

STATE GOVERNMENT
AND POLITICS

JAMMU AND KASHMIR

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*In the memory of my father
Pandit Sri Kanth Teng*

State Government and Politics: Jammu and Kashmir

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PREFACE

The present study is an attempt to provide an analysis of the political institutions and political operatives, the Constitution of Jammu and Kashmir envisages. The Jammu and Kashmir State is accorded a special position in the Indian constitutional system and the provisions of the Constitution of India with regard to the government in the Indian States do not apply to it. The Government of Jammu and Kashmir State is organised in accordance with the Constitution of Jammu and Kashmir which was framed in 1957, a decade after the independence of India. The study is aimed to examine the basic structure of the Constitution of Jammu and Kashmir and the institutional framework it underlines. Cast within the broad setting of the special constitutional provisions the Constitution of India stipulates for the Jammu and Kashmir State, the government and politics of the State has assumed features which differ in many aspects from the government and politics in the other Indian States. An attempt has been made to examine these features and analyse them. A comprehensive foreground of the constitutional development of the State, with a detailed exposition of the Interim Government which remained in office till 1947, is presented in the first part of the study to reconstruct the context in which the Constitution of the State evolved. The constitutional developments have been dealt with separately in order to locate the broad trends which the political developments assumed after the Constitution of Jammu and Kashmir was adopted. The study is expected to provide to the general reader and the student of the government and politics of India, a fairly thorough analysis of the government and politics of the Jammu and Kashmir.

I owe my gratitude to Hakim Alim Ullah and Mr Moti {R. Baigra, who were so kind as to discuss with me certain aspects of the present study. I am deeply indebted to, late Sardar Budh Singh, Late Mirza Afzal Beg, late Pandit Sham Lal Saraf and Late Pandit Jia Lal Taimiri, veteran freedom fighters, who permitted me access to their personal papers. I am indebted to Lala Muluk Raj Saraf who permitted me to consult his personal records and the files of

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Mohan Krishen Teng

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1

CONSTITUENT ASSEMBLY

Jammu and Kashmir, one of the Princely states in India, acceded to the Indian Dominion in the wake of the stormy events which followed the invasion of the State by Pakistan in October, 1947. Maharaja Hari Singh, the ruler of Jammu and Kashmir had, at the time of the partition of India and the withdrawal of the Paramountcy, refused to accede to either of the two dominions, India and Pakistan and instead sought to execute standstill agreements with them. Hari Singh offered to accede the State to India on 26 October 1947, four days after irregular forces and regular troops from Pakistan entered the State territories. The accession was formalised on 27 October 1947, and the same day air-borne Indian troops were landed in Srinagar to stop the invaders.¹

After the accession of the State, Maharaja Hari Singh was advised by the Government of India to constitute an Interim Government, and invite the leaders of the National Conference to join it. The National Conference, founded in 1939, had spearheaded the movement for self-government in the State and, committed to the realisation of a united India, joined the resistance against the invaders from Pakistan. The leaders of the National Conference had also demanded the transfer of the powers of the government to "the people" and had called upon the Indian leaders to advise the Maharaja to reorganise his government. The State government was organised under the Constitution Act of 1939, which provided for the institution of a Council of Ministers appointed by the Maharaja and responsible to him, to conduct the administration of the State. The Constitution also provided the institution of a Legislative assembly for the State which was known as the Praja Sabha. The Council of Ministers was headed by Mehar Chand Mahajan, a retired Judge of the Punjab High Court, who had been appointed the Prime Minister of the State in September 1947, shortly before Pakistan struck. The Congress leaders were particularly keen to get a national government instituted in the

State, which enjoyed the support of the majority of Muslim population. Nehru and other Congress leaders were committed to establish self-rule in the Indian States and had extended their wholehearted support to the 'Quit Kashmir' movement which the National Conference had launched in May 1946, and which had demanded the repudiation of treaties with the Dogra rulers of the State and liberation of the State from the British Paramountcy. Hari Singh's proposals were accordingly abandoned but the decision to institute the Interim Government was put off for the time being. Pending the decision to appoint the Interim Government, Maharaja Hari Singh was persuaded to institute an Emergency Administration to deal with the emergency which had been caused by the invasion. It was agreed upon that the Emergency Administration would be headed by the President of the National Conference, Sheikh Mohammad Abdullah and constituted of subordinate Emergency Officers who would be appointed on the advice of Sheikh Mohammad Abdullah.²

On 30 October 1947, Sheikh Mohammad Abdullah was appointed by Maharaja Hari Singh as Head of the Emergency Administration with powers to deal with the emergency. Sheikh Mohammad Abdullah was sworn in as the Head of the Administration by the Chief Justice of the High Court of the State. Bakshi Ghulam Mohammad was appointed the Deputy Chief Emergency Officer of the State. A number of other Conference leaders were appointed Emergency Officers in the Emergency Administration. Mirza Afzal Beg was appointed the Emergency Officer for the district of Anantnag. Sufi Mohammad Akbar was appointed the Emergency Officer for Baramullah, Peer Mohammad Maqbool was appointed the Emergency Officer for Muzaffarabad and Mohammad Amin was appointed the Emergency Officer for Banihal. Ghulam Mohammad Sadiq was made in charge of the Internal Security, Home Guards and Civil Defence. Shyam Lal Saraf was entrusted with the charge of trade and supplies. Maulana Sayeed Masoodi was given to handle publicity and propaganda. Further, Mohi-ud-din Qara was appointed the Emergency Officer for communications, Abdul Ahad the Emergency Officer for procurement of firewood, Mohi-ud-din Hamadani the Emergency Officer for Peace-Brigade, Ehsan Ullah the Emergency Officer for Transport, Durga Prasad Dhar the Secretary for Internal Security and Order and Janki Nath Zutshi, the Secretary to the Head of the Administration. Kashyap Bandhu, Colonel Ram Lal, Colonel Baldev Singh Pathania, Colonel Baldev Singh Samyal and Colonel Adalat Khan were appointed from outside the National Conference. Kashyap

Bandhu was appointed the Emergency Officer for refugees and rehabilitation. Colonel Ram Lal was put in charge of the Home Guards and Colonel Baldev Singh Samyal was appointed the Emergency Officer of Border Scouts of Jammu. Baldev Singh Pathania was appointed the Chief Emergency Officer Jammu, and Colonel Adalat Khan was appointed the Administrative Officer of Bhadarwah.

The Emergency Administration was an anomalous organisation, which was charged with the task of dealing with the emergency in the State, but which was not vested with any substantive powers of the Government. The powers of the State Government were vested with the Maharaja and were supposed to be exercised by his Prime Minister, Mehar Chand Mahajan. The Emergency Officers were, presumably, required to function under his orders. The government headed by Mehar Chand Mahajan was, however, in the wilderness and existed only in name. The State was in a condition of upheaval and the lines of control on which the civil administration was based before the invasion, were completely broken. More than half of the territory of the State was occupied by Pakistan and most of the remaining districts were ravaged by the invasion. Scarcity of foodgrains, oil, salt and other essentials of life, was widespread and supplies from India were yet to be resumed. Communal disturbances posed the gravest threat and civil defences were hardly organised to meet any such eventuality. Hari Singh wanted the Emergency Administration to act as an instrument of civil defence and face as best as it could, the devastation wrought by the invasion and the impending threat of communal violence and fight the espionage activities of Pakistan, spread wide and deep all over the State.

The Emergency Administration, however, did not function the way Hari Singh wanted it to function, and once it was in the saddle, it repudiated the State Government and assumed virtual control over the entire State administration. The Heads of the departments of the Government were ignored and the control of the Departments was taken over by the Emergency Officers. The District Officers were instructed to function under the orders of the District Emergency Officers. Many senior officers of the government were relieved of their posts and removed from service and replaced by Conference cadres.

The Emergency Administration made hectic attempts to secure administrative control over the State army which was placed under the operational control of the Indian army. However, partly due to Hari Singh's opposition to any such move and partly due to the reluctance of the Government of India to hand over the State army

to the Emergency Administration, the Emergency Administration did not secure its hold over the State army. The National Conference had, in the wake of the invasion, raised a number of armed contingents which were called the Home Guards. The Home Guards were placed under the administrative control and operational command of the Emergency Officer for internal security. A number of senior National Conference leaders were attached to the Home Guards as political officers. In the Jammu province, a number of armed contingents, the Border Scouts, were raised locally and placed under the control of Emergency Officer for Jammu. Both the Home Guards and the Border Scouts were deployed in action against the invading armies, and were also entrusted with the function of civil defence and maintenance of internal security. The police administration of the State, which was in a state of disintegration, was placed under the control of the Deputy Chief Emergency Officer and deployed, along with the Home Guards and other National Conference cadres, for civil defence.³

The Emergency Administration also took over the task of the procurement and distribution of foodstuffs and other essential supplies. Thousands of refugees were huddled in the two cities of Srinagar and Jammu. Many more were pouring in fast from the territories which had been over-run by the invaders and which were still under their occupation. The Emergency Administration commanded whatever transport, private and public, was available in the State and raised a fleet of vehicles, many of which were put on military duty but some of which were deployed to maintain a minimum flow of supplies into the State.

Interim Government

In November 1947, a month after the Emergency Administration was instituted the Government of India advised Maharaja Hari Singh to appoint an interim government based on the model of the government instituted in Mysore, till a pattern of more representative government was evolved for the State.⁴ In Mysore the Interim Government was constituted of Cabinet of Ministers headed by the Chief Minister. The leader of the Congress party was appointed the Chief Minister and the other Ministers of the Cabinet were appointed on his advice. A specific set of the powers of the government was reserved for the Ruler, and the rest of the powers were vested with the Council of Ministers. The Ruler was given the right to appoint a Dewan, who would be a member of the Cabinet and formally preside over the meetings of the Cabinet. Nehru wrote to Hari Singh:

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

Hari Singh conveyed his readiness to the Indian leaders, to form an Interim Government on the basis of the Mysore model. In the initial stages of the negotiations for the institution of the Interim Government, the National Conference agreed to the reconstitution of the State Government on the basis of the Mysore model. But, after Nehru wrote to Hari Singh and Hari Singh agreed to constitute the Interim Government, the Conference changed its mind and refused to accept the Mysore model as the basis of the proposed Interim Government. Sheikh Mohammad Abdullah informed Gopalaswamy Ayangar, who was a Minister without Portfolio in the Government of India and who had been entrusted with the task of negotiating the appointment of the Interim Government in the State, that the National Conference would not accept the interposition of the Dewan in between the Interim Government and the Maharaja and demanded the removal of Mehar Chand Mahajan from his office. Sheikh Mohammad Abdullah also refused to accept any reservation of powers for the Ruler, which the Mysore model envisaged and demanded that the State army be put under the administrative control of the Interim Government.

Immediately after the reaction of the Conference leaders was known to the Indian leaders, Gopalaswamy Ayangar informed Hari Singh that the proposals made by Nehru had not been approved by the Conference leaders. Gopalaswamy Ayangar who had served Maharaja Hari Singh in the capacity of the Prime Minister of the State for a number of years, communicated to the Maharaja a fresh

proposal for reconstitution of the State Government.⁵ Ayangar proposed:

- (i) The Emergency Administration and the Council of Ministers headed by Mehar Chand Mahajan would be replaced by an Interim Government constituted of a Council of Ministers appointed under the Jammu and Kashmir Constitution Act of 1930;
- (ii) Sheikh Mohammad Abdullah would be appointed the Prime Minister and the other members of the Council of Ministers would be appointed on his advice;
- (iii) The rules of business of the Council of Ministers and the allocation of the portfolios would be "approved by the Ruler on the Prime Minister's advice";
- (iv) The Maharaja would be empowered to place restrictions on the powers of the Council of Ministers by special restrictions in respect of certain subjects;
- (v) An Army Minister would be included in the Council, who would be vested with the administrative control of the State Army and "The Ruler would continue to be the Commander-in-Chief of the State army";
- (vi) The interim Government would, for the time being, be responsible to the Ruler;
- (vii) Mehar Chand Mahajan would be relieved of his office and would not be retained in the Council in the capacity of the Ruler's Dewan.

The proposals made by Ayangar marked a complete departure from the Mysore model and Hari Singh refused to accept them. The Maharaja insisted upon strict adherence to the Mysore model as the basis of the Interim Government in the State. He wrote to Ayangar:

When I received the Prime Minister of India's letter, I accepted the Mysore model because my view was that the early formation of a popular Ministry was necessary in all States, and the Rulers should grant responsible government to their people. I stand by the promise and declaration I made. Sheikh Abdullah in some of his speeches—that came to my notice—accepted the Mysore model as agreed to by me.

As the matter now stands, I am firmly of the opinion that an Interim Ministry should be formed on that model and I am not prepared to deviate from it except in very minor matters.⁶

Hari Singh conveyed to Ayangar that he agreed to accept any minor changes in the Mysore model but he would not accept any modification of the Mysore model in regard to the reserved subjects and the appointment and the position of his Dewan. He made certain counter proposals to Ayangar and suggested.

- (i) Subjects listed in Schedule II of the Mysore model, namely, the Ruler and his family, succession, prerogative of the Ruler, Palace and Privy Purse, relationship with the Dominion Government, High Court, appointment of Judges, appointment of members of the Public Service Commission, the appointment of Auditor General, the State army, protection of the minorities, summonings and dissolution of the legislature, elections, emergency powers in case of constitutional breakdown and the residuary powers, should be reserved for the executive authority of the Ruler;
- (ii) The Ruler should be reserved the right to appoint a Dewan of his choice and the Dewan should be a member of the Council of Ministers and should formally preside over the meetings of the Council; and
- (iii) The Praja Sabha should be revived and after fresh elections the Sabha be declared to be the Constituent Assembly of the State.⁷

Ayangar, perhaps deliberately did not make a direct reference to the reserved subjects which the Constitution Act of 1939 enumerated and did not specify whether subjects reserved under the Constitution Act would be reserved for the Ruler after the Interim Government would be instituted. Obviously, his proposals that the Ruler could "place restrictions on the powers of the Council in respect of certain subjects" was a way to vest with the Ruler the power to restrict the function of the Council of Ministers in regard to the subjects which were reserved for the Ruler under the Constitution Act of 1939. But the proposals were clumsily worded and fraught with considerable possibilities of sharp disagreement between the Ruler and the Interim Government. Throughout the negotiations for the establishment of the Interim Government, Ayangar shirked from dealing with both Hari Singh and the Conference leaders with firmness and shifted in his postures so often that the organisation of the Interim Government which he devised, crumbled within days of its institution.

Hari Singh's communication compelled Ayangar to clarify his proposals with regard to the reserved subjects. Ayangar conveyed to

Hari Singh that the subjects listed in Schedule II of the Mysore model would be reserved for the Ruler of the State by virtue of the Jammu and Kashmir Constitution Act of 1939, under which the Interim Government would be instituted as most of the reserved subjects enumerated by the Mysore model were included in the subjects reserved for the Ruler by the Constitution Act. "Most of the items", Ayangar wrote to Hari Singh, "in this Schedule are reserved matters under the Jammu and Kashmir Constitution Act. Items 1, 2 and 4 (of Mysore model) are reserved from the cognizance of the Praja Sabha under Section 24 of the Jammu and Kashmir Constitution Act, 1926, though the description is not identical. They can be listed in the administration of which you are not bound to obtain the advice of the Ministers. The powers of the Ruler under item 3 in regard to the High Court are to be found in Section 48 and 49 of that Act. In addition, similar powers are reserved to the Ruler in Section 71 as regards the Board of Judicial Advisors. The Ruler's powers to summon and dissolve the Legislature (item 6 of the Mysore model) are reserved to the Ruler under Sections 4 and 5 of the Jammu and Kashmir Act." Ayangar assured Hari Singh that the protection of the interests of the minorities, which was not included in the reserved subjects under the Constitution Act of 1939, could be included in the reserved subjects by the notification by which the Interim Government would be established.⁸

Ayangar, however, did not approve of the suggestion that the Dewan would preside over the meetings of the Council and advised Hari Singh that it would be desirable that the Prime Minister presided over the meetings of the Council. Ayangar further refused to accept the proposal to revive the Praja Sabha and convert it into the Constitution Assembly of the State and suggested that the Interim Government should be entrusted with the task of making "proposals for bringing into existence a Constitution-making body composed of elected representatives of the people for the purpose of framing, for your approval and promulgation, a Constitution for Jammu and Kashmir State." Ayangar laid emphasis on the removal of Mehar Chand Mahajan from the State Government and advised Hari Singh to relieve him of his office. "We", Ayangar wrote to Hari Singh, "and in We I include myself, Pandit Jawaharlal Nehru and Sardar Patel are convinced that it is not possible for Sheikh Abdullah and Mr. Mehar Chand Mahajan to work together in the same government hereafter and that it is best in the circumstances that Mr. Mahajan should be allowed to terminate his present connections with the State."⁹

Hari Singh accepted the proposals Ayangar made with regard to

the reservation of the subjects for the Ruler, the constitution of the Council of Ministers and the institution of a Constituent Assembly in the State, but did not approve of the suggestion to relieve Mehar Chand Mahajan. Hari Singh reiterated his stand that he would prefer to appoint Mehar Chand Mahajan as his Dewan and would also want his Dewan to preside over the meetings of the Council. "There are two matters, however", Hari Singh wrote to Ayangar, "which I find extremely difficult to accept. I must insist that the Dewan should be the president of the Cabinet. This is so in Mysore, where the leader of the Congress party is the Chief Minister. In most of the earlier letters and verbal conversations Pandit Nehru and Sardar Patel accepted the view that Mr. Mahajan as Dewan can formally preside over cabinet meetings. Mr. Menon also gave me the same impression. I went back on my commitment when I agreed to give Sheikh Abdullah the designation of Prime Minister and I cannot appease him further on the point that he should preside over and not the Dewan, who is a man of my confidence."¹⁰

The National Conference leaders rejected outright the proposals made by Ayangar. They refused to recognise the reservation of any powers for the Ruler of the State; and demanded that the subjects sought to be reserved under the Constitution Act of 1939, be also placed within the authority of the Interim Government. The Conference leaders reiterated their stand on the appointment of the Dewan and refused to accept the interposition of a Minister in between the Interim Government and the Ruler. The Conference leaders also demanded the removal of Mehar Chand Mahajan from his office.¹¹

Hari Singh was ultimately prevailed upon to relieve Mehar Chand Mahajan and accept that the Prime Minister would preside over the meetings of the Council. The Conference leaders, however, did not agree to the reservation of any powers for the exclusive control of the Ruler. A workable arrangement was finally arrived at between the parties and it was agreed upon:¹²

- (i) that an Interim Government constituted of a Council of Ministers would be appointed by the Ruler;
- (ii) Sheikh Mohammad Abdullah would be appointed the Prime Minister and the other members of the Council of Ministers would be appointed by the Ruler on the advice of the Prime Minister;
- (iii) a Dewan would be appointed by the Ruler on his own choice and the Dewan would be a member of the Council;

- (iv) the meetings of the Council of Ministers would be presided over by the Prime Minister;
- (v) the Ruler would function as a Constitutional head and would reserve to himself the prerogative to advise and warn his Ministry and though he would not be able to overrule his Ministry, he would not be expected "to sign on the dotted lines on easy paper that is put up to him;"
- (vi) the subjects listed in the Jammu and Kashmir Constitution Act of 1939, as the reserved subjects, would be reserved for the Ruler, and the reserved subjects would not form a part of the portfolios allotted to the Ministers;
- (vii) matters pertaining to the administration of the reserved subjects would be initiated by the Dewan and then sent to the Prime Minister for his advice, after which "the Prime Minister or the Council of Ministers would be formally seized of these matters";
- (viii) the State army would remain under the command of the Ruler; and
- (ix) that a National Assembly, elected on the basis of adult suffrage, would be convened to draw up a Constitution for the State.

