual Constituent Assembly for the State. The framers of the Indian Constitution, it is clear, perhaps, laboured under the impression that the temporary provisions with regard to the State would subsist only for a relatively short duration and their operation would hardly extend beyond the time, the Constituent Assembly of the State would take to frame the Constitution for the State. Perhaps, they visualised that, in case the temporary provisions under Article 370 were perpetuated beyond the tenure of the Constituent Assembly, the Constituent Assembly would by a resolution initiate amendment in the provisions and recommend to the Parliament of India to vest the powers of the Constituent Assembly in an instrument accredited to undertake the function. This, however, was not done. The Constituent Assembly of the State was dissolved in 1957, when its function of the framing the Constitution of the State was completed. In case, a necessity is felt to suspend or abrogate the operation of the special provisions, the President is left with no alternative but to advise the Parliament to amend the provisions envisaged by Article 370. It needs to be noted that Article 370 does not vest any constituent power in the hands of the President as it did not vest any such powers with the Constituent Assembly of the State. The two instrumentalities were only endowed with the power to suspend or modify the operation of the provisions envisaged by the Article and not the power to abrogate or amend the provisions of the Article.

The provisions of Article 370, subject the powers of the President and the Constituent Assembly of the State to limitations, but do not prejudice or limit the power of the Parliament to amend or abrogate the provisions envisaged by it. The plenary power of the Parliament, to amend the provisions of Article 370 or repeal them, is reserved. The power of the Parliament to repeal or amend the provisions envisaged by 370 is not subject to any restraint. The constituent power to amend the provisions of the Constitution, in accordance with the procedure laid down by the Constitution, cannot be fettered except by an instrument expressly created by the Constitution. Even if such a stipulation and reservation was incorporated in the Constitution, the power would remain with the Parliament to repeal the special provisions and the reservations in one stroke.

Politics of Autonomy

The unfortunate events that preceded the accession of the State to India and the consequent unsettled political conditions that prevailed in the State for a long time after, did not only impede the growth of a progressive social and political outlook in the State and its economic development, it also damaged the evolution of democratic precepts and processes. These conditions liberated many extremist tendencies ranging from secession from India to complete integration in the Indian federal structure. The special provisions envisaged for the State have been used to justify the diverse opinions the different sections of the leadership have espoused. Needless to say, that the provisions have offered the psychological ground for extremism in most of the cases. Role performance of the political parties and factions, in the Government and outside, has usually been evaluated in the context of the autonomy, the State has enjoyed. This has directly and usually led to blurring of the political perspectives. The censure has often been piled on the federal instrumentalities.

The orbit of autonomy secured for the State has been gradually reduced by the various Presidential Orders which have been promulgated from time to time, to modify the provisions of Article 370 of the Constitution of India. The provisions of the Constitution of India with regard to the division of powers between the Centre and the States, the Union Government, the jurisdiction of the Supreme Court, the Emergency Powers of the

President, Auditor and Comptroller General, Services and the Official Language have been extended to the State with reservations which are not substantially significant. The structure of the government, which the Constitution of the State has devised, is not different from the form of the government the Constitution of India envisages for the States in India. The Constitution establishes a parliamentary government and ensures executive responsibility to the legislature, elected on the principles of universal adult franchise. The Constitution of the State also adopts the general principle of the state policy incorporated in the Constitution of India, with modifications which reflect a remarkable sense of commitment to social justice. The only aspect of the Constitution of India over which the shadows of the special status still persist, is in regard to the rights and remedies available to the people of the State. There is hardly any justification and necessity for the restrictions which are placed on the general right to freedom as it is applicable to the Jammu and Kashmir State. The interests of the State-subjects are needed to be safeguarded, particularly in view of the protracted isolation, the State has lived through, for long periods of its history and the economic and educational lag, it still suffers. The interests can, however, be secured by legal safeguards which do not prejudice the right to rule of law and freedom.

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Appendix I

“Resolution on Responsible Government August 5, 1938”

“This mass meeting of the people places on record its complete repudiation of the present system of irresponsible Government, and wishes to express its faith in the establishment of complete responsible government which alone can cure the ills of the people. Therefore this gathering appeals to all patriotic persons to muster under the banner of freedom and to be prepared for the coming struggle for liberty. The victory of that struggle alone would usher in a period of complete political, economic and social emancipation.”

