

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

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*.

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:

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 warranto 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 warranto 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 Tikku 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 unamended 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 ;