The Interim Government was instituted by a proclamation which Maharaja Hari Singh issued on March 5, 1948.¹³ The Interim Government was constituted of a Council of Ministers which was headed by Sheikh Mohammad Abdullah, who was appointed the Prime Minister. The other members of the Council were appointed from among the other leaders of the National Conference. Mehar Chand Mahajan was relieved of his office and the Maharaja was reserved the right to appoint a Dewan who was to sit in the Council of Ministers as one of its members. The Council of Ministers was to constitute a cabinet which was to function on the principle of joint responsibility. The Council was also charged to take appropriate steps as soon as normal conditions in the State were completely restored, to convene a National Assembly based upon adult suffrage, to frame a Constitution for the State. The Constitution was to provide adequate safeguards for the minorities and also envisage provisions to guarantee the people of the State, the freedom of speech and freedom of assembly. The proclamation reserved the final powers on the formulation of the Constitution in the Ruler and the Constituent Assembly was enjoined upon to submit the Constitution, after it was framed, for the acceptance of the Ruler. The

proclamation stipulated;

- (1) My Council of Ministers shall consist of the Prime Minister and such other Ministers as may be appointed on the advice of the Prime Minister. I have by Royal Warrant appointed Sheikh Mohammad Abdullah as the Prime Minister with effect from today.
- (2) The Prime Minister and the other Ministers shall function as a Cabinet and act on the principle of joint responsibility. A Dewan appointed by me shall also be a member of the Cabinet.
- (3) I take this opportunity to give once again a solemn assurance that all sections of my people, will have equal opportunities of service both civil and military, irrespective of creed and community.
- (4) My Council of Ministers shall take appropriate steps as soon as restoration of normal conditions has been completed, to convene a National Assembly, based upon adult suffrage, having due regard to the principle that the number of representatives from each voting area should, as far as practicable, be proportionate to the population of that area.
- (5) The Constitution to be framed by the National Assembly shall provide adequate safeguards for the minorities and contain appropriate provisions guaranteeing freedom of conscience, freedom of speech and freedom of Assembly.
- (6) The National Assembly shall, as soon as the work of framing the new Constitution is completed, submit it through the Council of Ministers for my acceptance.

The proclamation did not make any reference to the arrangements which were made for the function of the Interim Government. No mention was made of the subjects reserved for the Ruler and their administration. The agreements arrived at between the Conference leaders, Hari Singh and the Government of India, were enounced in a separate protocol of Rules of Business. The protocol was approved by Hari Singh and then sent to the Conference leaders for their acceptance. The Maharaja was reserved authority over matters regarding the Ruler, Ruler's family, succession, privy purse, Private Department, Constitutional relation between the State and the Indian Dominion, High Court, appointment of Judges, the State army, protection of the interests of minorities, emergency and breakdown of Constitutional machinery, the dissolution and summoning of the legislature

and the other residuary powers. In matters pertaining to the reserved subjects, the authority to initiate action was reserved for the Dewan, who was empowered to initiate measures for the administration of the reserved subjects, obviously with the approval of the Ruler. The measures were then to be sent to the Prime Minister for his advice and after his advice was registered, the measures were to be taken up by the Council of Ministers for execution. The matters reserved for the Maharaja were not to form a part of the portfolios allocated to the Ministers. The Rules of Business also embodied the general principles which were formulated to regulate the Constitutional relations between the Ruler and the Council of Ministers.

The Interim Government was constituted under ill-stars. Within days of its institution, it ran into trouble. Both, the Maharaja and leaders of the National Conference espoused divergent views about the Interim Government. The Conference leaders paid scant respect to the division of authority the Interim Government was based upon, and usurped most of the powers, reserved for Hari Singh under the Ayangar scheme. The Conference leaders made frantic efforts to bypass the Maharaja and assume unrestricted authority over the function of the government. They also sought to reorganise the balance of power and the property relations, the Dogras had sustained, and replace them by instruments of authority and patterns of property relations which were based on the division of community interests in the State. Drawing their main support from the Muslims, who formed the majority of the population in the State, the Conference leaders attempted to secure a wider political base for their authority. Maharaja Hari Singh, however, refused to con-
 tenance changes which deprived him of his power and privileges and sought to establish balance of power and interest helpful to him in the long run. "Neither the Maharaja nor the leaders in the Interim Government considered Ayangar scheme sound and therefore, none of the two sides made any serious effort to evolve a spirit of compromise. In fact the two sides in the dual government espoused radically divergent views and followed diametrically different directions. The Conference leadership idealised complete transfer of power to political instruments which were answerable to the people, drastic reorganisation of the existing property relations, particularly in regard to the land tenures and a relatively wider role for the Muslim majority in the State. The Maharaja, however, was not prepared to reframe the existing instruments of social and political control, without finding alternatives which were acceptable to him. The dual government came to a tragic end."¹⁴

Hari Singh complained to the Indian leaders about the high-handedness of the Interim Government. Vallabhbhai Patel wrote several letters to Sheikh Mohammad Abdullah seeking his cooperation in easing the tension between the Maharaja and the Interim Government. He also requested Sheikh Mohammad Abdullah to confirm the Rules of Business which had been formulated for the function of the Interim Government in consultation with the Conference leaders, but which had not been confirmed by the Interim Government. Sheikh Mohammad Abdullah ignored the remonstrations Patel made. Patel wrote to Nehru:

I entirely agree with you that we should have a real first class man to act as a sort of bridge between His Highness and Sheikh Sahib. In fact, this problem of differences and tension between the two has been worrying me very much. I have written several letters to Sheikh Sahib about easing this tension and improving relations, but I regret to say that I have had no reply. From all accounts it appears that the arrangements regarding reserved and non-reserved subjects to which Sheikh Sahib had agreed in March last, are now being treated as a nullity and that the presence of the Maharaja and the existence of the reserved subjects are both being ignored. Even the Private Department of the Maharaja is being interfered with and action is being taken, which while it might bring back a few stragglers, would alienate the sympathies of the non-Muslims, who, whatever reasons there may be, still seem to regard the Maharaja as a symbol of their safety. I have impressed upon Sheikh Sahib as well as Bakshi the necessity of maintaining the prestige, the rights and privileges of the Maharaja, but the manner in which the question of his privy purse, jagirdars, and commandeering of office accommodation of his Private Department have been dealt with, has left on my mind a painful impression.¹⁵

In Srinagar, the situation deteriorated rapidly and the Conference leaders mounted a scathing attack on the Maharaja and called for his abdication. Patel wrote to Nehru from Dehra Dun, where he was convalescing after his illness. By the time his letter was received by Nehru, he was posted with a long communication from Sheikh Mohammad Abdullah, which listed several charges against Maharaja Hari Singh and which asked for his removal. Sheikh Mohammad Abdullah wrote to Patel:

I am, therefore, constrained to aver once again that the choice is finally between the Maharaja and the people and if the choice is not soon made, it might land us into very serious trouble both militarily and politically. The only alternative is that His Highness should abdicate in favour of his son and that there should be no reservation whatsoever in the administration of various subjects under the Ministers. This is my considered opinion after taking stock of the whole situation in the last seven months. I have on a number of occasions apprised Pandit Ji, Mr. Gopalaswamy Ayangar and other high-ranking officials of the Government of India of this. Recently, I had a frank talk about this with Raj Kumari Amrit Kaur. I am therefore giving my considered, decisive and final opinion in this behalf. It is now upto the State's Ministry and Pandit Ji to decide how this object can be achieved.¹⁶

The Indian leaders made frantic efforts to diffuse the crisis in the State and resolve the differences between the Maharaja and the Interim Government. After the Security Council adopted the August 13 Resolution, which in principle repudiated the Indian stand on the finality of the accession of the State to India and almost foisted a plebiscite on Jammu and Kashmir, the Indian leaders assumed caution in their dealings with the National Conference. They were even frightened to antagonise the Conference leaders, who they believed enjoyed the support of the Muslims in the State, and would win for India, the plebiscite in the State, if and when it was held. Towards the middle of August, Hari Singh was called to Delhi for consultations. He had long parleys with Sardar Patel and the other officers of the State's Ministry. Nehru pulled the wires from behind.

Hari Singh was finally persuaded to accept a fresh formula for the function of the Interim Government, which the Indian leaders believed would remove the major irritants between him and the Interim Government. The formula underlined:

- (i) that the control of the State troops would be transferred to the Indian army;
- (ii) that the Maharaja would not interfere with the function of the Interim Government and would not question its decision;
- (iii) that the Maharaja would not oppose the administrative reorganisation of the State Government nor would he oppose any economic measures, the Interim Government would under-

take; and

- (iv) that the Interim Government would be allowed to exercise powers with regard to the reserved subjects, except in regard to the Maharaja and his family, the Maharaja's estates, his privy purse and the Private Department.¹⁷

Hari Singh returned to Jammu, but the situation did not ease. The Conference leaders complained that the Maharaja continued to obstruct the functioning of the Interim Government, impede the reorganisation of the administration of the State and prevent the introduction of the economic reforms the Interim Government sought to achieve. The Conference leaders further expressed their disappointment with the arrangements which were made for the State army. They desired to reorganise the State army, and after having opened it to fresh recruitment, build it into an effective advance flank of the Interim Government. An idea of the outlook of the Conference leaders about the future of the State army can be had from the observations Sheikh Mohammad Abdullah made on the question of State army, in a letter he wrote to Sardar Patel in October 1948. He wrote :¹⁸

It will not be quite the whole truth to say that the question of the administration of the Army has been settled. Even such settlement as has been arrived at, which took full six months to materialise, has not so far been implemented in its entirety. With the taking over of the State forces by the Indian Government it was agreed that steps would be taken to reorganise and rebuild our Army so that when the present emergency is over and Indian Forces are withdrawn, the State will be left with a properly organised army of its own to fall back upon. This request was made as early as March last and has been repeated several times since. During my discussion of the matter with Shri Gopalaswamy Ayangar and Mr. (V.P.) Menon at New Delhi on 20 and 21 June last it was agreed between us that an Indian Army Officer will be appointed to reorganise the State forces. Nothing, however, has been done in that direction so far to my knowledge.

The pronouncements of the Conference leaders on the removal of Maharaja Hari Singh and their demand for his abdication, evoked sharp reaction from the Hindus in the Jammu province and a widespread agitation broke out against the Interim Government in the entire province. The Conference leaders came down upon the agitation with a heavy hand and charged the Maharaja of having incited

the trouble. They introduced a new element in their strife with the Maharaja and called for the abolition of the institution of Dogra monarchy. In February 1949, the Indian leaders decided to advise Hari Singh to leave the State for some time.

Hari Singh was called to Delhi in the last week of April. On April 29, 1949, he was told by Sardar Patel at his residence, where the Maharaja and Maharani Tara Devi had come to meet Patel, that the Government of India desired him to leave the State for some time and hand over his charge to his son Yuvraj Karan Singh. "Both of them," Patel wrote to Nehru, "were visibly taken aback by this proposal, and I could notice that there was a sense of shock and bewilderment at the end of my discussion with them on 29 April."¹⁹ Hari Singh, bitter at the treatment he had received, accepted the proposal Patel made. He wrote to Patel, "The contrast naturally fills me with poignant feelings. However, once again putting my complete trust in your judgement and benevolent intentions towards us, I might be prepared to fall in with your wishes and to absent myself from the State for a period of three or four months in consideration of the fact as emphasised by you, namely, complications created by the reference to the United Nations Organisation and the plebiscite issue."²⁰

Maharaja Hari Singh never returned home. He lived in Bombay, a lonely and forlorn man, till he breathed his last on April 26, 1961.

Article 370

At the time Maharaja Hari Singh was advised to leave the State, the Constitution of India was in the final stages of its completion. No decision was taken, either by the Indian leaders or the State leaders, about the position the State would be accorded in the Indian Constitutional system. The Government of India and the leaders of the National Conference, had repeatedly stated that Jammu and Kashmir would be secured a special position in the Indian Constitutional system, transitionally, till normalcy was restored in the State. The State was still unrepresented in the Constituent Assembly of India and the members from the State were yet to be nominated. While Hari Singh was still in the State, the Indian leaders invited the Conference leaders to Delhi to finalise the Constitutional position the State would have in the Union of India. A meeting of the leaders of the Indian Government and the Conference leaders, in which both Nehru and Sheikh Mohammad Abdullah participated, was held in Delhi in May 1949.²¹ A number of issues which included the application of the Constitution of India to the State, the division of

powers between the Government of India and the Government of the State, the institution of a separate Constituent Assembly for the State and the location of residuary powers came up for discussion in the conference. The Conference leaders expressed their preference for a minimal application of the Constitution of India to the State, division of powers corresponding to the delegation of authority envisaged by the Instrument of Accession, the abolition of the hereditary rule of the Dogras, the institution of a separate Constituent Assembly in the State and the formulation of a separate Constitution for the Government of Jammu and Kashmir. The Indian leaders, who had the taste of the temper of the Conference leaders were flustered at the proposals the Conference leaders made and though they agreed to leave a wider margin of authority to the State Government including the residuary powers and to accept the abolition of the Dogra rule and the institution of a separate Constitution for the government of the State, they insisted upon the application of the Constitution of India to the State with regard to the territorial jurisdiction of the Union of India, citizenship, fundamental rights, Directive Principles, the powers of the Supreme Court, the Government of India, the elections and the emergency powers. An agreement was finally reached which envisaged:

- (i) the future of the dynastic rule of the Dogras would be determined by the Constituent Assembly of the State;
- (ii) the State would have a separate Constitution;
- (iii) a Constituent Assembly would be instituted in the State on the basis of universal adult franchise;
- (iv) provisions of the Constitution of India with regard to citizenship, Fundamental Rights, and Directive Principles of State Policy would be uniformly applicable to the State;
- (v) the division of powers between the Government of India and the State would be governed by the provisions of the Instrument of Accession;
- (vi) the Constituent Assembly of the State would be empowered to determine which other powers would be transferred to the Government of India;
- (vii) the administrative and operational control of the State armies would be taken over by the Government of India.²²

The agreement was shortlived as the National Conference leaders resiled from their commitments immediately they returned to Srinagar. The issues came to a head when Gopalaswamy Ayengar drew up the

draft proposals for the constitutional position of the State and sent those to the Conference leaders for their consideration and approval. The draft proposals were based on the principles which had been agreed at Delhi in May. The draft proposals underlined that :²³

- (i) the provisions of the Constitution of India with regard to the government of the States which had acceded to India would not apply to Jammu and Kashmir and the State would have a separate Constitution;
- (ii) a Constituent Assembly would be convened in the State which would formalise the Constitution of the State;
- (iii) provisions of the Constitution of India with regard to the territorial jurisdiction of the Union of India, citizenship, Fundamental Rights and the Directive Principles of State Policy would apply to the State;
- (iv) other provisions of the Constitution of India would apply to the State, by an order of the President of India issued in concurrence with the Government of the State;
- (v) the Government of India would have the power to legislate on the subjects in the Union List and the Concurrent List of the Seventh Schedule of the Constitution of India which the President of India would declare, in concurrence with the Government of the State, to correspond to the matters specified in the Instrument of Accession;
- (vi) the President of India would be empowered to amend or repeal the Constitutional provisions incorporated for Jammu and Kashmir State in the Constitution of India, on the recommendations of the Constituent Assembly of the State.

After a short spell of silence and close door deliberations, the National Conference leadership placed the draft proposals before the Working Committee of the Conference. A number of other Conference leaders were specifically invited to attend the meeting of the Working Committee. The Working Committee turned down the draft proposals.

Sheikh Mohammad Abdullah sent an alternative draft to Ayangar which envisaged the application of the provisions of the Constitution of India which corresponded to the subjects which had been transferred to the Indian Government by virtue of the Instrument of Accession. The main purpose of the communication which Sheikh Abdullah sent to Ayangar, was to convey to the Constituent Assembly that the National Conference did not accept the inclusion of the Jammu and

Kashmir State in the constitutional structure of India.²⁴

The constitutional relations between the State and India had two aspects: first, the placement of the State in the constitutional structure, the Constitution of India laid down, and second, the division of powers between the State Government and the Government of India. The Indian leaders agreed to accept a modified design of the division of powers between the Central Government and the Jammu and Kashmir State. They were also prepared to provide safeguards for the State Subject rules which secured special rights and privileges to the people of the State. But the Indian leaders did not entertain any doubts about the inclusion of the State in the broad framework of the constitutional relationships the Constitution of India embodied. Obviously, the placement of the State within the Indian constitutional structure did not effect the autonomy of the State. Nehru and the other Indian leaders believed that the State could safely be brought within the territorial jurisdiction of the Indian Union, and subjected the general imperatives, the Constitution of India envisaged. The Indian leaders also believed that the people of the State could be admitted to the citizenship of India and the fundamental rights and related guarantees the Constitution of India provided subject to the condition that the State Subject rules were not adversely affected. The National Conference leaders harboured completely different views and refused to accept the placement of the State in the Indian constitutional structure. They also refused to accept any division of powers, whatsoever its nature, between the Government of India and the Government of the State, except the delegation of powers effected in accordance with the Instrument of Accession. The Conference leaders clarified their stand as they informed the Government of India, that the State had acceded to the Dominion of India, only in respect of the subjects specified in the Instrument of Accession i.e., the foreign affairs, defence and communication. They claimed that the State had executed limited accession to the Indian Dominion, leaving the factum of sovereignty in the State. The Conference leaders, in effect, sought to identify the accession of the State with the delegation of powers undertaken by virtue of the Instrument of Accession, and therefore, claim a separate identity for the State which would not form a part of the basic structure the Constitution of India embodied.²⁵ In view of the dispute with Pakistan the stand taken by the Conference leaders had many sinister forebodings.