“Resolution of the Working Committee of the All Jammu and Kashmir National Conference, February 10, 1946.

“The Working Committee of Jammu and Kashmir National Conference have taken into consideration the speech made by the Viceroy of India in the Princes’ Chamber on the 17th January, 1946, alongwith the declaration made by the Chancellor of the Chamber on behalf of the Princes regarding Constitutional advancement in the States. After fully examining the salient points in both the speeches, the Working Committee have come to the following conclusions :

1. That the advice tendered by the Crown Representative to the Princes regarding the steps to be taken in making the administration of these States progressive did not amount to anything progressive. In fact it lost all its significance when he (Viceroy), made such progress conditional on the maintenance of the treaties and the consent of the Princes. These treaties and engagements which are outdated, reactionary and questionable have always stood and will always stand in the way of the States People’s progress and to think that the Rulers

will give up their privileged positions that they enjoy under them at their sweet will is nothing but wishful thinking. The National Conference has at several occasions made it clear that these treaties have been made in times and under circumstances which do not obtain now and have been framed without seeking the consent of the States People. Under such circumstances no treaties or engagements which act as a dividing wall between their progress and that of their brethren in British India, can be binding on the people."

Appendix II

Text of letter dated October 26, 1947 from Sri Hari Singh, the Maharaja of Jammu and Kashmir to Lord Mountbatten, the Governor-General of India.

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 economical 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 should 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 development indicated below. In fact the Pakistan Government are operating Post and Telegraph system inside the State.

Though we have got a Standstill Agreement with the Pakistan Government that Government 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 the several points simultaneously, that it has become difficult to stop the wanton destruction of life and property and looting. The Mahora power-house 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.

The mass infiltration of tribesmen drawn from the distant areas of the North-West Frontier coming regularly in motor trucks using Manschra-Muzaffarabad Road and fully armed with up-to-date weapons cannot possibly be done without the knowing of the Provincial Government of the North-West Frontier Province and the Government of Pakistan. In spite of repeated requests made by my Government no attempt has been made to check these raiders or stop them from coming to my State. The Pakistan Radio even put out a story that a Provisional Government has been set up in Kashmir. The people of my State, both the Muslims and non-Muslims generally have taken no part at all.

With the conditions obtaining at present in my State and the great emergency of the situation as it exists, I have no option but to ask for help from the Indian Dominion. Naturally they cannot send the help asked for by me without my State acceding to the Dominion of India. I have accordingly decided to do so and I attach the Instrument of Accession for acceptance by your Government. The other alternative is to leave my State and my people to freebooters. On this basis no civilized Government can exist or be maintained. The alternative I will never allow to happen as long as I am Ruler of the State and I have life to defend my country.

I may also inform your Excellency's Government that it is my intention at once to set up an interim Government and ask Sheikh Abdullah to carry the responsibilities in this emergency with my Prime Minister.

If my State has to be saved, immediate assistance must be available at Srinagar. Mr. Menon is fully aware of the situation and he will explain to you, if further explanation is needed.

In haste and with kindest regards.

Yours sincerely,
Hari Singh.

The Palace, Jammu,
26th October, 1947.

Instrument of Accession of Jammu and Kashmir State

The following is the text of the actual Instrument of Accession executed by the Ruler of Jammu and Kashmir State on 26 October, 1947.

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 Singhji, Jammu and Kashmir Naresh Tatha Tibet adi Deshadhipathi, 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

1. I hereby declare that I accede to the Dominion of India with the intent that the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purpose of the Dominion shall, by virtue of this my Instrument of Accession but subject always to the terms thereof, and for the purpose only 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 hereafter 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 me by an Instrument supplementary to this Instrument.

6. Nothing in this Instrument shall empower the Dominion Legislature to make any law for this State authorizing 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 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 deem 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 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.

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,
Maharajahdhiraj of Jammu
and Kashmir State.