Gopaldaswamy Ayangar, with a view to reduce the application of the Constitution of India to the State, drew up fresh proposals and agreed to omit the application of the constitutional provisions

with regard to fundamental rights and the Directive Principles of State Policy from the provisions of the Constitution of India which were sought to be extended to the State.²⁶ To his utter consternation the Conference leaders refused to accept the fresh proposals as well. It is difficult to appreciate the reasons which led Ayangar to modify his stand on issues which were of fundamental importance. Perhaps he laboured under the impression that the Conference leaders were genuinely anxious to secure the State Subject rules and the land reforms against the probable effect of the extension of the fundamental rights. Ayangar was also unmindful of the harm the fateful change of deleting the fundamental rights, would do to the people of the State among them particularly the regional and religious minorities. In a vain bid to placate the Conference leaders, Ayangar also turned his back on the severe reaction which was widespread, particularly in Jammu, against the unrestricted authority the State Government exercised.²⁷

The Indian leaders finally relented and Gopalaswamy Ayangar drew up fresh proposals in consultation with Mirza Afzal Beg, the Revenue Minister in the State Government. The draft proposals were based on the lines suggested by the Conference leaders and none of the provisions of the Constitution of India, except those embodied in Article 1 and Schedule I, which defined the territorial jurisdiction of India, were made applicable to the Jammu and Kashmir State. The draft provisions were incorporated in Article 306-A, which after having been adopted by the Constituent Assembly, was renumbered Article 370 of the Constitution of India.

The Constitution of India was finalised on November 26, 1949. It was brought into force on January 26, 1950. The Constitution was not made applicable to the Jammu and Kashmir State except in respect of Article 1 and Article 370. The Article defined the territorial jurisdiction of India and the Jammu and Kashmir State was included in the territories, listed in the Schedule I of the Constitution of India. The territories of Jammu and Kashmir State were defined to include territories which formed the States at the time the Instrument of Accession was signed by Maharaja Hari Singh on October 25, 1947.²⁸

Article 370 envisaged four major sets of constitutional provisions which provided for the institution of a Constituent Assembly of the State and a separate Constitution for the State; division of powers between the Union Government and the Government of the State; the modification of the operation of the provisions of Article 370 and the amendment and abrogation of Article 370. In accordance

with clause 1(a) of Article 370, Article 238 of the Constitution of India was saved application in regard to Jammu and Kashmir and the provision of the Constitution of India in regard to the government of the States was not made applicable to the State. Clause 2 of Article 370 envisaged provisions for the convocation of a Constituent Assembly "for the purpose of framing the Constitution of the State."

Clause 1(b) of Article 370 laid down the scheme of the division of powers between the Union Government and the State. The Parliament of India was empowered to make laws for the State in regard to such matters in the Union List and the Concurrent List, which in consultation with the Government of the State, were declared by the President of India to correspond to matters transferred to the Government of India by virtue of the Instrument of Accession. The Parliament was also empowered to legislate in regard to such other matters in the Union List and the Concurrent List as the President of India would specify, by order, issued in concurrence with the Government of the State. The Government of the State was construed to mean the person being recognised by the President of India as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the proclamation dated 5 March, 1948.

In accordance with clause 1(d) of Article 370, powers were vested with the President of India, to extend the application of the provisions of the Constitution of India to the State, by an order with or without modifications and amendments. Such an order was to be issued by the President in consultation with the Government of the State in case it related to the matters specified in the Instrument of Accession. In case such an order related to the other provisions of the Constitution of India, such an order was to be issued by the President with the concurrence of the Government of the State.

The concurrence of the State Government in relation to the extension of the provisions of the Constitution of India to the State and the extension of the powers of the Parliament to legislate in regard to the State, was to be placed before the Constituent Assembly, when it was convened, if such concurrence was given before the institution of the Assembly. The concurrence of the Government was to be placed by the Assembly "for such decision as it may take thereon." Evidently, the Constituent Assembly was vested with power to take a decision on the concurrence of the State Government, and not on the order issued by the President with such concurrence. The Assembly was empowered to call into question the

concurrence of the State Government and not the order of the President. The order issued by the President was not, therefore, subject to the decision of the Assembly. Any decision of the Assembly which repudiated the concurrence the State Government had given, ceased to have effect after the concurrence was repudiated and did prejudice any order the President had issued.

Clause 3 of Article 370, vested in the President of India, powers to declare by a public notification that the provisions of Article 370 would cease to be operative or would be operative with such exceptions and modifications which he would specify. All such notifications were to be issued by the President on the recommendation of the Constituent Assembly. It is evident that neither the President nor the Constituent Assembly was vested with the power to amend or abrogate the provisions of Article 370 and remove it from the statute book. The Constituent Assembly and the President of India were only empowered to terminate or modify the operation of Article 370.

The power to amend or repeal Article 370, was obviously vested with the Parliament of India which enjoyed the plenary powers to amend the Constitution of India and repeal any of its provisions. Article 370 did not incorporate any provisions which imposed a limitation on the powers of the Parliament to amend its provisions or repeal them. It did not vest any powers in the Constituent Assembly of the State in regard to the amendment or repeal of Article 370. Article 370, therefore, fell within the ambit of the Constitutive powers of the Parliament to amend the Constitution of India or repeal its provisions. The constituent power of the Parliament could only be restricted by an instrument which the Constituent Assembly of India created. The Constituent Assembly of India did not create any instrument which imposed a limitation on the powers of the Parliament of India to amend Article 370 or repeal its provisions. Even if any such instruments had been created by the Constituent Assembly of India, they would have the same sacrosanctity which all other instruments created by the Constituent Assembly possessed and would, therefore, be subject to the powers of the Parliament to the same extent the other provisions of the Constitution of India were. The Parliament of India could abolish all such instruments along with the provisions of the Constitution they protected. Article 370, therefore, envisaged:

- (i) that the President of India was not vested with any powers to amend or repeal the provisions of Article 370;

- (ii) that the Constituent Assembly of Jammu and Kashmir was not vested with any powers to initiate or recommend repeal or amendment of Article 370;
- (iii) that the powers to amend or repeal the Constitution of India rested with the Parliament of India; and
- (iv) that any instruments created by any authority in India which restricted the powers of the Parliament of India to amend or repeal Article 370, were redundant and void.

On November 25, 1949, Yuvraj Karan Singh, ordered by a proclamation, that the Constitution of India would govern the relations between the State and Union of India. According to the proclamation, the Constitution of India, superseded and abrogated all other constitutional provisions in force in the State which were inconsistent with the Constitution of India. The Constitution of India was brought into force on January 1, 1950.

The Constituent Assembly

On 1 May 1951, Yuvraj Karan Singh issued a proclamation and ordered the convening of the Constituent Assembly in the State, for which the State Government had been reserved the powers by virtue of Article 370 of the Constitution of India. The proclamation *inter alia* stipulated:

- (i) A Constituent Assembly consisting of representatives of the people, elected on the basis of the adult franchise shall be constituted forthwith for the purpose of framing a Constitution for the State of Jammu and Kashmir;
- (ii) For the purpose of the said elections the State shall be divided into a number of territorial constituencies each containing a population of 40,000 or as near thereto as possible, and each electing one member. A Delimitation Committee shall be set up by the Government to make recommendations regarding the number of constituencies and the limits of each constituency;
- (iii) Elections to the Constituent Assembly shall be on the basis of adult franchise, that is to say, every person who is a State subject of any class, is not less than twenty-one years in age on the first day of March, has been a resident in the constituency for such period as may be prescribed by the rules, shall be entitled to register in the electoral rolls of that constituency, provided that any person who is of unsound

mind or has been so declared by a competent court, shall be disqualified for registration;

- (iv) The vote at the election shall be direct and by secret ballot.²⁹

The elections to the Constituent Assembly were held on 15 October 1951. Seventy-three of the seventy-five members of the Assembly, all nominees of the National Conference, were returned unopposed. Most of the candidates, other than the National Conference candidates, who filed their nominations for election, withdrew from the contest. Nomination papers of a large number of candidates were rejected in the process of scrutiny. The remaining two seats, which were contested from two constituencies in the Jammu province, were annexed by the National Conference after the Praja Parishad announced its decision to boycott the elections. The Constituent Assembly was inaugurated by Sheikh Mohammad Abdullah on 5 November 1951. In his inaugural address the Sheikh made many interesting observations. He declared that the Constituent Assembly was a sovereign body and drew its powers from the people of the State. "You are the sovereign authority in this State of Jammu and Kashmir", Sheikh Mohammad Abdullah said. "What you decide has the irrevocable force of law. The basic principle of sovereignty of the nations, embodied ably in the American and French Constitutions, is once again given shape in your midst. I shall quote from famous words of Article 3 of the French Constitution of 1791: "The source of all authority resides fundamentally in the nation. . . . sovereignty is one and indivisible; inalienable and imprescriptible. It belongs to the nation."³⁰

Sheikh Mohammad Abdullah enumerated the basic tasks which he stated, the Constituent Assembly had to address itself to "one great task before the Assembly", Sheikh Mohammad Abdullah said, "will be to devise a Constitution for the further generation of the country." The second major issue, the Constituent Assembly would be required to decide, was the future of the ruling dynasty. "Your decision," Sheikh Mohammad Abdullah addressed the members of the Constituent Assembly, "will have to be taken with urgency and wisdom for on that decision rests the future form and character of the State." Another major issue the Constituent Assembly would be called upon to decide was with regard to the payment of compensation for land, which had been taken away from the landowners and transferred to the tillers of the soil.

The most vital issue, Sheikh Mohammad Abdullah underlined

for the consideration of the Constituent Assembly, was the accession of the State. "Finally," Sheikh Mohammad Abdullah observed, "this Assembly will, after full consideration of the three alternatives, that I shall state later, declare its reasoned conclusions regarding accession." Unfolding the three alternatives Sheikh Mohammad Abdullah observed, "The Cabinet Mission has provided for three courses which may be followed by the Indian States when determining future affiliations. A State can either accede to India or accede to Pakistan, but failing to do either, it still can claim the right to remain independent. These three alternatives are naturally open to our State." Sheikh Mohammad Abdullah continued, "while the intention of the British Government was to secure the privileges of the Princes, the representatives of the people must have the primary consideration of promoting the greatest good of the common people. Whatever steps they take must contribute to the growth of a democratic social order wherein all invidious distinctions between groups and creeds are absent. Judged by this supreme consideration, what are the advantages and disadvantages of our State's accession to either India or Pakistan, or having independent status?" Sheikh Mohammad Abdullah concluded, "I have now put the pros and cons of the three alternatives before you. It should not be difficult for men of discrimination and patriotism gathered in this Assembly to weigh all these in the scales of our national good and pronounce that the true well-being of the country lies in the future."³¹

The inaugural statement delivered by Sheikh Mohammad Abdullah to the Constituent Assembly of the State was received with consternation both inside and outside the State. The address raised a number of questions of fundamental political significance. Wherefrom did the Constituent Assembly derive its power? How could the Constituent Assembly assume powers to vote on accession, to India or to Pakistan or vote for independence? Could the Constituent Assembly supersede the Indian Independence Act and the provisions it envisaged for the Indian States and the act of accession of the Jammu and Kashmir State to the Indian Dominion performed by Maharaja Hari Singh? Could it also supersede the provisions of Article I of the Constitution of India which brought the State within the territorial jurisdiction of the Union of India; Article 370 of the Constitution of India which provided for the convocation of the Constituent Assembly in the State and delimited its powers and finally the proclamation of Yuvraj Karan Singh, ordering the institution of the Constituent Assembly by virtue of the powers vested in him by the Constitution of India? Who empowered the Constituent

Assembly to assume positions which the Cabinet Mission proposed in 1946, and how was the Constituent Assembly authorised to presume that the proposals made by the Cabinet Mission, survived the partition of India? Was the Constituent Assembly of the State, expressly or implied vested with any separate and independent charge by the people of the State, who were constituted into an inseparable part of India by virtue of the accession of the State to the Indian Dominion, in October 1947?

The inaugural address delivered by Sheikh Mohammad Abdullah was actually a frank confession of the burdens the National Conference leadership carried. Sheikh Mohammad Abdullah spelt out in unmistakable terms:

- (i) that the Constituent Assembly was vested with a separate charge which was not derived from the State of India;
- (ii) that Yuvraj Karan Singh was vested with power, independent of the Constitution of India, to convene the Constituent Assembly of the State;
- (iii) that after the Constituent Assembly was convened, the powers vested in the Yuvraj were assumed by the Constituent Assembly;
- (iv) that the Constituent Assembly was a creation of the Cabinet Mission plan and did not take cognizance of the Indian Independence Act of 1947, and the Accession of the State to India by Maharaja Hari Singh;
- (v) that the Constituent Assembly accepted only the Cabinet Mission proposals and would, therefore, enforce its right to choose options provided by the Cabinet Mission; and
- (vi) that the Constituent Assembly had the right to accede to India, accede to Pakistan or assume independence.

The leadership of the National Conference evidently sought to subject the accession of the State to India, to the vote of the Constituent Assembly. The Conference went a step further and sought to secure the Constituent Assembly the powers to repudiate the accession of the State to India. vote in favour of accession to Pakistan or the independence of the State. The Government of India realised the dangers the position taken by the Conference leaders was fraught with, and lost no time to assert that the accession of the State to India was irrevocably accomplished in 1947, when Maharaja Hari Singh had signed the Instrument of Accession to India and the Constituent Assembly of the State was vested with no power except to affirm the accession of the State to India and no separate

charge other than the Constituent Assembly of India had empowered it to exercise. The Government of India was already subject to heavy pressure in the Security Council where Great Britain and the United States of America had thrown their weight with Pakistan to seek the annulment of accession of the State to India. Pakistan had refused to accept the institution of the Constituent Assembly in the State and rejected the claims of the Assembly to determine the finality of accession. India was caught in a difficult position, it had permitted the institution of the Assembly, but any recognition of the claims the Assembly made to determine the disposition of the State was bound to undermine the accession of the State to India. This was the stress, which ultimately convinced Nehru that the commitments the Government of India had made in the Security Council with regard to the finalisation of the future disposition of the State, deserved to be withdrawn. This was also the time, when Nehru, who had himself handled the issues with the National Conference and the Government of Kashmir, decided to secure the placement of the State in the Indian Constitutional structure, delimit the function and authority of the Constituent Assembly and finalise with the Conference leaders the basis on which the future constitutional organisation of the State would be evolved. The Conference leaders hurried to give assurances that the National Conference supported the accession of the State to India, which they claimed was an act of faith in the ultimate unity of India, the secular content of the Indian political organisation and the identity of ideological basis of the national movement in India and in the Jammu and Kashmir State. However, Conference leaders, were not prepared to abandon the claims to an independent charge they sought for the Constituent Assembly of the State. They were also not ready to accept the placement of the State in the Indian constitutional structure. They also opposed to accept any criteria, laid down in collaboration with the Government of India, to delimit the powers of the Constituent Assembly or formulate principle for the evolution of the Constitution of India.

On 7 November 1951, the Constituent Assembly, set up two committees, the Basic Principles Committee and the Advisory Committee on Fundamental Rights and Citizenship. Sheikh Mohammad Abdullah was elected the chairman of both the committees. Besides the two committees, a Drafting Committee was also constituted by the Constituent Assembly and Mirza Afzal Beg was elected its chairman. The Basic Principles Committee was charged with the task of formulating principles on which the Constitution of the State would be founded.

Constitution Amendment Act, 1951

While the preparations were going on for the convocation of the Constituent Assembly, Yuvraj Karan Singh ordered, by a proclamation, drastic amendments in the Constitution Act of 1939. The Amendment Act aimed to bring the Constitution Act of 1939 "in accord with the spirit of the proclamations dated 5th March 1951, and the changes brought about in the actual governance of the State."³² The Amendment Act was promulgated by Karan Singh in exercise of inherent powers the Ruler of the State was reserved under the Constitution Act of 1939.

The Amendment Act provided for the appointment of a Council of Ministers to aid and advise the Ruler in the exercise of his powers. The Council was to be constituted of the Prime Minister and such other ministers as were appointed by the ruler on the advice of the Prime Minister. The Prime Minister was to be appointed by the Ruler and was to preside over the Council. The other members of the Council were also to be appointed by the Ruler, but on the advice of the Prime Minister. Provisions were made by the Amendment Act for the appointment of the Deputy Ministers who were to be appointed by the Ruler from among the members of the Legislative Assembly of the State. The powers vested by the Constitution Act of 1939, in the Prime Minister of the State, to make rules for the business of the Council of Ministers with the approval of the Ruler, were dissolved and the Council was empowered to make rules with regard to the transaction of its business.³³

An express stipulation was included by the Amendment Act in the Constitution Act of 1939, and the advice of the Council of Ministers was made mandatory for the Ruler, to follow in the exercise of his powers. In accordance with the Amendment Act, the Ruler was required to act on the advice of the Council of Ministers in the exercise of all matters, except those enumerated in the List I of the Seventh Schedule of the Constitution of India, with respect to which the Parliament of India was vested with powers to legislate in regard to the State. The inherent powers vested in the Ruler, and the prerogatives enjoyed by him under Section 3 of the Constitution Act of 1939, were, however, not dissolved and left intact. The Prime Minister and the other Ministers in the Council of Ministers were to be collectively responsible to the Legislative Assembly.³⁴

Provisions of the Constitution Act of 1939 with regard to the Praja Sabha were repealed and the Praja Sabha was abolished. In accordance with the provisions of the Amendment Act, the Constituent Assembly, to be convened under the proclamation made by

Yuvraj Karan Singh, dated April 20, 1951, was to function as the Legislative Assembly of the State till provisions were made for the institution of a Legislative Assembly in the State. The Legislative Assembly was empowered to make rules and standing orders to regulate its own business and until such rules were made, the business of the Assembly was to be conducted in accordance with the rules and standing orders, which regulated the procedure and the conduct of the business of the Praja Sabha.

The Legislative Assembly was to be presided over by a Speaker, who was to be elected by the Assembly. In the absence of the Speaker, the Assembly was to be presided over by the Deputy Speaker who was also to be elected by the Legislative Assembly. The Speaker and the Deputy Speaker were empowered to exercise powers which the President of the Praja Sabha exercised.

The Legislative Assembly was empowered to legislate on all matters and subjects, except those which were transferred to the Union Government by virtue of List I of the Seventh Schedule of the Constitution of India. The division of powers between the residuary powers and non-residuary powers envisaged by the Constitution Act of 1939, were abolished.³⁵

The Legislative Assembly was vested with wide control over the finances of the State.³⁶ Modifications were introduced in the division of the "Expenditure Charged upon the Revenues of the State" and the "Expenditure proposed to be met from the revenues of the State", envisaged by the Constitution Act of 1939, and the "Expenditure charged upon the revenue of the State" was redefined to include:

- (i) allowances of the Ruler and the other expenditure relating to his office;
- (ii) debt charges, sinking fund charges and other expenditures relating to raising of loans and service and redemption of debt;
- (iii) salaries and the allowances of the judges of the High Court and the members of the Board of Judicial Advisers;
- (iv) expenditure relating to the Constituent Assembly;
- (v) expenditure incurred to satisfy any judgement, decree or award of any court or arbitral tribunal; and
- (vi) any other expenditure which was declared by law or by the Legislative Assembly to be charged upon the revenues of the State.

The "expenditure proposed to be met from the revenues of the

State" was subject to the vote of the Legislative Assembly. The Council of Ministers was empowered to authorise expenditure, but the action of Council was subject to the final approval of the Assembly. The "Expenditure charged upon the revenues of the State" was not subject to the vote of the Assembly. However, the Assembly was empowered to discuss the demands for any such expenditures. The powers, which the Ruler was reserved under the Constitution Act of 1939, to over-ride the decision of the Assembly on votable demands, were abolished. All other restrictions which the Constitution Act of 1939, placed on the competence of the Assembly in regard to financial matters and appropriation of funds, were also abolished.

Sadar-i-Riyasat

Shortly after the Constituent Assembly was instituted, the National Conference leaders decided to abolish the hereditary rule of the Dogra dynasty. The Basic Principles Committee of the Constituent Assembly was called upon to make a report on the future of the hereditary rule of the Dogras and the feasibility of the replacement of the Regency of Yuvraj Karan Singh by a chief executive which would be elected by the people. The Basic Principles Committee submitted an Interim Report to the Constituent Assembly on 10 June 1952. The Committee recommended the termination of the Dogra rule and the institution of a chief executive who would be elected by the people of the State. The report stipulated:

It is the considered view of the Committee that sovereignty does and must reside in the people and that all power and authority must flow from the expression of their free will. The State and its Head, respectively symbolise this sovereignty and its centre of gravity. The Head of the State represents the authority vested in him by the people for the maintenance of their rights. The promotion of this vital principle of constitutional progress makes it imperative that this symbol of State power should be subject to the vote of the people. The Committee, therefore, strongly feels that consistent with the democratic aspirations of the people of the State, the office of the Head of the State should be based upon the elective principles and not upon the principle of heredity. This would afford opportunities to all citizens to rise to the highest point of authority and position, with the support and confidence of the people. The spirit of equality and fraternity required by democracy, demands that in no sphere of state activity should a citizen be debarred from participating in the progress of his

country and the advancement of his ideas. It is clear that the hereditary principle in the appointment to any office of power curtails the peoples' choice and to that extent, restricts their right to elect suitable person of outstanding merit and personal qualities to that position. The process of democratisation will not be complete till the highest office of the State is thrown open to the humblest of the land and in this manner, the Head of the State will be repository of the unbound respect, confidence and esteem of the people.

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

- (a) the form of the future Constitution of Jammu and Kashmir shall be wholly democratic;
- (b) the institution of hereditary rulership shall be wholly democratic;
- (c) the office of the Head of the State shall be elective.³⁷

The Interim Report of the Basic Principles Committee was adopted by the Constituent Assembly on 12th June 1952. Durga Prasad Dhar, a Deputy Minister in the State Government, moved a resolution which called upon the Drafting Committee of the Assembly to prepare appropriate proposals for the implementation of the recommendations of the Basic Principles Committee. The resolution of the Assembly stipulated:

This Assembly resolves that the recommendations contained in the Interim Report of the Basic Principles Committee, as adopted by the Assembly, be implemented and that for this purpose the Drafting Committee be directed to place before this Assembly appropriate proposals in the form of resolution or otherwise, within a period of one month from the date of passing of this resolution.³⁸

The decision of the Conference leaders to end the Dogra rule and replace the Ruler by a chief executive, presumably elected by the people of the State, created a sharp reaction both inside the State and in the rest of the country. Differences had already set in between the Government of India and the Conference leaders, on major political issues, including the plenary powers of the Constituent Assembly, the extension of further provisions of the Constitution of

India to the State and placement of the State in the federal organisation of India. The Government of India, had on more than one occasion, expressed its preference for a wider extension of the provisions of the Constitution of India to the State, particularly in respect of citizenship, fundamental rights, jurisdiction of the Supreme Court of India, powers of the Indian President pertaining to emergencies arising out of war and threats of war and internal disturbance, the elections, audits and account and the division of powers between the Union Government and the Government of the State. The constitutional changes proposed by the Constituent Assembly of the State brought the issues to a head. The Government informed the Conference leaders that it would be necessary to review the entire structure of constitutional relations between the State and the Union of India before the changes proposed by the Constituent Assembly could be considered. Nehru stated in the Parliament:

Now this portion might well have lasted some time longer, but for the fact that the Constituent Assembly of Kashmir came into existence and came into existence with our goodwill and with our consent. Now it is sitting down to draw up its Constitution. When it is drawing up its Constitution, it has to be in some precise terms; it cannot be fluid. Therefore, the question arose that nothing should be done by the Constituent Assembly of the Jammu and Kashmir State which does not fit in with our Constitution, which in no sense is contrary to it or conflicts with any part of it. That is why this question arose to consider.³⁹

In July 1952, a month after the report of the Basic Principles Committee was presented to the Constituent Assembly, the Government of India convened a high power conference between the State leaders and the representatives of the Government. Sheikh Mohammad Abdullah and Pandit Nehru also joined the deliberations of the conference. The conference was convened in Delhi and deliberated upon the principles the Conference leaders postulated as well as the suggestions for the readjustment of the relations between the Government of India and the Jammu and Kashmir State. An agreement, later known as the Delhi Agreement was finally arrived at between the representatives of the Government of India and the leaders of the State. It was agreed upon that dynastic rule of the Dogra Maharajas would be abolished and the State would be headed by a Head of the State, who would be elected for a fixed term, by the Legislative Assembly of the State and recognised by the President of

India. An agreement was reached regarding the broad principles on which the proposed constitutional organisation of the State would be based. An understanding was also reached regarding the extension of the Constitution of India pertaining to citizenship, fundamental rights, original jurisdiction of the Supreme Court and the division of powers between the State Government and the Government of India. It was agreed that the Constituent Assembly of the State would make recommendations to the President of India to order necessary modifications in the application of the various provisions of the Constitution of India to the State.⁴⁰

On August 11, 1952, Sheikh Mohammad Abdullah placed the Delhi Agreement before the Constituent Assembly and made a long statement on the stipulations of the agreement. An inconclusive debate followed. On August 19, 1952, the Drafting Committee of the Constituent Assembly presented its report to the Constituent Assembly. In the report of the Drafting Committee, Mirza Afzal Beg made an interesting observation:

This Assembly unanimously adopted the recommendations contained in the Interim Report of the Basic Principles Committee with regard to the future Headship of the State on the 12th June 1952, and directed the Drafting Committee to place before this House appropriate proposals in this behalf within a period of one month. As it was necessary to have corresponding adjustments made in the Indian Constitution, it became essential to have consultations with the Government of India on this subject. Therefore, a delegation headed by the undersigned, the Chairman of the Drafting Committee, was deputed to Delhi for this purpose. During the course of consultations certain other matters cropped up besides the question of the future Headship of the State. All these matters and the agreements arrived at between the Government of India and the representatives of the Kashmir Government have been placed before this House in a statement made by the leader of the House and have been approved by this Assembly.

The report of the Drafting Committee was unanimously approved by the Constituent Assembly. The Assembly adopted the resolution appended to the Report of the Drafting Committee, which laid down the guidelines for the proposed changes in the Constitution Act of 1939. The Resolution stipulated:⁴¹

(i) that the Head of the State would be designated the Sædar-i-

Riyasat;

- (ii) that the Sadar-i-Riyasat would be elected by the Legislative Assembly of the State and recognised by the President of India;
- (iii) that the Sadar-i-Riyasat would hold office during the pleasure of the President of India and subject to that condition remain in office for a term of five years;
- (iv) that the Sadar-i-Riyasat would exercise the powers which were exercised by the Ruler of the State;
- (v) that the Sadar-i-Riyasat would enjoy such emoluments, allowances and privileges as the Constitution of the State prescribed and pending that, as the Constituent Assembly would specify.

In November 1952, a formal Bill, which embodied the provisions of the resolutions of the Constituent Assembly was moved in the Constituent Assembly. The Bill was adopted unanimously and the Constitution Act of 1939 was amended. The amendment abolished the hereditary rule of the Dogra House. Section 4 of the Constitution Act of 1939, which vested the territories of the Jammu and Kashmir State and the rights, jurisdiction and authority of its government in Maharaja Hari Singh, was repealed.⁴² Section 4 was substituted by fresh provisions which stipulated:

1. The Head of the State shall be designated as the "Sadar-i-Riyasat.
2. All rights, authority and jurisdiction which appertain or are incidental to the Government of the territories of Jammu and Kashmir shall be exercisable by the Sadar-i-Riyasat on the advice of the Council except in so far as may be otherwise provided by or under this Act, and except in regard to those matters enumerated in List I in the Seventh Schedule to the Constitution of India with respect to which the Parliament of India has power to make laws for the State.

In accordance with the Amendment Act, the head of the State was designated the Sadar-i-Riyasat. It is interesting to note that the amendment did not replace the Ruler by a chief executive but created a separate legal instrument to head the State. The Sadar-i-Riyasat was obviously required to function in the capacity of the Constitutional head of the government of the State, which was vested in the Council of Ministers. The powers and functions of the Sadar-i-Riyasat

were defined by the Amendment Act. All rights, authority and jurisdiction with regard to the government of Jammu and Kashmir were to be exercised by the Sadar-i-Riyasat on the advice of the Council of Ministers.

The Sadar-i-Riyasat was to remain in office during the pleasure of the President of India, subject to that condition his tenure was fixed at five years.³⁴ He was reserved the right to resign from his office by writing in his own hand addressed to the President of India. In the event of a casual vacancy in the office of the Sadar-i-Riyasat by reason of his death, resignation or otherwise, the powers and functions exercisable by the Sadar-i-Riyasat were to be exercised by the person who was recognised as the officiating Sadar-i-Riyasat by the President of India on the recommendation of the State Government. Powers were reserved by the Constituent Assembly to provide in due course a suitable remedy "in respect of violation of the Constitution or gross misconduct by the person for the time being holding the office of the Sadar-i-Riyasat." The Sadar-i-Riyasat was entitled to receive such emoluments, allowances and privileges as were prescribed in the Constitution. Pending the formulation of the Constitution, the Sadar-i-Riyasat was to receive such emoluments, allowances and privileges as were fixed by the Constituent Assembly.

In accordance with the Amendment Act, Sadar-i-Riyasat was to be elected to his office by the members of the Legislative Assembly by secret ballot with a single transferable vote. After having been elected by the Assembly, the Sadar-i-Riyasat was to be recognised by the President of India. The Prime Minister of the State was vested with the authority to communicate to the President the name of the person who was elected the Sadar-i-Riyasat by the Assembly. Obviously the election of the Sadar-i-Riyasat was subject to the recognition of the President of India, without whose recognition the election of the Sadar-i-Riyasat was not deemed to be complete. Before entering upon his office the Sadar-i-Riyasat was required to subscribe to an oath of affirmation to "faithfully execute the office of the Sadar-i-Riyasat of Jammu and Kashmir" and to "preserve, protect and defend the Constitution of State as by law established and devote himself to the service and well-being of the people of the State".

The amendment laid down the qualifications for the election to the office of the Sadar-i-Riyasat. No person was eligible to be elected to the office of the Sadar-i-Riyasat unless:

- (i) he was a State Subject of Class I, as defined by the State Subject Notification No. I-L/84 dated 20th April 1927;

- (ii) he had completed the age of twenty-one years on the date he filed nomination papers for the election to the office of the Sadar-i-Riyasat;
- (iii) he was eligible to be elected as a member of the Constituent Assembly of the State;
- (iv) he was not a member of the Legislative Assembly of the State;
- (v) he did not hold any other office of profit.

On November 14, 1952, Yuvraj Karan Singh, who was dispossessed of his throne, was nominated by Sheikh Mohammad Abdullah for election to the office of the Sadar-i-Riyasat. The election of Karan Singh was unanimous and he was sworn in as the Sadar-i-Riyasat of Jammu and Kashmir on November 17, 1952.

The Delhi Conference and the consequent agreement marked a temporary phase in the steadily deteriorating relations between the leadership of the National Conference and the Government of India. In fact, the factors which strained in the relations between the two governments, were more vital than those which the Delhi Agreement underlined. The burden of distrust the Conference leaders carried with them is reflected in the statement Maulana Sayeed Masoodi, the General Secretary of the National Conference and a nominated member of the Parliament made on August 6, 1953.

"The fact of the matter is that there is a deliberate attempt on the part of those who do not view Kashmir's present position with favour to cloud the real issue to escape responsibility for the harm that has been caused to the Indo-Kashmir relationship by the support given to recent agitation for Kashmir's merger with India. The real issue, it should be realised, is that there are people in India who are not prepared to see Kashmir maintain its existing position. They are angry that Kashmiris should remain aloof both from India as well as Pakistan; one should not work oneself up necessarily to see this view being expressed. Instead it should be examined dispassionately. Then only can there be possible a correct appraisal of the situation in Kashmir. If Kashmir rose as one against Pakistan it was because they saw that country wanted to force them into a position which they were not prepared to accept. If today demands are in India which endanger the present autonomous position of the State and realising this danger, the people of Kashmir feel inclined towards a third alternative, it is not they who should be blamed for it, but those who are the root

cause of it. It will not do to point out the defects of this or that alternative. What is required is to remove the causes which have led to this line of thinking. All those people in India who are honestly interested in seeing Kashmir and India thrive together on the basis of a willing, not forced association should come into the field and organise the Indian public opinion against the movement for the merger of the State."⁴⁴

On August 7, 1953, three of the five members of the State Cabinet, Bakshi Ghulam Mohammad, Sham Lal Saraf and Girdhari Lal Dogra wrote to Sheikh Mohammad Abdullah, that dangerous trends had grown in the politics of the State which threatened the unity and the secular character of the State. They charged Sheikh Mohammad Abdullah and Mirza Afzal Beg, the fifth member of the State Cabinet, to have connived at the growth of such trends. They charged Sheikh Mohammad Abdullah and Mirza Afzal Beg to have deliberately delayed the implementation of the Delhi Agreement and denounced it in public, to precipitate a rupture in the relationship of the State with India. The Cabinet members informed Sheikh Mohammad Abdullah that the Council of Ministers had lost the confidence of the people in its ability to give them a clean, efficient and healthy administration. The Cabinet members wrote:

The events of the last few months have, in particular, thrown the State in the midst of a severe crisis. The repercussions of this crisis are bound to be serious and far reaching. We regret to state that you, as the head of the Government, have not only failed to take note of the situation but have, by your words and deeds, accentuated the tension. You have consistently refused to acknowledge responsibilities that devolve on you as the Prime Minister of the State by not following the declared policies that form the basis of the Government. You have tended to act in a manner that has generated uncertainty, suspense and doubt in the minds of the people of the State in general and of those in Jammu and Ladakh in particular. All these have combined to strengthen the disruptionist forces seeking the disintegration of the State

During the early hours of the morning on 9 August 1953, Sheikh Mohammad Abdullah was dismissed from his office. Bakshi Ghulam Mohammad, who was the Deputy Prime Minister in Sheikh's ministry, was invited to form the government. Sheikh Mohammad Abdullah along with Mirza Afzal Beg was arrested.

The Constituent Assembly was summoned to meet in October 1953, two months after the dissolution of the government headed by Sheikh Mohammad Abdullah. Most of the members of the Assembly were trusted men of Sheikh Mohammad Abdullah. However, sixty-one members of the Assembly pledged their support to Bakhshi Ghulam Mohammad and three of the remaining members joined him later.

On October 20, 1953, the Basic Principles Committee and the Advisory Committee on Citizenship and Fundamental Rights were reconstituted by a resolution of the Constituent Assembly. Sheikh Mohammad Abdullah was removed from the chairmanship of the two Committees and Syed Mir Qasim was elected in his place. The Drafting Committee was also reconstituted by the Assembly and Mirza Afzal Beg was removed from the chairmanship of the Committee. Girdhari Lal Dogra was elected the chairman of the Committee.

On January 4, 1953, a Joint Sub-Committee of the Basic Principles Committee and the Advisory Committee on Citizenship and Fundamental Rights, was constituted to consider the Delhi Agreement and make proposals for its implementation. The Sub-Committee presented its recommendation to a joint session of the two committees on January 22, 1954. On February 3, 1954, Syed Mir Qasim, the chairman of the two Committees, presented the report of the Basic Principles Committee and the Advisory Committee on Citizenship and Fundamental Rights to the Constituent Assembly. The Basic Principles Committee enunciated the broad principles on which the Constitution of the State would be framed. The Committee postulated:⁴⁵

- (i) the State Constitution would be based on sovereignty of the people, democracy, equality and social and economic justice.
- (ii) provisions would be incorporated in the Constitution to enable the people to develop their various cultures, languages and scripts and promote closer understanding among them;
- (iii) the government of the State would be based on the principle of executive responsibility;
- (iv) the judiciary of the State would be independent;
- (v) the legislative Assembly would be elected on the basis of universal adult franchise;
- (vi) the official language of the State would be Urdu, and English would continue to be used for official purposes;

- (vii) the Constitution would provide for the establishment of an independent Public Service Commission.

The Basic Principles Committee made specific recommendation regarding further extension of the provisions of the Constitution of India to the State. The Committee recommended the application of such other provisions of the Constitution of India, as were agreed to be applied to the State by virtue of the Delhi Agreement. The Committee observed, "the State's accession to the Union entails certain responsibilities on the Centre for protecting the interests of the State and also for its social and economic development. In order to enable the Centre to discharge its responsibilities which devolve upon it under the Constitution, those provision of the Constitution of India which may be necessary for this purpose should be made applicable to the State in an appropriate manner. While preserving the internal autonomy of the State all the obligations which flow from the fact of accession and also its elaborations as contained in the Delhi Agreement, should find an appropriate place in the Constitution.⁴⁶ The Committee also recommended the extension of the original and appellate jurisdiction of the Supreme Court of India to the State in civil and criminal matters.