Appendix III

Text of the Proclamation issued by the Head of the Jammu and Kashmir State on 1 May, 1951

Whereas it is a general desire of the people of the State of Jammu and Kashmir that a Constituent Assembly should be brought into being for the purpose of framing a constitution for the State ;

Whereas it is commonly felt that the convening of the Assembly can no longer be delayed without detriment to the future well-being of the State ;

And whereas the terms of the proclamation of the Maharaja dated 5 March, 1948 in regard to the convening of a national assembly as contained in clauses 4 to 6 of the operative part thereof do not meet the requirements of the present situation ;

I, Yuvraj Karan Singh, do hereby direct as follows :

1. A Constituent Assembly consisting of representatives of the people, elected on the basis of adult franchise, shall be constituted forthwith for the purpose of framing a constitution for the State of Jammu and Kashmir ;

2. For the purpose of the said elections the State shall be divided into a number of territorial constituencies, each containing a population of 40,000 or as near thereto as possible, and each electing one member. A Delimitation Committee shall be set up by the Government to make recommendations as to the number of constituencies and the limits of each constituency ;

3. Elections to the Constituent Assembly shall be on the basis of adult franchise, that is to say, every person who is a State Subject or any class, as defined in the notification No. 1-L/84 is not less than twenty-one years of age on the first day

of March, has been a resident in the constituency for such period as may be prescribed by the rules, shall be entitled to register in the electoral rolls of that constituency, provided that any person who is of unsound mind or has been so declared by a competent court, shall be disqualified for registration ;

4. The vote at the election shall be direct and by secret ballot ;

5. The Constituent Assembly shall have power to act notwithstanding any vacancy of the Membership thereof ;

6. The Constituent Assembly shall frame its own agenda and make rules for the governing of its procedure and the conduct of its business.

The Government shall make such rules and issue such instructions and orders as may be necessary to give effect to the terms of this proclamation.

Appendix IV

Opening Address by Honourable Sheikh Mohamad Abdullah to the Jammu and Kashmir Constituent Assembly (Extracts)

"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 fulfilment of this—their historic task. We are free, at last to shape our aspirations as people and to give substance to the 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.

When we look back on these years, we see how our footsteps have taken us not among the privileged, but into the homes of the poor and downtrodden. We have fought their battle against privilege and oppression and against those 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.

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 the Frontier regions, including Poonch and Chenani Illaqa—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 on 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 Srinagar. Today, in 1951, embodying such aspirations, men and women from the four corners of the State in this Constituent Assembly have 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 Constitutions, 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 generations 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 import 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 landowners' 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 hands lies the power of this decision.

Finally, this Assembly will after full consideration of the 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 directions 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 constitutions 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 constitutions. 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 us. 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 organisation 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 constitutional ties 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 constituent 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 co-operation and assistance in this great task, as well as offer our fullest co-operation 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 decisions 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 principle that there is one thing common to men 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 the manner in which the economic organisation of the country will be geared to that 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 existence 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 other's 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 requirements 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. It says :

"The duty of the Paramount Power to protect the States against rebellion and insurrection is derived from the clauses 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 attempts to eliminate him and substitute another form of Government."

In recognition of their services to the British Crown, the Indian Princes 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 rights, privileges and prerogatives were preserved.

Thus the pioneers of 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 recognising 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 in independent possession to "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."

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' peoples, 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 the consent of the State peoples. Under such circumstances, no treaties or engagements which act as a 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 iniquity 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, 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. The 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's 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 frantic 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 people's organisation, the National Conference. Even at this hour of grave national danger, the Ruler failed to see the wisdom of taking this organisation 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 Maharajah's authority was limited to that of a constitutional ruler, making it imperative upon him to consult his Government on all issues relating to the governance of the State.

This was obviously an interim measure. The Cabinet of the people's representatives thus chosen functioned with the support and co-operation of the National Conference, but with the passage of time it became clear that the Maharajah 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 Yuvaraj Karan Singh thereupon became the Regent and has functioned since as Constitutional Head of the State.

Today, the Constituent Assembly having met, the time has come for the people's representatives to make the 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 fulfilment of the people's 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 heads of States.

After the attainment of complete power by the people, it would have been an appropriate gesture of goodwill to recognise Maharajah 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 disqualifications 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 with pain and regret his failure to stand by them in times of crisis, and his incapacity to afford protection to a section of his people in Jammu.