The Advisory Committee on Citizenship and Fundamental Rights recommended the extension of the provisions of the Constitution of India with regard to citizenship to the State, subject to the conditions that the State-subject rules would not be prejudiced. The Committee further recommended the extension of the provisions of the Constitution of India with regard to Fundamental Rights to the State subject to the condition that the laws of the State relating to the State-Subjects and their rights and privileges and laws made by the State Legislature defining the State-Subjects and conferring upon them special rights and privileges, in relation to the acquisition and holding of property in the State, employment under the State and imposing restrictions on citizens other than State subjects for settling in the State, would not be declared void on the ground that such laws were inconsistent with or abridged the fundamental rights conferred by the Constitution of India. The Committee further recommended the formulation of the Principles of State Policy which would be intended for the guidance of the State.

The report of the Basic Principles Committee and the Advisory Committee on Citizenship and Fundamental Rights was adopted by the Constituent Assembly on 6 February 1954. The Assembly instructed the Drafting Committee to formulate proposals to implement

the recommendations of the Basic Principles Committee and the Advisory Committee on Citizenship and Fundamental Rights. The Drafting Committee presented its report to the Assembly on 11 February 1954. An annexure which embodied the recommendations of the Basic Principles Committee and the Advisory Committee on Citizenship and Fundamental Rights regarding the extension of the further provisions of the Constitution of India to the State was appended to the report. The Committee reported,

“The Annexure to this report while reflecting the desire of the House for the ratification of accession of the State with the Union of India, indicates in detail the provisions of the Constitution of India which generally correspond to Defence, Foreign Affairs and Communications and such other matters as are considered essential concomitants of the fact of accession. In accordance with the directions contained in the two reports, referred to above, the Committee has endeavoured to clearly demarcate the sphere of Union jurisdiction keeping in tact all along the residual powers of the State. While doing so the Committee has further provided adequate safeguards for preserving the basic policies of the State in respect of the land reforms and the interests of the permanent residents of the State.”

The report of the Drafting Committee was adopted by the Constituent Assembly and later presented to the President of India for being incorporated in Article 370 of the Constitution of India. On 14 May 1954, the President promulgated the Constitution (Application to Jammu and Kashmir) Order, 1954, and modified the operation of Article 370 of the Constitution of India to give effect to the recommendations of the Constituent Assembly of the State.

The Constitution (Application to Jammu and Kashmir) Order, 1954, extended the application of the following provisions of the Constitution of India to the State:⁴⁷

- (i) provisions pertaining to the Union and its territories with the exception that the Parliament could not exercise its powers to increase or diminish the area of the State or alter its name without the consent of the State Government;
- (ii) provisions pertaining to the Citizenship subject to the condition that the “Permanent Residents” of the State who had migrated to Pakistan were reserved the right to return to the State and acquire Indian citizenship on a “permit for reset-

- tlement or permanent return” issued by the legislature of the State or under any law made by it and the State Legislature was vested with the power to define the “Permanent Residents” and confer upon them special rights or privileges in respect of settlement in the State, employment in the services of the State, and the grant of scholarships or other aids provided by the State Government;
- (iii) provisions pertaining to the fundamental rights and the legal remedies, with reservations and exceptions which restricted the application of the right to freedom, right to liberty, right to property and the right to constitutional remedies;
 - (iv) provisions pertaining to the Government of India with the exception that the representatives of the State for the Lok Sabha were to be nominated by the President on the recommendations of the State Legislature;
 - (v) provisions pertaining to the jurisdiction and the powers of the Supreme Court, subject to the condition that the Parliament could extend the appellate jurisdiction of the Supreme Court in relation to the Jammu and Kashmir State only on a request of the State Legislature;
 - (vi) provisions of the Union List except those pertaining to Central Bureau of Intelligence and Investigation, Preventive Detention, Courts and Wards, High Court and extension of its jurisdiction, trading and corporations, Weights and Measures, Mines and 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;
 - (vii) provisions with regard to the administrative relations between the Centre and the State with the exceptions in regard to such matters in the Union List as were reserved for the State;
 - (viii) Provisions pertaining to the proclamation of emergency caused by war and external aggression;
 - (ix) Provisions pertaining to official language of the Union subject to the condition that the official language of the Union would remain confined to the communications between the States and the Union, and the communications between the States and the proceedings of the Supreme Court;
 - (x) Provisions pertaining to the amendment of the Constitution of India with the exception that amendments in the Constitution of India would apply to the State by an order of the President.

Constitution Amendment 1955

The extension of the application of the provisions of the Constitution of India by the Constitution (Application to Jammu and Kashmir) Order, May 1954, necessitated consequential changes in the standing constitutional provisions of the State. Accordingly the Constitution Act of 1939 was amended on 8 April 1955 to incorporate in the Constitution Act the changes effected by the Constitution (Application to Jammu and Kashmir) Order, 1954. The Amendment Act was given retrospective effect and was deemed to have come into force from 14 May 1954, the date from which the Constitution (Application to Jammu and Kashmir) Order, was promulgated.⁴⁸

The Amendment Act redefined the State-Subjects, who were conferred upon the citizenship of India by the Constitution (Application to Jammu and Kashmir) Order, 1954, and were further classified into a special category of people, namely the Permanent Residents of the State. The Permanent Residents of the State were defined to include:⁴⁹

- (i) The State Subjects of Class I and Class II defined so by the State-Subject Notification No. 1-L/34 dated 20th April 1927, and the Notification No. 13-L dated 27th June 1927;
- (ii) Persons who after having acquired immovable property in the State in pursuance of Ijazzatnama Rules, were ordinarily residing in the State for not less than ten years prior to the date, the Constitution (Application to Jammu and Kashmir) Order of 1954, was promulgated;
- (iii) The State-Subjects of Class I and Class II, who having migrated to the territories which came to be included in Pakistan, after first March 1947, returned to the State under a permit for settlement in the State or on a permanent return issued by or under the authority of law made by the State Legislature.

The State-Subjects of Class I and Class II were defined by Notification No. 1-L/34 dated 20 April 1927 and Notification No. 13-L/34 dated 27 June 1927, as the people who were born and residing in the State before the commencement of the Dogra rule in 1846, and the people who settled in the State before the year 1885, and resided in the State thereafter. The Companies, which were recognised as the State-Subjects before the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, within the meaning of the Notification No. 1-L/34 dated 20 April 1927, were deemed to be a Permanent Resident of the State. In accordance with the Amendment Act, every person who was a permanent Resident of the State was,

subject to the provisions of the law made by the State Legislature, to continue to be a Permanent Resident of the State.

The Amendment Act stipulated provisions by virtue of which the State Legislature was empowered to define the Permanent Residents of the State and regulate their rights and privileges. Such legislation was not to be enacted by the State Legislature except when it was passed by a majority of not less than two-thirds of the total membership of the Legislative Assembly. The State Legislature was also empowered to legislate in respect of the acquisition of the status of the Permanent Residents of the State, and until such laws were made, the acquisition of the status of the Permanent Resident, was to be governed by the Ijazzatnama Rules which provided for the grant of State-Subject Certificate.

The Amendment Act incorporated major changes in the rules and regulations pertaining to the immunities and the privileges of the members of the Legislative Assembly of the State and the members of its Committees. The immunities and privileges of the members of the Constituent Assembly were governed by the rules and procedure which provided for the immunities and the privileges of the Praja Sabha. In accordance with the Amendment Act, the immunities and privileges of the members of the Legislative Assembly were to be governed by the rules and procedure providing for the privileges and the immunities of the members of the Parliament of India.⁵⁰

The Amendment Act introduced changes in the jurisdiction of the State High Court. The original jurisdiction of the High Court in civil suits was limited to cases of which the value was not less than twenty thousand rupees. The Constitution Act of 1939, vested in the Court, original jurisdiction in cases which were over ten thousand rupees in value. Section 62 of the Constitution of 1939, was repealed. A new section, namely, Section 62-A, was added to the Constitution which provided that if the High Court was satisfied that any case pending in any subordinate court, involved the interpretation of a substantive question of the Constitution Act of 1939, or the Constitution of India, it could withdraw the case and either dispose it of or determine the question of law and then return the case to the subordinate court for its disposal.⁵¹

The Amendment Act abolished the Board of Judicial Advisers, which was created by the Constitution Act of 1939. The High Court of the State was vested with the powers to hear appeals in all criminal and civil cases which were exercised by the Board of Judicial Advisers. The High Court was also vested with the advisory jurisdiction the Constitution Act of 1939, vested in the Board of Judicial Advi

sers. The Court was empowered to give such advice to the Council of Ministers, on a point of law and fact, as the Council would refer to it.⁵²

The Constituent Assembly of the State completed its task in November 1956. The draft Constitution was finally approved by the Constituent Assembly on 17 November 1956. On 26 January 1957, the Constitution was brought into force.

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52. *ibid.*, Sec. 12.

THE BASIC STRUCTURE

The Constitution of India provides for a uniform basic structure of government for the Indian States. The governments in the Indian States are based on the principle of administrative responsibility, and the Councils of Ministers, which constitute the political executive, exercise their authority subject to the approval of the State Legislatures. The Governors of the Indian States, who are appointed by the President of India, represent the Union Government and act as the fulcrum of the balances of power between the Union and the Governments in the States. The Governments in the Indian States exercise limited authority subject to the prescriptive arising out of the fundamental rights embodied in the Constitution of India and the powers of review vested in the courts. The Constitution of India provides for the institution of an independent judiciary and in the States the High Courts, which are at the apex of the judicial organisation of the States, are vested with the power to review the executive and the legislative instruments, the governments in the States establish. The Constitution of India, also subjects the governments in the States to the precedence of the Union Government, both, in matters which are specifically within the purview of the Union Government and the matters which are ordinarily placed within the control of the State governments. The Constitution of India also lays down the Directive Principles of State Policy for the Government of India and for the Governments in the Indian States. The governments in the Indian States are bound to the same extent, to which the Government of India is, to follow and execute the imperatives which the Directive Principles of State Policy underline.

In its broad aspects, the Constitution of Jammu and Kashmir follows the fundamental postulates of government which the Constitution of India envisages for the Indian States. The Constitution of Jammu and Kashmir, provides for a democratic political organisation based upon the principle of public accountability and provides for an independent judicial organisation which is headed by the High Court

of Judicature and which is vested with the power of review. Further, the Constitution lays down an elaborate list of the Directive Principles of State Policy, which are aimed to ensure to the people of the State, social justice, equality before law, and safeguards against exploitation.

There are, however, certain special features which characterise the Constitution of Jammu and Kashmir and which are distinctly different from the provisions the Constitution of India embodies for the Indian States. The parliamentary form of government, envisaged by the Constitution of Jammu and Kashmir, is based on checks and balances which ensure the precedence of the Chief Minister and the Council of Ministers in the State Government and restrict the enforcement of responsibility. Secondly, the Constitution of Jammu and Kashmir creates a special class of "Permanent Residents of Jammu and Kashmir" and confers upon them special rights and privileges. Thirdly, the Constitution of Jammu and Kashmir does not incorporate a bill of rights, but stipulates enabling provisions which are deemed to make available to the "Permanent Residents of Jammu and Kashmir" the fundamental rights guaranteed by the Constitution of India. Fourthly, the Directive Principles of State Policy, enshrined in the Constitution of Jammu and Kashmir are fundamentally different from the set of Directive Principles of State Policy embodied in the Constitution of India and commit the government of the State to a specifically determined course of political action. The Directive Principles of State Policy incorporated in the Constitution of Jammu and Kashmir State, instruct the Government of the State to "promote the welfare 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. Fifthly, the Constitution of Jammu and Kashmir enshrines provisions for the recruitment and regulation of the public services in the State, breakdown of the constitutional machinery in the State and the flag and the official language of the State. Finally, the Constitution envisages the institution of an "Academy for the development of art, culture and languages in the State." Some of these special provisions though they do not effect the basic structure of the parliamentary government in the State, do, however, give to the government of the State, a texture and content which distinguishes it from the governments of the other Indian States.

Preamble

The Constitution of Jammu and Kashmir opens with a preamble, which, specifically embodies certain major postulates. The Preamble

describes:

- (i) the Jammu and Kashmir State as an integral part of India;
- (ii) the source from where the Constitution derives its power;
- (iii) the factum of authority vested with the people of the State to give to themselves the Constitution;
- (iv) the existing relations of the State with the Union and the scope for redefinition of such relations; and
- (v) the objects and purposes, the Constitution seeks to achieve.

The Preamble reads:

We, the people of the State of Jammu and Kashmir, having solemnly resolved, in pursuance of accession of this State to India, which took place on the twenty-sixth day of October 1947, to further the existing relationship of the State with the Union of India as an integral part thereof, and to secure ourselves, Justice—social, economic and political; Liberty of thought, expression, belief, faith and worship; Equality of status and of opportunity; and promote among us all; Fraternity, assuring the dignity of the individual and the unity of the Nation;

In our Constituent Assembly, this seventeenth day of November 1956, do hereby adopt, enact and give to ourselves this Constitution.

The Preamble states unambiguously that the Jammu and Kashmir State is an integral part of India, by virtue of the accession of the State to India, accomplished on 27th October 1947. The Preamble states that the Jammu and Kashmir State becomes a part of India before the Constitution of India was framed and before the Constitution of Jammu and Kashmir was enacted. Therefore, the Jammu and Kashmir is neither created by the Constitution of India nor by the Constitution of Jammu and Kashmir. The constitutional relationship between the Jammu and Kashmir State and the Union of India is obviously, subordinate to the basic fact that Jammu and Kashmir is a part of India and term and tenure of the constitutional relationship between the Jammu and Kashmir State and the Union of India, embodied in the Constitution of India or the Constitution of Jammu and Kashmir, does not form a part of the accession of the State to India and cannot effect the fact of such accession. The provisions of the Constitution of Jammu and Kashmir are couched with no inten-

tion to define the State of Jammu and Kashmir and the Preamble unambiguously states that in terms of the accession of the State to India.

It follows that the source from which the Constitution of Jammu and Kashmir derives its power is the State of India and this is the second important postulate which the Preamble embodies. "We the people of the State of Jammu and Kashmir, having solemnly resolved, in pursuance of accession of this State to India" amply explains that the Constitution is not given by the people of the Jammu and Kashmir State to themselves in their sovereign right, but in pursuance of the fact that the Jammu and Kashmir State is a part of India. The people represented in the Constituent Assembly of Jammu and Kashmir had no independent and inherent power to give themselves the Constitution they framed. It was only as a part of the people of India that the people of Jammu and Kashmir reposed their will in the Constituent Assembly of India and it was again as a part of the people of India that they reposed their will in the Constituent Assembly of Jammu and Kashmir which was an instrument created by the Constituent Assembly of India. The sovereign will of the people of India could not be divided and the sovereign will of the people of the State was not a separate charge which could be vested in a separate and independent constitutional instrument. The powers exercised by the Constituent Assembly of Jammu and Kashmir were derived from the Constitution of India which enshrined the sovereign will of the people of India. The Constituent Assembly of the Jammu and Kashmir was vested with no plenary powers but powers which the Constitution of India authorised it to exercise by virtue of its provisions embodied in Article 370.

The third basic postulate the Preamble enshrines is that the founding fathers of the Constitution of Jammu and Kashmir sought to "further define the existing relations of the State with the Union of India". The intention of the Preamble is expressed in Section 5 of the Constitution of Jammu and Kashmir, which stipulates:

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.

In 1956, when the Constitution of Jammu and Kashmir was drafted, the Constitutional relations between the Jammu and Kashmir State and the Union of India, were governed by the provisions of the

Constitution of India applicable to the State by virtue of Article 370 and the Constitution, Application to Jammu and Kashmir Order, 1954. Section 5 of Jammu and Kashmir State Constitution embodies general enabling provisions which,

- (i) incorporate the provisions of the Constitution of India applicable to the Jammu and Kashmir State in regard to the legislative and executive relations between the State and the Union of India;
- (ii) provide an anticipatory sanction for all such modifications which are brought about in the provisions of the Constitution of India applicable to Jammu and Kashmir.

The final and the most vital postulate of the Preamble is the statement of the objectives and purposes, the Constitution of Jammu and Kashmir seeks to serve. The objectives and purposes of the Constitution are enounced in the operative part of the Preamble which seeks to secure to the people of the State, justice—social, economic and political; freedom of thought and expression and liberty of belief, faith and worship; equality in terms of opportunity and fraternity among the people of the State. The constitutional operatives of the ideals, the Preamble envisages, are incorporated in the provisions of the Constitution of Jammu and Kashmir and the provisions of the Constitution of India applicable to the Jammu and Kashmir State. The fundamental principles of equality and liberty are defined in Part III of the Constitution of India which are applicable to Jammu and Kashmir and are also incorporated in Section 10 of the Constitution of Jammu and Kashmir. The postulate of justice and fraternity are embodied in Part IV of the Constitution of Jammu and Kashmir, which enumerates the Directive Principles of State Policy.

Permanent Residents

The Constitution of India provides for a uniform and single citizenship for the people of India. A citizen of India enjoys the position and status of a citizen in every part of the country, and enjoys without any discrimination all the rights and privileges which the Constitution embodies.¹ In regard to the Jammu and Kashmir State, however, the citizens of India, including the residents of the State, do not enjoy the rights and privileges conferred on the citizens of India by the Constitution of India. The Constitution of the Jammu and Kashmir State classifies the people of the State into a special category of the "Permanent Residents of the State". The Constitution

creates a separate jurisdiction for such people by vesting powers with the Legislature of the State to define the people of the State into Permanent Residents and confer upon them special rights and privileges to the exclusion of the other citizens of India including those who are residing in the State.² All Permanent Residents in the State are citizens of India but all citizens of India are not the Permanent Residents of the State.

The Constitution of India confers Indian citizenship on all persons:³

- (i) Who at the time of the commencement of the Constitution of India were born in India and domiciled in India;
- (ii) Who at the time of the commencement of the Constitution of India were domiciled in India and either of whose parents was born in India;
- (iii) Who at the time of the commencement of the Constitution of India were domiciled in India and were ordinarily residing in India for not less than five years immediately preceding the commencement of the Constitution;
- (iv) Who migrated to India from Pakistan before 19th July 1948, and ordinarily resided in India since the date of their migration, provided they or their parents or their grandparents were born in India, as defined in the Government of India Act, 1935, which included the British Indian Provinces and the Indian States;
- (v) Who migrated to India from Pakistan after 19 July 1948, provided either of their parents or their grandparents were born in India and who on the application for registration, filed before the commencement of the Constitution of India, and having resided in India for six months preceding the date of such application, were registered as the citizens of India by an officer appointed by the Government of India;
- (vi) Who migrated to Pakistan after 1 March 1947, but subsequently returned to India under a permit issued under the authority of the Government of India for resettlement or permanent return under the authority of any law, provided such persons were registered as citizens of India on an application for registration filed before the commencement of the Constitution of India and such persons had resided in India for six months immediately before the date of the application;
- (vii) Who or any of whose parents or grandparents were born in India as defined by the Government of India Act, 1935, but

who were living in any 'country outside India', provided such persons got themselves registered as citizens of India, on an application in the prescribed form, by the consular or diplomatic representative of India in the country of their residence.

The provisions of the Constitution of India with regard to citizenship, were applied to the Jammu and Kashmir State in 1954, when the Constitution (Application to Jammu and Kashmir) Order, 1954, was promulgated by the President of India. The provisions of the Order with regard to citizenship were given retrospective effect and deemed to have been brought into force in the State from 26 January 1950. An exception was, however, made in respect of the application of Article 7 of the Constitution of India and the Permanent Residents of the State who migrated to Pakistan after March 1, 1947, were entitled to assume Indian citizenship, if they returned to the State under a permit for resettlement or a permanent return issued by or under the authority of law made by the Legislature of the State. In its application to the State, Article 7 was appended with a proviso which stipulated:

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

The Permanent Residents of the Jammu and Kashmir State having migrated to Pakistan after March 1, 1947, are, therefore, entitled to assume the citizenship of India if they return to State under a permit for resettlement in the State or a permanent return issued by the authority of law made by the Legislature of the State. The substantive effect of the proviso added to Article 7 by the Constitution (Application to Jammu and Kashmir) Order, 1954, is that the Permanent Residents of the State, who migrated to Pakistan after March 1, 1947, can assume Indian citizenship by the instruments which are created by the legislature of the Jammu and Kashmir State. It is interesting to note that the Constitution (Application to Jammu and Kashmir) Order, 1954, does not define the Permanent Residents of the State, but leaves them to be defined by the laws made by the

Legislature of the State.⁵

The Constitution of Jammu and Kashmir defines the Permanent Residents of the State as:⁶

- (i) the citizens of India, who on 14 May 1954, were the State-Subjects of Class I and Class II or who after having lawfully acquired immovable property in the State were ordinarily residing in the State for not less than ten years before that date; and
- (ii) The citizens of India, who were the State-Subjects of Class I and Class II, but after having migrated to the territories now included in Pakistan, after March 1, 1947, returned to the State under a permit of resettlement or permanent return issued by or under the authority of any law made by the State Legislature.

The Permanent Residents of the State, therefore, include the people of the State: (i) who are the citizens of India within the scope of the provisions of the Constitution of India with regard to citizenship as applicable to the Jammu and Kashmir State and (ii) who are the State-Subjects of Class I and Class II.

The State Subjects were for the first time defined by a circular which was issued by Maharaja Hari Singh, the Ruler of the State, in 1927 by virtue of which employments in the service of the States were reserved for the hereditary State-Subjects of Jammu and Kashmir. The hereditary State-Subjects of Jammu and Kashmir were defined by the Circular to include:

- (i) persons who were born and were residing within the territories of the State before the commencement of the reign of Maharaja Gulab Singh in 1846, when the Jammu and Kashmir State was founded.
- (ii) persons who settled in the State before the commencement of the year 1885, when Maharaja Pratap Singh assumed the throne of the State, and were since residing in the State.

This Circular was issued from the office of the Private Secretary to the Ruler on 31 January 1927, and was immediately brought into force.⁷ The Circular read :

His Highness the Maharaja Bahadur has been pleased to command that in future in the case of every new entrant into State

service the authority empowered to make the appointment should certify that he has satisfied himself after due enquiries that the person appointed is a hereditary State-Subject. Further, that in the absence of such a certificate the Accountant General should not pass the pay bill of such a State servant without the definite orders of His Highness in Council to the contrary.

For the purposes of this order the term Hereditary State Subject will be held to mean and include 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 the persons settled therein before the commencement of *Samvat* 1942 and have since been permanently residing therein. The certificate will be given after due enquiries by the (Wazir Wazarat) in whose charge the candidate for State service resides and the form of such certificate should be submitted by the Accountant General for the approval of His Highness in Council. In the meantime this Order will have effect from the date of issue, namely, 31st January 1927.⁸

The Circular was followed by a fresh Government Notification, which was issued on 20 April 1927, and which further defined the Hereditary State-Subjects of Jammu and Kashmir. The Notification classified the Hereditary State Subjects of Jammu and Kashmir into three classes: the State Subjects of Class I, the State Subjects of Class II and the State Subjects of Class III.

The State Subjects of Class I were defined to mean and include :

- (i) The people who were born in the State and were residing therein before the commencement of the reign of Maharaja Gulab Singh in 1846, when the State of Jammu and Kashmir was founded; and
- (ii) the people who settled in the State before the close of *Samvat* year 1942, and were permanently residing in the State after they had settled and had acquired immovable property in the State.

The State Subjects of Class II were defined to mean and include people who had settled within the State before the close of *Samvat* year 1968, and who resided permanently in the State thereafter and acquired immovable property.

The State Subjects of Class III were to mean and include all other people of the State, not included in the State Subjects of Class I

and Class II, who were permanently residing within the State and who had become State-Subjects under the authority of a *Rayatnama* issued by the Government of the State. A *Rayatnama* was a certificate of permanent residence in the State which entitled the people who settled in the State to assume the status of state-subjects. A *Rayatnama* was granted to people who had acquired immovable property in the State by virtue of an *Ijzat-nama* and had resided in the State continuously for ten years after having acquired immovable property. An *Ijzatnama* was a permit granted to a person who was not a State Subject, to acquire immovable property, in the State.⁹

In 1932, the State Government issued another notification, which sought to define the position of the State-Subjects of Jammu and having migrated to foreign states and the position of the foreign nationals residing in the Jammu and Kashmir State. The Notification laid down the precept and procedure to determine the nationality of the State Subjects, and in effect formulated a separate jurisdiction for the nationals of the State. The State Subjects who had migrated to foreign territories were to be treated as the nationals of the State and the State Subjects of Jammu and Kashmir. The descendants of such emigrants were to be treated, up to two generations as the nationals of the State and the State Subjects. Such nationals of the State, were, however, not entitled to claim the rights granted to the State-Subjects residing in the State. The Notification stipulated:

That all emigrants from the Jammu and Kashmir State to foreign territories shall be considered State Subjects and also the descendants of these emigrants born abroad for two generations; provided that these nationals of the Jammu and Kashmir State shall not be entitled to claim the internal rights granted to Subjects of the State by the laws and rules for the time being in force in this State unless they fulfil the conditions laid down by those laws and rules for the specific purposes mentioned therein.

All foreign nationals in the State were not to be treated as having acquired the nationality of the Jammu and Kashmir State. They were to be treated as the nationals of the State only after they had attained eighteen years of age, had been permitted to purchase immovable property under an *Ijzatnama* and had after ten years of continuous residence in the State obtained a *Rayatnama* from the State. The certificates of the nationality of the State were to be granted by Minister-in-charge of the Political Department of the

State on an application and in accordance with the rules and procedure laid down by the State Subject Definition rules of 1927.

The foreign nationals residing in the State of Jammu and Kashmir shall not acquire the nationality of the Jammu and Kashmir State until after the age of 18 on purchasing immovable property under permission of an Ijazatnama and no obtaining a Rayatnama after ten years continuous residence in the Jammu and Kashmir State as laid down in Notification No. 1-L of 1984 dated 20th April 1927.

Certificates of nationality of Jammu and Kashmir State may, on application be granted by the Minister-in-charge of the Political Department in accordance with the provisions of Section 1 of this Notification.¹⁰

The Government issued another Notification the same year, which entitled the wife or the widow of a State Subject to be treated as a State Subject of the class to which her husband belonged so long she continued to reside in the territories of the State. The notification applied only to such wives or widows who were not hereditary State Subjects and who were married to the State Subjects.¹¹ In 1939, another Notification was issued by the State Government which created an additional class of the State Subjects. In accordance with the Notification, Companies which were registered within the State and in which the State was financially interested or which operated to the economic benefit of the State, and which in the opinion of the State Government, were financially sound, were declared to be the State Subjects of Class IV. The Companies which were covered by the proclamation were authorised to acquire immovable property in the State, and claim such rights as were provided for by the State Subjects rules. The notification stipulated:

His Highness is further pleased to direct that notwithstanding any law or rule or other order to the contrary, no disability as regards the acquisition of any interest in land or other immovable property in the State shall attach to a Company which is a State Subject within the meaning of Notification No. 1-L/84 dated 30th April 1927.¹²

The State Subject rules were drastically modified in 1954, when the Jammu and Kashmir Constitution Act of 1939, was amended by the Constitution Amendment Act of May 1954. The Jammu and

Kashmir Constitution Act of 1939, did not embody any provisions with regard to the State Subjects. However, fresh provisions were added to the Jammu and Kashmir Constitution Act of 1939, which created a uniform class of the "Permanent Residents of the State." The Permanent Residents of the State were defined to include:¹³

- (i) citizens of India who were the State Subjects of Jammu and Kashmir, Class I, on the date of the commencement of Act i.e. 14 May 1954;
- (ii) citizens of India who were the State Subjects of Jammu and Kashmir, Class II, on the date of the commencement of Amendment Act i.e. 14 May 1954; and
- (iii) citizens of India, who having acquired immovable property in the Jammu and Kashmir State in pursuance of an Ijazatnama granted under the Ijazatnama Rules, for the time being in force, and have been ordinarily residing in the territories of the State for not less than ten years prior to the commencement of the Amendment Act i.e. 14 May 1954.

Provisions were also made by the Constitution Amendment Act, by virtue of which the State Subjects of Class I and the State Subjects of Class II, who migrated to the territories included in Pakistan after 1 March 1947, and who returned to the State under a permit for settlement in the State or permanent return, issued, by or under the authority of any law made by the State Legislature, were to "continue to be deemed permanent Residents of the State". The State Subjects of Class III who migrated to Pakistan after 1 March 1947, were not covered by the Amendment Act and were evidently, excluded from the Permanent Residents of the State. Companies, defined as the State Subjects of Class IV by the State Subjects Rules,¹⁴ were also deemed to be the permanent Residents of the State.

In accordance with the provisions of the Constitution Act, the Permanent Residents of the State were to continue to retain their status of being the Permanent Residents of the State perpetually subject to the laws made by the State Legislature. The Permanent Residents of the State, could not therefore, be deprived of their right of being the Permanent Residents of the State, subject to the laws made by the State Legislature. Obviously the State Legislature was vested with the power to enact laws which could impinge upon the rights of the Permanent Residents of the State.¹⁵ The State Legislature was

empowered to legislate with regard to:

- (i) the definition of the Permanent Residents of the State;
- (ii) the regulations of their special rights and privileges.

All such laws were, however, to be enacted by the State Legislature, only after they were approved by a majority of not less than two-thirds of the total membership of the Legislative Assembly.¹⁶

The provisions of the Constitution Amendment Act of 1954, pertaining to the Permanent Residents of the State, were by and large incorporated in the Constitution of Jammu and Kashmir. In accordance with the provisions of the Constitution of Jammu and Kashmir, the Permanent Residents of the State are defined to include:

- (i) the State Subjects of Class I and Class II, as defined by the State Subject Notification No. I-L/84 dated 20 April 1927, read with Notification No. 13-L/1929 dated 27 June 1932, who were the citizens of India on 14 May 1954;
- (ii) the citizens of India, who having lawfully acquired immovable property in the State, were ordinarily residing in the State for not less than ten years prior to 14 May 1954;¹⁷
- (iii) State Subjects of Class I and Class II who having migrated to the territories, included in Pakistan after 1 March 1947, returned to the State under a permit for resettlement in the State or for permanent return, issued by or under the authority of any law made by the State legislature;¹⁸
- (iv) State Subjects of Class I and Class II residing in the territories of the State occupied by Pakistan and constituted into Azad Kashmir who were able to prove that they had migrated from Azad Kashmir to Pakistan after 1 March 1947, and who were issued permits for resettlement in the State or permits for permanent return under the authority of law made by the State legislature.¹⁹

The Constitution of Jammu and Kashmir excludes the following classes of the State Subjects from the definition of Permanent Residents of the State:

- (i) the State Subjects, who are not the citizens of India;
- (ii) the State Subjects who migrated to Pakistan after 1 March 1947, but did not return to the State under a permit of resettlement

- in the State or a permanent return issued by or under the authority of any law made by the State legislature;
- (iii) the State Subjects of Class III, who migrated to Pakistan after 1 March 1947;
- (iv) the State Subjects, who voluntarily renounce the citizenship of India and acquired the citizenship of any foreign country;
- (v) the State Subjects debarred from acquiring the citizenship of India by law made by the Parliament of India;
- (vi) State Subjects excluded from the Permanent Residents of the State by the law made by the State legislature.

Fundamental Rights

The Constitution of Jammu and Kashmir does not envisage a separate charter of fundamental rights. Provisions are included in the Constitution of the State by virtue of which the Permanent Residents of the State are guaranteed the fundamental rights which are incorporated in the Constitution of India. Section 10 of the Constitution of Jammu and Kashmir stipulates that "the Permanent Residents of the State shall have all the rights guaranteed to them under the Constitution of India."

When the Constitution of India was framed in 1950, the provisions pertaining to the fundamental rights were, under Article 370, saved application in regard to the Jammu and Kashmir State. The provisions with regard to the fundamental rights were partially applied to the Jammu and Kashmir State in 1954, when the Constitution (Application to Jammu and Kashmir) Order dated 14 May 1954, was promulgated by the President of India to an end the operation of Article 370.²⁰ A number of special and extraordinary restrictions were imposed by the Constitution (Application to Jammu and Kashmir) Order, 1954, on the application of the provisions of the Constitution of India with regard to the fundamental rights, to the Jammu and Kashmir State. Section 10 of the Constitution of Jammu and Kashmir, at the time it was formulated in 1956, provided for the application of the Constitution of India with regard to the fundamental rights of the State along with the restrictions placed upon them.

The provisions of Section 10 of the Constitution of Jammu and Kashmir have two principal aspects. First, that the fundamental rights embodied by the Constitution of India are available only to the Permanent Residents of the State and not to the other residents of the State including the citizens of India who are not the Permanent Residents of the State. Secondly, only such of the fundamental rights embodied by the Constitution of India, as are applicable to the State

of Jammu and Kashmir, are available to the Permanent Residents. Section 10, therefore, merely reiterates the intention of the Constitution (Application to Jammu and Kashmir) Order, 1954, and seeks to remove any irreconcilability between the Constitution (Application to Jammu and Kashmir) Order, 1954, and the Constitution of Jammu and Kashmir. Section 10 does not create the fundamental rights embodied by the Constitution of India, nor does it create any title to such fundamental rights. The intended effect of Section 10, to restrict the fundamental rights to the Permanent Residents of the State, operates subject to the provisions of the Constitution of India and does not deprive the people of the State, who are excluded from the definition of the Permanent Residents of the State by any law made by the State Legislature, of the fundamental rights embodied by the Constitution of India and guaranteed to them by the Constitution (Application to Jammu and Kashmir) Order, 1954. To the extent, Section 10 of the Constitution of Jammu and Kashmir impinges upon the fundamental rights guaranteed by the Constitution of India, it loses its effect. The fundamental rights envisaged by the Constitution of India are not conferred on the people of the State by Section 10 of the Constitution of Jammu and Kashmir, but by the Constitution of India as it is applicable to the State by virtue of the Constitution (Application to Jammu and Kashmir) Order, 1954. The fundamental rights available in the State are, therefore, enumerated within the meaning of the Constitution of India and are enforced in the State by the instrumentalities which exercise authority drawn from the Constitution of India.

The Permanent Residents of the State are entitled to special rights and privileges in the State which are envisaged by the Constitution (Application to Jammu and Kashmir) Order, 1954, as well as the Constitution of Jammu and Kashmir. The Constitution (Application to Jammu and Kashmir) Order, 1954, adds a new Article to Part III of the Constitution of India in its application to Jammu and Kashmir.²¹ The new Article marked 35-A, reserves special powers to the State Legislature to define "the classes of persons who are or shall be the permanent Residents of the State," and confers on such Permanent Residents any special rights and privileges to the exclusion of the people of the State who are not the Permanent Residents of the State. The State Legislature is empowered to reserve such rights and privileges to the Permanent Residents in regard to:

- (i) employment under the State Government;
- (ii) acquisition of immovable property in the State;
- (iii) settlement in the State;

- (iv) right to scholarships and such other forms of aid as the State Government may provide.

The State Government is vested with the powers to exclude the people of the State, who are the citizens of India, from the definition of the Permanent Residents of the State and also exclude them from the right to claim employment under the State Government, right to acquire immovable property in the State, right to settle in the State and right to seek scholarships and the other forms of aid which the State Government provides. Laws enacted by the State Legislature excluding Indian citizens from such rights and privileges cannot be held void on the ground that they violate fundamental rights envisaged by the Constitution of India.²²

The Constitution of Jammu and Kashmir vests wider powers with the State Legislature in regard to the Permanent Residents and their rights and privileges than the Constitution (Application to Jammu and Kashmir) Order, 1954, envisages. The State Legislature is vested with unrestricted powers to define "the classes of persons who are or shall be Permanent Residents of the State" or "alter the definition of the classes of persons who are or shall be Permanent Residents of the State." Section 8 of the Constitution of Jammu and Kashmir vests with the State Legislature powers to include within the meaning of the Permanent Residents people who are not citizens of India or the State Subjects of Jammu and Kashmir and dispossess Permanent Residents, or classes of Permanent Residents of their status of Permanent Residents. Section 8 reads:

Nothing in the forgoing provisions of this Part shall derogate from the power of the State Legislature to make any law defining the classes of the persons who are, or shall be permanent residents of the State.

The State legislature is also vested with unlimited authority to confer on the Permanent Residents of the State any special rights and privileges, regulate such rights and modify them.²³ The Constitution of Jammu and Kashmir does not limit the power of the State legislature to the matters which Article 35-A places within the scope of the powers of the State Legislature. The powers vested with the State legislature obviously conflict with the limits imposed on the autonomy of the State by the fundamental rights embodied by the Constitution of India and the legislation enacted by the State Legislature in violation of Article 35-A of the Constitution of India, will always be bad

law and liable to be struck down by the courts.

Article 13 of the Constitution of India is applicable to the State without any reservations and secures the fundamental rights available to the people of the State under the Constitution of India, against any violation by any authority including such authority as is created by the Constitution of Jammu and Kashmir. The obligations imposed by Article 13, on public authority are expressly universal.²⁴ In its application to Jammu and Kashmir State, Article 13 underlines :

- (i) that the State Legislature cannot enact law which abridges or takes away the fundamental rights conferred by the Constitution of India on the people of the State and the laws made by the State Legislature which contravene such fundamental rights are void to the extent of the contravention; and
- (ii) that laws within the scope of Article 13 include the laws made by the Legislature of Jammu and Kashmir State as well as the amendments in the Constitution of Jammu and Kashmir.