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 in 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 Maharajah's accession to India legally valid or not? The legality of the accession has not been seriously questioned by any responsible or independent person or authority.

These two answers are obviously correct. Then where is the justification of treating India and Pakistan at par in matters 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 plane. Under various garbs, attempts have been made to sidetrack 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 Commonwealth forces, which threatens to bring in Imperial 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 Commonwealth troops could have created suspicions 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 into 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 bandied 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 allegations that we are the "stooges of India", and nobodies 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 dealings.

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 and disappearance of the Paramount Power. The end of the War brought to a head 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 or their right to nominate their personal 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 into 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 changeover 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 June 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 into Standstill Agreements with either or both pending finalization of their decisions.

The betrayal of the interests of the State's 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 had even the slightest sense of realism or 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 into a Standstill 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 Indian leaders consistently refused to recognise the right of the Maharajah to decide the 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 disassociated itself from them, and that, during the upsurge of 1946, their local party organs had assisted the administration to suppress the movement.

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." Thus 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 realise, 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 defenceless people at the mercy of the invaders. It was not an ordinary

type of invasion, inasmuch as no canons of warfare were observed. The tribesmen who attacked the State in thousands, killed, burned, looted and destroyed whatever came their way and 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 Maharajah, suddenly disappeared from the Capital. This created a strange vacuum, and would have certainly led to 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 Pushkar 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 India. But the absence of any constitutional ties 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 Standstill Agreement with the State on the ground that she could not 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 State's 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 plaint 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 interests of world peace. If this had been done, conditions would have ipso 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 affects 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 the 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 groups and creeds are absent. Judged by this supreme consideration, what are the advantages and disadvantages of

our State's accession to either India or Pakistan, or of having independent status?

As a realist I am conscious that nothing is all black or all white, and there are many facets to each of the propositions 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 people's freedom. The autocratic rule of the Princes has been done away with and representative governments have been entrusted with the administration. Steps towards democratisation 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 the 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 democracy. This should meet the argument that the Muslims of Kashmir cannot have security in India, where the large majority of the population 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, colour, caste and class.

The national movement in our State naturally gravitates towards these principles of secular democracy. The people here will never 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 of 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 are 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 travelled 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 centred 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 industrialised 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 practical for us to produce here—for instance, sugar, cotton cloth and other 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-the-street depends.

I shall refer now to the alleged disadvantage 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, parti-

cularly 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 utilising 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 jeopardised. This would happen if a communal organisation had a dominant hand in the Government, and Congress ideals of the equality of all communities were made to give way to religious intolerance. The 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 stabilising relations between the Hindus and Muslims of India. Gandhiji was not wrong when he uttered words before his death which paraphrase, "I lift up mine eyes unto 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 a 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 Muslims the State must accede 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 on 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 Muslims 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 States. We do not find a Christian bloc, a Buddhist bloc, or even a Muslim bloc, about which there is so much talk nowadays in Pakistan. These days 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 decides to make this the predominant consideration. What will be the fate of 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 on 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 Pakistan there is

a chronic dearth of markets for our products. Neither, for that matter, can she help us with our industrialisation, being herself industrially backward.

On the debit side we have to take into account the reactionary character of her politics and State policies. In Pakistan we should remember that the lot of the State's 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 a 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 considerations. Firstly, it is not easy to protect sovereignty and independence in a small country which has not sufficient strength to defend itself on our long and difficult frontiers bordering so many countries. Secondly, we must have the goodwill of all our neighbours. 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 too 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.

Appendix V

Interim Report of the Basic Principles Committee (Extracts)

The Basic Principles Committee feels that the time has come when a final decision should be taken in regard to the institution of hereditary rulership.

After due deliberation and careful thought, the Committee is of the opinion that the institution of monarchy is a relic of the feudal system which was based on mass exploitation of the resources of a country and the labour of its people for the self-aggrandisement of an individual and a limited class of his associates. As such, the Committee considers this system opposed to the aspirations of the people for an untrammelled democratic order, the spirit of which is surging throughout all countries of the world. It strongly feels that the continuance of a monarchical system would be the imposition of an anachronism particularly when these monarchies are disappearing fast in many parts of the world under the compelling forces of history and social change.

It is the considered view of the Committee that sovereignty does and must reside in the people and that all power and authority must flow from the expression of their free will. The State and its Head, respectively, symbolise this sovereignty and its centre of gravity. The Head of the State represents the authority vested in him by the people for the maintenance of their rights. The promotion of this vital principle of constitutional progress makes it imperative that this symbol of State power should be subject to the vote of the people. The Committee therefore strongly feels that, consistent with the democratic aspirations of the people of the State, the office of Head of the State should be based upon the elective principle and not upon the principle of heredity. This would afford opportunities

to all citizens to rise to the highest point of authority and position, with the support and confidence of the people. The spirit of equality and fraternity required by democracy demands that in no sphere of State activity should a citizen be debarred from participating in the progress of his country and the advancement of its ideals and traditions. It is clear that the hereditary principle in the appointment to any office of power curtails the people's choice and to that extent, restricts their right to elect suitable person of outstanding merit and personal qualities to that position. The process of democratisation will not be complete till the highest office of the State is thrown open to the humblest of the land and in this manner, the Head of the State will be the repository of the unbounded respect, confidence and esteem of the people.

In view of these considerations the Committee feels that there must be a sense of finality about the decisions in regard to this fundamental issue. Accordingly, the Committee recommends that :

- (a) the form of the future constitution of Jammu and Kashmir shall be wholly democratic,
- (b) the institution of hereditary Rulership shall be terminated,
- (c) the office of the Head of the State shall be elective.

Sd/- S. M. Abdullah.
 Sd/- G. M. Bakshi.
 Sd/- M. A. Beg.
 Sd/- G. L. Dogra.
 Sd/- S. L. Saraf.
 Sd/- D. P. Dhar.
 Sd/- Piar Singh.
 Sd/- Harbans Singh.
 Sd/- Mubarik Shah.
 Sd/- G. M. Hamdani.
 Sd/- Mir Qasim.
 Sd/- Bhagat Ram Sharma.
 Sd/- Abdul Gani Goni.
 Sd/- Ram Devi.
 Sd/- Moti Ram Baigra.
 Sd/- Ram Piar Saraf.
 Sd/- Mir Assadullah.

Report Relating to Citizenship and Fundamental Rights (Extracts)

The Advisory Committee on Fundamental Rights and Citizenship was set up by the resolution of the Constituent Assembly dated 7th November, 1951, in order to make recommendations as regards qualifications required for Citizenship and the determination of Fundamental Rights of the residents of the State. The Committee was reconstituted by the Constituent Assembly by its resolution dated the 20th October, 1953.

The State having acceded to the Union of India, every State Subject and every person having his domicile in the State is a Citizen of India under the provisions of the Constitution of India. It is, however, recognized by the Government of India that this position would not affect the existing State Subject definition. While the Committee adheres to principle underlying this definition, it feels that the definition should be liberalized in keeping with the changed times. The Committee therefore recommends that all the three classes of State Subjects provided in the definition be removed and a uniform class of permanent residents be established. Accordingly, every person residing in the State who is a State Subject of Class I or Class II or who after having acquired immovable property in the State has been ordinarily residing there for a period of not less than ten years prior to the date of enforcement of this provision shall be a permanent resident of the State.

The power of the State Legislature to define 'Permanent Residents of the State' in future in any manner it deems fit and to regulate the special rights and privileges of the Permanent Residents of the State should be preserved. A majority of not less than two-thirds of the total membership of the House shall be necessary for the exercise of this power. The Committee is of the opinion that while adequate provisions to that effect should be incorporated at an appropriate place in the Constitution of India, the provisions of Part II of the Constitution of India relating to Citizenship should also be made applicable to the State and care should be taken to protect the special position accorded to the State Subjects to be now known as "Permanent Residents of the State" and their special rights and privileges. Necessary modification shall also have to be provided in that

Part to enable those subjects of the State who had migrated to Pakistan in 1947 in connection with the disturbances or in fear of the same, to return to the State under a Permit for resettlement or permanent return issued under the authority of law that would be made by the State Legislature in due course.