The fundamental rights envisaged by the Constitution of India, which are applicable to the Jammu and Kashmir State are:²⁵

- (i) Article 12 and Article 13, which define the nature and scope of the fundamental rights;
- (ii) Article 14, which defines the right to equality;
- (iii) Article 15, which defines the right against discrimination on grounds of religion, race, caste, sex and place of birth;
- (iv) Article 16, which defines right to equality of opportunity in matters of public employment;
- (v) Article 17, which abolishes untouchability and forbids practice of untouchability in any form;
- (vi) Article 18, which prohibits the conferment of titles and the acceptance, by the Indian citizens of titles conferred by foreign states;
- (vii) Article 19, which defines the right to freedom;
- (viii) Article 20, which defines the right to protection in respect of conviction for offences;
- (ix) Article 21, which defines the right to protection of life and personal liberty;
- (x) Article 22, which defines the right to protection against arrest and detention;
- (xi) Article 23, which prohibits trafficking in human beings and

forced labour;

- (xii) Article 24, which prohibits the employment of children in factories and on mines and other hazardous employments;
- (xiii) Article 25, which defines the right to freedom of faith and profession, practice and propagation of religion;
- (xiv) Article 26, which defines the right to freedom to manage religious affairs;
- (xv) Article 27, which defines the right to pay taxes for the promotion of any particular religion;
- (xvi) Article 28, which defines the right to freedom to attend religious instruction or religious worship in educational institutions;
- (xvii) Article 29, which defines the right to protection of the interests of the minorities; and
- (xviii) Article 30, which defines the right of the minorities to establish and administer educational institutions.

Provisions of Article 22 are applicable to the State of Jammu and Kashmir, with two main reservations. Clause (4) and (7) of Article 22, provide that no law providing for preventive detention shall authorise detention for a period exceeding three months unless an Advisory Board has reported that there is sufficient cause for such detention. The Advisory Boards are constituted of Judges of the High Court or persons who have been or qualified to be the Judges of the High Court. Clause (4) further stipulates that the detention cannot exceed, in any case, beyond the maximum period prescribed by a law made by the Parliament of India. The reservation in the application of clause (4) and (7) vests the power to prescribe the maximum period of preventive detention in the State Legislature and not the Parliament of India.

The fundamental right to property, embodied by Articles 31, 31-A, 31-B, 31-C and 31-D, was deleted from the Constitution of India by the Constitution (Forty-fourth) Amendment in 1978, and reduced to a civil right. The amendments to the Constitution of India under Article 368, are applicable to the State of Jammu and Kashmir only after their operation is extended to the Jammu and Kashmir State, by an enabling order of the President of India in accordance with the provisions of the Constitution (Application to Jammu and Kashmir) Order, 1954.²⁶ No such order, has so far been issued by the President of India and the application of the Forty-fourth Amendment to the Constitution of India, has not been extended to the State. Consequently, the right to property, embodied by the Constitution of

India, before it was deleted by the Forty-fourth Amendment, is still available in the State in the form it was made applicable to the State by the Constitution (application to Jammu and Kashmir) Order, 1954, and the subsequent Presidential Orders.²⁷ As a matter of fact, like other fundamental rights, envisaged by the Constitution of India, the right to property, was also extended to the Jammu and Kashmir State, with a number of reservations and exceptions. First, the provisions of clauses (3), (4) and (6) of the Article 31, were not made applicable to the State. Clause 3 of the Article 31 imposed a limitation on the State legislature and no law enacted by any State Legislature with regard to acquisition of property for public purposes and the determination of compensation for such acquisition, could take effect unless the law was not reserved for the consideration of the President and did not receive his assent. Clause (4) of Article 31, provided that Bills pending in the Legislature of a State at the time of the commencement of the Constitution of India, with regard to the acquisition of property and the determination of compensation were required to be reserved for the consideration of the President of India and also his assent. Clause (6) of Article 31 laid down that any law with regard to acquisition of property and determination of compensation enacted not more than eighteen months before the commencement of the Constitution of India, were to be reserved for the consideration and assent of the President.

The legislature of the Jammu and Kashmir State was obviously exempted from submitting any laws it enacted with regard to the acquisition of property and the determination of compensations or any Bills pending consideration at the time of the commencement of the Constitution or any laws enacted in the Jammu and Kashmir State to the President of India for his consideration and assent.

Secondly, Clause (5) of Article 31, was omitted in its application to the Jammu and Kashmir State and replaced by a new clause. In accordance with the substituted clause (5):

- (i) provisions of any existing law with regard to acquisition of property for public purposes and payment of compensation, could not be effected by Clause (2) of Article 31, which provided for the acquisition of property for public purposes and the payment of compensation for property acquired for public purposes;
- (ii) provisions of any law which the State of Jammu and Kashmir made after the promulgation of the Constitution (application to Jammu and Kashmir) Order, 1954, with regard to the

imposition or levy of any tax or penalty, promotion of public health and prevention of danger of life and property and evacuee property could not be prejudiced by Clause (2) of Article 31.²⁸

Article 31-A was added to the Constitution of India by the (First Amendment) Act, 1955, and was also made applicable to the Jammu and Kashmir State with a number of reservations. The State Legislature was reserved the power to undertake legislation providing for,²⁹

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

While the legislatures in other Indian States were required to reserve all Bills pertaining to such matters for the consideration and the assent of the President, no such limitation is placed on the powers of the Legislature of the Jammu and Kashmir State. The State Legislature is also vested with wide authority to undertake legislation to implement Directive Principles of State Policy envisaged by the Constitution of Jammu and Kashmir. No such legislation is required to be reserved for the consideration of the President.

Modifications are made in the application of the provisions of Article 31-A to the State according to which estates are redefined to include land which is occupied or has been let for agricultural purposes or for purposes subservient to agriculture or for pastures, and

- (i) building pastures on such land;
- (ii) trees standing on such land;
- (iii) forest land;
- (iv) wooded waste land;
- (v) cultivation fields floating;
- (vi) areas of Jandars and Garats;
- (vii) Jagirs, Inams, Maufis, Mukararis, and other grants, excluding building sites near towns or villages and land reserved for municipalities, notified areas or town-planning.³⁰

The Constitution of India provides for constitutional remedies for the enforcement of fundamental rights. The provisions of the Constitution of India are applicable to the Jammu and Kashmir State with two modifications. First, in regard to the Jammu and Kashmir State the Parliament of India cannot empower any other court to issue writs and orders in Jammu and Kashmir, for the enforcement of fundamental rights. Further, a special clause, sub-clause (2-A), is added to Clause 2 of Article 32 and the High Court of Jammu and Kashmir is vested with the power 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 fundamental rights.³¹

Secondly, in its application to Jammu and Kashmir, a new Article numbered 35-A, is added to Part III of the Indian Constitution by the Constitution (application to Jammu and Kashmir) Order, 1954. Article 35-A stipulates:

Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of the State,

- (a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or
- (b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects:
 - (i) employment under the State Government;
 - (ii) acquisition of immovable property in the State;
 - (iii) settlement in the State; or
 - (iv) right to scholarships and such other forms of aid as State Government may provide;

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provisions of this Part.

Article 35-A in effect, saves all such laws which are in force in the State and which define the Permanent Residents of the State and confer on them special rights and privileges in regard to the employment under State Government, acquisition of immovable property in the State, settlement in the State, and the grant of scholarship

and such other forms of aid as the State Government provides, from being declared void on the ground that such laws take away or abridge the Fundamental Rights conferred on the citizens of India. Article 35-A further reserves the right to the State Legislature to enact any law to define the Permanent Residents and confer upon them special rights and privileges with regard to matters of employment, acquisition of immovable property and settlement in the State and the grant of scholarships and other aids the State Government provides. Laws made by the State Legislature in pursuance of Article 35-A are not deemed to be void on the ground that they violate or abridge the Fundamental Rights.

Article 35-A seeks to protect the State Subject Rules and also to vest the power in the State Legislature to exclude citizens of India who are not the Permanent Residents of the State, from the special rights which Permanent Residents are granted under the State Subject Rules. The citizens of India, who are not the Permanent Residents of the State, cannot claim the rights which the laws in force in the State, confer on the Permanent Residents or the laws enacted by the State Legislature confer on them.

Evidently Article 35-A, of the Constitution of India, encroaches provisions, which are severely pernicious and vest in the State legislature wide powers to:

- (i) Confer upon the Permanent Residents of the State special rights and privileges in terms of employment under the State Government, acquisition of immovable property in the State, settlement in the State and the scholarships and other forms of aid provided by the State Government, to the exclusion of the citizens of India, who reside in the State but are not defined as the Permanent Residents of the State;
- (ii) exclude Permanent Residents of the State or sections of the Permanent Residents of the State from the definition of the Permanent Residents, and to deprive them of the special rights and privileges, the Permanent Residents of the State enjoy;
- (iii) include, Indian citizens or section of Indian citizens within the definition of the Permanent Residents of the State to the exclusion of the other Indian citizens.

The limitations imposed by Article 35-A on the availability of the fundamental rights in the State are further enhanced by the

Constitution of Jammu and Kashmir which vests with the State legislature powers to:

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

It is a grievous constitutional error to vest in the State Legislature powers which it can use to circumvent the fundamental rights guaranteed by the Constitution of India. Section 35-A allows the State Legislature to define the class of Permanent Residents and provide the Permanent Residents special rights and privileges to the exclusion of the other people of the State who are not the Permanent Residents of the State. There is a wide scope for the State Legislature to enact any discriminatory legislation, and to deprive any section of the people of the State from the special rights and privileges which they are entitled to as the Permanent Residents. The State Legislature is empowered to include any person, even if he were not a citizen of India, within the definition of the Permanent Residents and exclude citizens of India as well as the Permanent Residents of the State from any such definition. There is an inherent conflict between the rights conferred on the people of the State and the provisions of the Constitution of the State which resort to classifications on grounds of community, region, religion and class, and the successive State Governments have actually used such powers to channelise patronage into lines preferred by them.

The authority vested in the State Legislature to define the classes of people, which are entitled to special rights and privileges, violates the spirit of the Constitution of India, which vests no authority with the Government of India or the governments in the Indian States, to determine the scope of the fundamental rights guaranteed by the Constitution of India. Rights are fundamental only in case they are placed out of the reach of the government and that is accomplished by Article 13 of the Constitution of India. So long as this Article is applicable to the Jammu and Kashmir State, universal limitations are imposed on any authority within the State including the State Legislature to enact discriminatory legislation in accordance with the provisions of Article 35-A of the Constitution of India or the provisions of the Constitution of the State.

Article 35-A is an extra provision which was added to Part III

of the Constitution of India by an executive order—the Constitution (application to Jammu and Kashmir) Order, 1954 and is confined to the application of Part III of the Constitution of India to the Jammu and Kashmir State. It deserves to be noted that the Constitution (application to Jammu and Kashmir) Order, 1954, is not an amendment within the scope of Article 368 of the Constitution of India, and cannot escape the implications of Article 13 of the Constitution of India. Any special limitation imposed by the President of India by virtue of Article 370 cannot supersede the powers vested in the Courts by Article 13 of the Constitution of India, to review laws and executive orders passed and promulgated by any public authority in India.³²

Directive Principles of State Policy

The Constituent Assembly of the State set out to finalise the basic principles of the Constitution of the State in October 1953. The Basic Principles Committee of the Constituent Assembly and the Advisory Committee on Fundamental Rights and Citizenship presented their reports to the Constituent Assembly in February 1954. The Advisory Committee on Citizenship and Fundamental Rights took a broader view of the fundamental rights and included in its report recommendations with regard to the Directive Principles of State Policy as well. The Basic Principles Committee which laid down the principles for the Constitution of the State Government, did not make any recommendations with regard to the Directive Principles of State Policy. The Advisory Committee on Citizenship and Fundamental Rights, classified the Directive Principles of State Policy within the broad framework of the fundamental rights. However, the Committee drew a distinction between the two sets of rights: the fundamental Rights, which envisaged safeguards against prejudicial action and were, therefore, required to be enforced by the Courts and the Directive Principles of State Policy which required positive action by the State and could not be enforced by the Courts. The Committee observed:

An examination of the Fundamental Rights embodied in the Constitutions of some of the more important countries of the world would reveal that while there are certain rights which require positive action by the State and which can be granted only so far as such action is practicable, there are others which require that the State shall abstain from prejudicial action. It is obvious that the rights of the first type are not normally either capable of or suitable for enforcement by legal action,

while those of the second type may be so enforced. Both classes of rights are mentioned together under the head "Fundamental Rights" in certain Constitutions but in certain others distinction between the two forms of rights is clearly recognised. A similar distinction is recognised in Dr. Lanterpacht's "International Bill of Rights of Man, 1945." The Committee having carefully considered that matter, is of the view that it would be useful to separate the two classes of rights, firstly, those rights which shall be enforceable in a court of law and secondly, those which shall be guaranteed by enjoining upon the State to take specified and planned action in the field of social and economic reconstruction of the State. This set of rights shall retain fundamental position in the governance of the State.³⁴

The Committee recommended that in order to provide the people of the State with equal opportunities and adequate minimum of citizenship, it was necessary to provide for a "separate set of principles which would be fundamental in the governance of the State and shall be intended for the guidance of the State." The Committee observed:

The Committee recognises that in a democratic state every person must be provided with equal opportunities and adequate minimum of civilised standard of life. To realise that ideal, however, the State must take resort to economic planning with a view to achieve all sided advance on a country-wide scale.³⁵

The recommendations of the Committee envisaged the Principles of State Policy which sought to secure the people of the State, right to work with payment in accordance with its quantity and quality, subject to a basic minimum wage, better conditions of work, decent standard of life, full employment, leisure and cultural opportunities, material security in old age, sickness and disability, and maternity relief. The recommendations of the Committee embodied guidelines for the State to secure for the people adequate means of livelihood and ensure that the ownership and control of the material resources of the community were utilised for common good and were not allowed to "result in the concentration of the ownership and control of essential commodities of few individuals to the common detriment." The recommendations of the Committee also envisaged the principles which sought to secure strength and health of workers both men and women, protection for children against moral and material

abandonment, free and compulsory primary education for all children and special care for the socially and educationally backward sections of the people. The Committee also laid guidelines for the development of the State language, and the regional languages, especially the backward languages, and the establishment of a State Language Academy to evolve the scripts of such languages, enrich them by translations, study of their history and raise scholarship for their study.³⁶

The Directive Principles of State Policy were finally included in Part IV of the Constitution of Jammu and Kashmir State. The Principles envisage four major policy formulations. The formulations pertain to:³⁷

- (i) Economic reorganisation of the State;
- (ii) Work, wages, social security and social insurance;
- (iii) Protection of children, women and socially backward classes; and
- (iv) Education.

Section 13 of the Constitution of Jammu and Kashmir stipulates that the prime objective of the State shall be to reorganise the social, economic and political institutions of the State according to the "objectives of the freedom movement envisaged in "New Kashmir."³⁸ Within the broad scope of objectives envisaged by 'New Kashmir', the State is charged by the Constitution to promote the welfare of the people by "establishing and preserving a socialist order of society" in which all forms of exploitation of man are abolished and social, economic and political justice inform the institutions of national life. The founding fathers of the Constitution have added a specifically defined operative dimension to the Directive Principles of State Policy. Not content with the construction of the Constitutional framework for the government of the State and the location of national objectives, the founding fathers have laid down guidelines for the operational process to realise the welfare of the people. The Constitution underlines the construction of a "socialist order of society" in the State. The Directive Principles of State Policy envisaged by the Constitution of India are not qualified by any such drastic operative stipulations. The Constitution of India stipulates that the State will endeavour to establish a "social order" which would ensure the welfare of the people, a stipulation which covers general pattern of economic and social reorganisation.³⁹ Ambedkar stated in the Constituent Assembly of India:

There are various ways in which people believe that economic democracy can be brought about: there are those who believe in individualism as the best form of economic democracy; there are those who believe in having a socialist state as the best form of economic democracy; there are those who believe in the communistic idea as the most perfect form of economic democracy.

Now, having regard to the fact that there are various ways by which economic democracy may be brought about, we have deliberately introduced in the language that we have used, in the directive principles, something which is not fixed or rigid. We have left enough room for people of different ways of thinking, with regard to the reaching of the ideal of economic democracy, to strive in their own way, to persuade the electorate that it is the best way of reaching economic democracy, the fullest opportunity to act in the way in which they want to act.⁴⁰

The founding fathers of the Constitution of Jammu and Kashmir, followed a different direction and laid down clearly defined categories of positive essential direction for the economic reorganisation of the State. The founding fathers did not only express their preferences for a specific social order in which man was not exploited, they laid down formal directives for the establishment of the economic organisation they sought to establish in the State.⁴¹ They stipulated in Section 14 of the Constitution:

Consistently with the objectives outlined in the foregoing section, 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:

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

The import of the stipulations, embodied in Section 14, is revolutionary. The Constitution directs the State to plan the development of the productive forces of the State. Planning of productive processes, forms the fulcrum of the entire policy design as envisaged in the Directive Principles of State Policy. Since the function of the governing principles of the State is to establish a socialist order of society, planning of productive processes is cast in the specific context of planning the development of all economic forces to establish a socialist society. The Constitution is direct and specific in its instruction and does not provide for the growth and development of an economic organisation in which the national resources are immune from social control. Planned development of productive process underlines social control of all productive forces. The principle is enounced in operational terms in the instructions to foster and protect three sectors of productive processes: the public sector in which the means of production are owned by the State, the cooperative sector in which the means of production are socially owned and the private sector in which the means of production are owned by individuals and corporates. The framers of the Constitution, therefore, voted for the reorganisation of the property relations in general and the consequent restructuring of the productive process. They imposed a heavy embargo on the private sector by laying down that operation of the private sector should at no time be allowed to lead to the concentration of wealth or of the means of production. The intention of the framers of the Constitution is clear and evidently they considered the containment of private ownership of wealth or means of production as an objective necessity for the construction of socialist order of society in the State. The words "or of the means of production" included in Clause (C) of Section 14, are significant in their meaning. The framers of the Constitution were not content with the adjustment in the operation of the private sector at the income level, for if their intentions were such, the words "concentration of wealth" would have been sufficient to convey their outlook. The framers of the Constitution sought to subject to social control, all means of production, whether privately or publicly owned and contain the operation of the privately owned productive processes in case such processes led to common detriment.

The Directive Principles of the State Policy underline an overall structural reorganisation as well as functional reorientation of the entire economic organisation of the State. The framers of the Constitution, in unequivocal terms, opt for drastic regulation of all

property relationships, and vest the authority to accomplish that in the State.