The Committee is of the view that the State Legislature should also be competent to make provisions with respect to acquisition and termination of the Status of permanent residents of the State and until the State Legislature enacts provisions in that behalf, the existing Ijzatnama Rules should continue to remain in force and the existing procedure for obtaining a State Subject Certificate should apply for the purpose of securing a certificate as to the status of a permanent resident.

Fundamental Rights

The Committee having taken note of the Fundamental Rights provided in various constitutions including the Constitution of India recommends the following rights for adoption by the State :

1. Equality of rights of all citizens, irrespective of religion, race, caste, sex, place of birth or any of them, all spheres—economic, political, cultural and social—should be guaranteed, that is to say, every citizen should have the right to EQUALITY before law and there should be no discrimination against any citizen on grounds only of religion, race, caste, sex or place of birth; and no citizen should be subject to any disability, liability, restriction or condition with regard to

- (a) access to shops, public restaurants, hotels and place of public entertainment; or
- (b) the use of wells, tanks, bathing Ghats, roads and places of public resort maintained wholly or partly out of State funds or dedicated to the use of the general public.

2. The Committee strongly feels that women must attain their just and rightful place in society and their co-operation in the mighty and responsible task of nation-building must be secured. Similarly all children born in the State should be ensured equality of opportunity irrespective of accidents of birth and parentage. In order to achieve that end the State should

be able to make any special provisions it deems fit for women and children.

3. Untouchability is abolished and its practice in any form shall be forbidden.

4. In conformity with the interests of the people, all citizens shall have right to FREEDOM of speech and expression, to assemble peaceably and without arms, to form associations or unions, to move freely throughout the territory of the State, to reside and settle in any part of the territory of the State, to acquire, hold and dispose of property subject to the laws of the State and to practise any profession, or to carry on any occupation, trade or business.

The State should, however, have powers to impose such restrictions as are considered reasonable by the State Legislature on the exercise of these rights in the interests of general public, security of the State, public order, communal harmony, decency or morality, or in relation to contempt of court, defamation, or incitement to an offence, or for the protection of the special rights and privileges of the permanent residents of the State.

5. Protection in respect of conviction for offences, and of life and personal liberty shall also be afforded. The provisions and procedure pertaining to preventive detention should follow on the lines of the corresponding provisions in the Fundamental Rights of India.

6. All citizens shall have RIGHT AGAINST EXPLOITATION, *i.e.*, traffic in human beings and forced labour, employment of children in factories etc., shall be prohibited.

7. FREEDOM OF RELIGION shall be guaranteed, *i.e.*, all citizens shall have the freedom of conscience and shall be free to profess, practise, and propagate any religion and to manage their respective religious affairs.

8. CULTURAL AND EDUCATIONAL RIGHTS should also be guaranteed by the Constitution. The interests of the minorities should be protected and any section of citizens having a distinct language, script or culture should have the right to conserve the same.

9. RIGHT TO PROPERTY shall be guaranteed, and no person shall be deprived of his property save by authority of

law. This should not, however, in any way affect the existing laws relating to land reforms nor should it prevent the State Legislature to make any further land reforms. Accordingly, no law, made by the State Legislature, providing for the acquisition by the State of any land or of any rights therein or for the extinguishment or modification of any such rights shall be deemed to be void on the ground that it is inconsistent with or takes away or abridges any of the aforesaid rights. The existing definition of land shall be preserved.

10. Similarly, all these Fundamental Rights should be subject to the over-riding condition that :

- (i) no law of the State relating to State Subjects to be hereafter called 'Permanent Residents' and regulating their rights and privileges ; and
- (ii) no law hereafter to be made by the State Legislature defining the permanent residents and conferring on them special rights and privileges in relation to acquisition and holding of property in the State or in matter of employment under the State and imposing restrictions on citizens other than permanent residents for settling within the State should become void on the ground that it is inconsistent with or takes away or abridges any of the rights conferred by Part III of Constitution of India.

11. The Committee feels that a declaration of Fundamental Rights would be more effective if suitable judicial remedies for the enforcement of these rights are provided and therefore it is proposed that the citizens shall have the right to Constitutional Remedies. In order to ensure the fullest protection in regard to enjoyment of these rights the citizens shall be allowed to seek redress from the highest court, *i.e.*, the Supreme Court of India.

In order to avoid any possibility of conflict of the Fundamental Rights proposed above and those contained in Part III of the Constitution of India, the Committee feels that the former rights in so far as they vary in certain respects, the provisions of the Fundamental Rights of the Union should be reflected in Part III of the Constitution of India. The Government of India has already agreed to provide appropriate modifications or exceptions in Part III of the Constitution of India to suit the requirements of the State.

Appendix VI

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 ; 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 recognised by the President 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 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.

Appendix VII

The text of the Kashmir Premier's statement on the Delhi Agreement in the State Constituent Assembly on the 11th August, 1952.

I crave permission to make a statement before the House in regard to the 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 House, while accepting these recommendations, had charged the Drafting Committee to present for the consideration of the Assembly, a draft resolution incorporating the proposed principles for the election of the 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 other matters pertaining to the constitutional relationship of our State with the Union. During the last stage of these discussions, it became necessary for me and some of my other colleagues in the Government to participate in the talks. I am now in a position to inform the House that certain broad principles have been laid down and certain decisions have been tentatively arrived at between the two Governments.

Before I apprise this House of the details of these tentative decisions, I wish to review briefly the background of our relationship with India. For some time past, there has been a good deal of discussion 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 sometimes 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 Paramountcy having lapsed, the Indian States became independent. They were, however, advised to join either of these two Dominions. 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 subcontinent, 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 rulers. 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 those 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 moment in the history of the State, the National Conference stepped in to avert what looked like total annihilation at the hands of raiders from Pakistan who were later proved to have been abetted by the Pakistan Government. The National Conference mobilised 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 morale 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 the unarmed people of

Kashmir could not hold out for long. Consequently, it became urgently necessary for us to seek the assistance of a 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 accede 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 enabled 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 principal 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 over-riding consideration was kept in view in determining the position of this State in the proposed Constitution. Earlier to this, it had been agreed between the two Governments 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 this State was determined in the Constitution of India. The representatives of the Jammu and Kashmir State reiterated their view that our association with India should be based on the terms of the Instrument of Accession. It was at this stage that the constitutional position of this State was determined in the Constitution of India. The representatives of the Jammu and Kashmir State reiterated their view 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 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.

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 modification, 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.

Since a good deal of confused 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 the Instrument

of Accession with the proviso that they may be extended to such other matters also as the President may by 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 serious consequences for a harmonious association of our State with India. The formula evolved with the agreement of the two Governments 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 became obvious. Consequently, it was decided to convene 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 of 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 issues in my address to the House, I had given clear indications of my party's view 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 satisfaction 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 State should be elective. While accepting the recommendations of the Basic Principles Committee this Assembly charged the Drafting Committee to place before the 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 finalise the position in respect of 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 agreement, the details of which I wish to place before the House.

The Government of India held the view that the fact that the Jammu and Kashmir State was 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 elections to Houses of Parliament.

Permit me, Mr. President, now to deal with each one of these items and also the agreements 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 the States other than Jammu and Kashmir, in the case of our State, they rested 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 upto the people of Kashmir through this Assembly to transfer more powers for mutual advantage to the custody of the Union.

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 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, 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 these 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 had 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 last twenties, the people of Jammu and Kashmir agitated for the protection of their bonafide rights against the 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 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 liberalise such a definition. The importance of the fact that 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 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 Muslim 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 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 the 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 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 Advisers" 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 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 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 a 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 and 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 Principle 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.
- (v) Provided that he shall, notwithstanding the expiration of his term, continue to hold the office until his successor 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 I 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 viewpoint, 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 of the State."

We generally accepted this position, but wanted some time to consider the implications and consequences as laid down in Articles 353, 358 and 359 which on the whole we 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 agreements arrived at between us and the Government of India. As the Hon'ble Members will, no doubt, observe, the attitude 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 the 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 fulfilment of our democratic ideals and the realization of our objectives.

This goodwill 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 of the State, the Hon'ble Members of this Assembly will have an opportunity of discussing these agreements and expressing their views thereon.

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