The Directive Principles of State Policy further instruct the State to organise and develop agriculture and animal husbandry by "bringing to the aid of the cultivator the benefits of modern and scientific research and techniques."⁴² This is aimed to achieve a speedy improvement in the standards of living of the rural masses and accelerate the pace of their prosperity. Instructions are also given to the State to rehabilitate, guide and promote "the renowned crafts and cottage industries of the State", initiate and execute well considered programmes modernising techniques and modes of production, including the employment of cheap power so that unnecessary drudgery and toil of the workers is eliminated and the artistic value of the products enhanced. The State is also instructed to provide for the encouragement of individual talent and initiative.⁴³

The second set of instructions, which the Directive Principles of State Policy envisage, deals with the right to work, minimum wages, conditions of work and social security. The State is to strive:

- (i) to secure for the people, men and women, equally, the right to work, "that is the right to receive guaranteed 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 for all workers, industrial and agricultural, just and humane conditions of work with leisure and other social and cultural opportunities;
- (iii) to secure for working men and women and children their health and ensure that the women and children are not forced by economic necessity to enter vocations unsuited to their sex, age or strength;
- (iv) to secure for the people of the State adequate maintenance, employment and in exigencies of underserved want by providing social insurance, medical aid, hospitals, sanatoria and health resorts at the State expenses;
- (v) to safeguard and promote the health of the people by improving public hygiene and by prevention of disease through sanitation, pest and vermin control, propaganda and other measures and by ensuring widespread, efficient and free medical services throughout the State with particular emphasis on remote and backward areas.⁴⁴

The State is also instructed to guarantee to the socially and educationally backward sections of society, special care in the promotion of their educational, material and cultural interests and protection against social injustice.⁴⁵

The third set of instructions, the Directive Principles of State Policy envisage, enjoins upon the State to:

- (i) secure for every Permanent Resident of the State right to free education upto the University standard;⁴⁶
- (ii) provide within a period of ten years from the commencement of this Constitution, compulsory education for all children upto the age of fourteen years;⁴⁷
- (iii) ensure to all workers and employees adequate facilities for adult education and part-time technical, professional and vocational courses;⁴⁸
- (iv) secure for all children the right to happy childhood with adequate medical care;⁴⁹ and
- (v) secure for all children and youth, equal opportunities in education and employment and protection against exploitation, moral and material abandonment.⁵⁰

The Directive Principles of State Policy envisage special instructions for the welfare and security of women. Section 22 of the Constitution enjoins upon the State to secure for all women.⁵¹

- (i) the right to equal pay for equal work;
- (ii) the right to maternity benefits as well as adequate medical care in all employments;
- (iii) the right to reasonable maintenance, extending to married women who are divorced or abandoned;
- (iv) the right to full equality in all social, educational, political and legal matters; and
- (v) special protection against discourtesy, defamation, hooliganism and other forms of misconduct.

An important aspect of the Directive Principles of State Policy is that they envisage instructions, which seek to separate the judiciary from the executive and secure a judicial system which is humane, cheap, objective and impartial and which ensures that justice shall be done and shall be seen to be done.⁵² The State is further directed to strive to ensure the efficiency, impartiality and incorruptibility of the various organs and instruments of justice, administration and public

utility services. The State is also instructed to take steps to organise village Panchayats and endow them with such powers and authority as are necessary to enable them to function as units of self-government.⁵³

The Directive Principles of State Policy impose on the State a positive responsibility to "combat ignorance, superstition, fanaticism, communalism, racialism and cultural backwardness."⁵⁴ The State is further charged to foster and promote "brotherhood and equality among all communities under the aegis of a secular state".

The Directive Principles of State Policy, envisaged by the Constitution of the State underline certain broad assumptions. These are:

- (i) Instructions laid down in the Directive Principles of State Policy are fundamental in the governance of the State;
- (ii) The Directive Principles of State Policy are a sacrosanct part of the Constitution of the State; and
- (iii) The imperatives laid down in the Directive Principles of the State Policy are not justiciable.⁵⁵

Long before the Constitution of Jammu and Kashmir was drawn up the Directive Principles of State Policy were incorporated in it, the issues were cleared by the Courts in the rest of the country that the laws made in furtherance of the Directive Principles of State Policy enshrined in the Constitution of India, could be held void if they impinged upon the provisions of the Constitution of India enumerating the fundamental rights. Obviously, when the Directive Principles of State Policy were formulated by the founding fathers of the Constitution of Jammu and Kashmir they entertained little doubt about the fact that the Directive Principles of State Policy, howsoever, radically progressive they had been rendered, were ultimately subsidiary to the provisions of the Constitution of India, applicable to the State and enforceable by the Courts. By that time it was recognised:

- (i) that instructions enshrined in the Directive Principles of State Policy formed a vital link in the constitutional structure of India and therefore, a balance of substantive content required to be established between the action taken in furtherance of the Directive Principles of State Policy and the limitations envisaged by the Constitution of India;⁵⁶ and
- (ii) that the instructions embodied in the Directive Principles of State Policy, were subservient to the provisions of the

Constitution of India, enumerating the fundamental rights and laws giving effect to Directive Principles of State Policy could be declared void if such laws infringed on the fundamental rights.⁵⁷

The Twenty-Fifth Amendment to the Constitution of India gave a new direction to the evolution of the constitutional provisions with regard to the Directive Principles of State Policy. The amendment provided:

- (i) that no law giving effect to their instructions embodied to implement Directive Principles of State Policy envisaged by Clause (b) and Clause (c) of Article 39, could be questioned in any court even if such laws took away or abridged the fundamental rights embodied in Article 14, Article 19 and Article 31 of the Constitution of India; and
- (ii) no law containing a declaration that it was aimed to give effect to the Directive Principles of State Policy would be called in question in any court on the ground that it did not give effect to such policy. Clause (b) and (c) of Article 39 laid down that the material sources of the community would be so distributed as to subserve the common good and the economic organisation of the society would not be allowed to operate to result in concentration of wealth and means of production. The Twenty-fifth Constitutional Amendment was made applicable to Jammu and Kashmir by the Constitution (Application to Jammu and Kashmir) Order, 1975.

The Forty-second Amendment to the Constitution of India finally removed the main limitations which were imposed on the Directive Principles of State Policy by the Constitution of India. The amendment provided that the laws which gave effect to the Directive Principles of State Policy could not be declared void on the ground that such laws took away or abridged the fundamental rights embodied by Article 14, Article 19 and Article 31 of the Constitution of India. The Forty-second Amendment was made applicable to the Jammu and Kashmir State by the Constitution (Application to Jammu and Kashmir) order, 1975. No subsequent constitutional amendment was made applicable to Jammu and Kashmir and the constitutional provisions with regard to Directive Principles of State Policy remained in force in the State, till Article 31(c) was struck down by the Supreme Court.⁵⁸

Parliamentary Government

In its broad structure, the government of the State is based on the model of parliamentary government. The State Government is headed by the Governor of the State who is appointed by the President of India. The Constitution of Jammu and Kashmir vests all executive authority in the hands of the Governor, who is charged to exercise his powers himself or through his officers in his name. The executive powers of the Governor extend to all such matters which are not transferred to the Union Government and which are reserved for the State under the provisions of Article 370 of the Constitution of India.⁵⁹ Functioning as a vital link in the processes of the parliamentary government, the Governor is also authorised by the Constitution of Jammu and Kashmir, to exercise important legislative and financial powers.⁶⁰ The Governor summons, prorogues and dissolves the Legislative Assembly of the State, addresses two Houses of the State legislature and sends messages to them for their consideration. The Bills passed by the legislature are submitted to him for his assent and he exercises the power to give his assent to the Bill, returns it to the Legislature for reconsideration or withholds his assent till the Bill is again passed by the legislature. The Governor also exercises the power to promulgate ordinances when the State Legislature is not in session and all such ordinances have the force of law. The Governor causes to be laid before the State Legislature the Annual Financial Statement showing the annual estimates of the receipts of revenue and expenditures. No demand for grants can be made except on his recommendations.

None of the powers vested in the hands of the Governor are exercised by him. The Constitution stipulates that the Governor shall appoint a Council of Ministers headed by the Chief Minister to aid and advise him in the exercise of his powers.⁶¹ The Council of Ministers is collectively responsible to the State legislature. The Council is appointed by the Governor from among members of the State Legislature and remains in office till it enjoys the confidence of the majority of the members of the Legislature. In practice the ministry is installed in office by the party which has a majority in the State legislature and remains in office so long as the majority party supports its policies. The Governor confirms the process.

The Constitution of Jammu and Kashmir places an express limitation on the Governor of the State and stipulates that "all the functions of the Governor except those under Sections 36, 38 and 92 shall be exercised by him only on the advice of the Council of Ministers."⁶² Section 36 and Section 38, pertain to the appointment

of the appointment of the Chief Minister and the other members of the Council of Ministers and Section 93, lays down provisions in regard to the constitutional breakdown in the State. Obviously, the discretion to select and appoint the Chief Minister and the other Ministers of the Council has little significance in a parliamentary structure based on party leadership. The Governor is bound to appoint the nominee of the majority party in the State Legislature as Chief Minister and the other members of the Council of Ministers on the advice of the Chief Minister. The Constitution of India vests a measure of discretionary authority in the Governors of the Indian States, who enjoy the technical authority to determine whether ministerial advice given is acceptable to them. "It should also be kept in mind that acting on the advice of the Council of Ministers does not necessarily mean immediate acceptance of the first thoughts. The Governor can convey his objections to any proposed course of action and ask the Council of Ministers if he thinks it necessary, to reconsider the whole issue. It is in the last resort that he must accept its advice. This is so because he represents the majority of the State at the apex, though symbolically, and has no rapport with the electorate and political parties."⁶³ The Governor of the Jammu and Kashmir State is denied any such power or prestige and he has no authority to determine whether ministerial advice given is acceptable to him. The limitation on the powers of the Governor is absolute and establishes the precedence of the Council of Ministers in the Government of the State. Over the years, however, the precedence ensured for the Council of Ministers has actually been assumed by the Chief Minister of the State.

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3

THE STATE GOVERNMENT

The Constitution of Jammu and Kashmir envisages a parliamentary form of government. The Constitution, before it was amended in 1965, provided for an executive which was constituted of a Sadar-i-Riyasat, who acted and exercised his powers on the aid and advice of a Council of Ministers. The Ministers were appointed by the Sadar-i-Riyasat from among the members of the State Legislature, who formed the majority of the members of the Legislative Assembly. The Council of Ministers was headed by a Prime Minister and the Prime Minister and the other Ministers were individually as well as collectively responsible to the State Legislature.¹

The Constitution of Jammu and Kashmir provided for a special procedure by virtue of which the Sadar-i-Riyasat assumed his office. The Sadar-i-Riyasat was first elected by the Legislative Assembly and then recognised by the President of India as the Sadar-i-Riyasat of the State. The Constitution laid down a number of qualifications for the person who could seek election to the office of the Sadar-i-Riyasat. No person could be nominated for the election of the Sadar-i-Riyasat unless such person was a Permanent Resident of the State; was more than twenty-five years of age and was qualified to be elected to the Legislative Assembly of the State. The Sadar-i-Riyasat could not be a member of either House of the Legislature, and if a member of either House of the Legislature was elected and recognised the Sadar-i-Riyasat, he was deemed to have vacated his seat in the Legislature from the date he entered upon his office as the Sadar-i-Riyasat. The Sadar-i-Riyasat was precluded from holding any office of profit under the State.

The Sadar-i-Riyasat held his office during the pleasure of the President and subject to that stipulation, he was to hold office for a term of five years. Notwithstanding the expiry of his term, the Sadar-i-Riyasat continued to hold office until his successor entered upon his office. A person, who held the office of the Sadar-i-Riyasat

was eligible to be re-elected to that office. Before entering upon his office, the Sadar-i-Riyasat, or the person acting as the Sadar-i-Riyasat, was required to subscribe an oath in the presence of the Chief Justice or, in his absence, of a Judge of the High Court of the State, affirming that he would "preserve, protect and defend the Constitution and the law" and would devote himself to "the service and well-being of the people of the State."

The Constitution laid down the procedure for the election of the Sadar-i-Riyasat by the Legislative Assembly.² The Sadar-i-Riyasat was elected by secret ballot and a single transferable vote. Nominations for the election of the Sadar-i-Riyasat were filed in the prescribed form. In case only one nomination was filed for the election, the person who filed the nomination was declared duly elected after the nomination was found in order and accepted. In case there were two candidates, the candidate who obtained higher number of votes, was declared elected. In case the two candidates obtained equal votes, the Speaker was reserved the right to exercise his casting vote. Where more than two candidates were nominated for the election, and no candidate secured more than half the votes cast, the candidate who obtained the smallest number of votes was excluded from the election. The balloting, then proceeded, the candidate obtaining the smallest number of votes being excluded from the election, until one of the candidates obtained more than half the number of the votes polled. In case three or more candidates obtained equal number of votes and one of them was required to be excluded, the Speaker was reserved the right to exercise his casting vote to effect the exclusion of one among the candidates. After a person was declared as having been elected by the Legislative Assembly, the Prime Minister of the State was authorised to communicate the name of the person elected the Sadar-i-Riyasat of the State to the President of India, for being recognised by him.

The Sadar-i-Riyasat received a salary of 5,500 rupees per month, besides other emoluments and allowances. The salary and the emoluments of the Sadar-i-Riyasat were charged on the Consolidated Fund of the State and were not subject to the vote of the Assembly.

The executive power of the State was vested in the Sadar-i-Riyasat. The executive power of the State extended to all matters which were not transferred to the Union and were reserved in residuum for the State. The Sadar-i-Riyasat exercised his powers through his officers who acted in his name. He was vested with the power to appoint the Prime Minister of the State and on his advice, the other members of the Council of Ministers, the Advocate General, and

the Chairman and the members of the Public Service Commission. The Sadar-i-Riyasat was empowered to allocate business among the ministers and also make rules for the convenient transaction of business of the Government.

The Sadar-i-Riyasat was vested with wide legislative powers. He was an integral part of the State Legislature and was empowered to summon, prorogue and dissolve the Legislative Assembly. He was also reserved the power to address the two houses of the State Legislature and send messages to them. He was also empowered to nominate eight members to the Legislative Council from among the economically and socially backward sections of the State, and from among the people who possessed special knowledge and practical experience in art, literature, science, social service and cooperative movement. He had the power to nominate two women to the Legislative Assembly, if he was of the opinion that women in the State were not adequately represented in the Assembly. All Bills passed by the State Legislature were required to be presented to the Sadar-i-Riyasat for his assent. No Bill was deemed to have become an Act without the assent of the Sadar-i-Riyasat. The Sadar-i-Riyasat was vested with the power to promulgate Ordinances during the recess of the State Legislature. The Ordinances promulgated by the Sadar-i-Riyasat had the effect as that of the Acts of the legislature.

The Sadar-i-Riyasat caused the State budget to be laid before the Legislative Assembly. No demands for grants were to be made except on his recommendation. The statements for supplementary grants and additional expenditure were also caused to be laid before the Legislature by him.

The Sadar-i-Riyasat was vested with the power to grant pardon and reprieve and suspend, remit and commute sentences awarded to persons convicted of offences against any law relating to matters on which the executive power of the State extended.

The Constitution provided for the institution of a Council of Ministers, headed by the Prime Minister, and charged with the function to aid and advise the Sadar-i-Riyasat in the exercise of his powers. An absolute limitation was imposed on the Sadar-i-Riyasat and he was bound to exercise all his powers on the advice of the Council of Ministers except the functions regarding the appointment of the Prime Minister, the Council of Ministers and declaration of the Constitutional breakdown in the State. The Council of Ministers constituted an independent political instrument which was installed in office, by the party which commanded a majority in the legislature

and remained in office so far as the majority continued to support it.

The Sadar-i-Riyasat was vested with power to declare a state of Constitutional Breakdown if he was convinced that the government in the State could not be conducted in accordance with the Constitution. The Sadar-i-Riyasat was empowered to suspend the operation of the provisions of the Constitution, wholly or in part, and assume to himself the power of the government and make such incidental and consequential provisions as appear to the Sadar-i-Riyasat to be necessary or desirable for giving effect to the object of the Proclamation. The Proclamation of Constitutional Breakdown was, however, to be made with the concurrence of the President of India. The Proclamation of the Constitutional Breakdown was to remain in force for six months after it was issued. The Proclamation could not be extended by the Sadar-i-Riyasat, but no limitation was placed on him to reimpose a Proclamation of Constitutional Breakdown after it had caused to be operative. Every Proclamation of the Constitutional Breakdown was required to be laid down before each House of the State Legislature as soon as the House was convened. Where the Sadar-i-Riyasat assumed to himself the powers of legislation, any law made by him remained in force for two years after the Proclamation ceased to operate.

The Sixth Amendment of the Constitution of Jammu and Kashmir, enacted in 1965, abrogated the provisions of the Constitution pertaining to the Sadar-i-Riyasat. The office of the Sadar-i-Riyasat was abolished and fresh provisions were incorporated in the Constitution which provided that the State Government would be headed by a Governor, who was appointed by the President of India and held his office during the latter's pleasure. Provisions were also made by the Sixth Amendment according to which the office of the Prime Minister of the State was abolished. The Sixth Amendment included provisions in the Constitution of Jammu and Kashmir which provided for a Council of Ministers headed by a Chief Minister, to aid and advice the Governor in the exercise of his powers.

Governor

The Governor of Jammu and Kashmir is appointed by the President of India by warrant under his hand and seal in accordance with Section 27 of the Constitution of Jammu and Kashmir. It is interesting to note that the power to appoint the Governor of the State is vested in the President of India by the Constitution of Jammu and Kashmir. In actual practice the decision for the appointment of

the Governor is made by the Prime Minister of India, usually in consultation with the Minister of Home Affairs of the Government of India. Practice has grown in the State, whereby the Union Government consults the Chief Minister of the State in the appointment of the Governor. Bhagwan Sahai was appointed the Governor of Jammu and Kashmir in 1967, after the Chief Minister of the State, Ghulam Mohammad Sadiq was consulted. Sahai was appointed after the National Conference had been merged into the Indian National Congress. So long the Congress remained in power in the State, the convention to consult the State Government in the appointment of the Governor was followed. Lakshmi Kant Jha, who succeeded Bhagwan Sahai was also appointed after the State Government was consulted. However, after stormy events in the State, which followed the defeat of the Congress in 1977, the practice of consulting the State Government in the appointment of the Governor, was abandoned. When Brij Krishen Nehru was appointed the Governor of the State in 1981, the reference made to the State Government was only formal. The leadership of the National Conference, watched the installation of Nehru with helpless indignation. Nehru's term was cut short and in April 1984, the Lieutenant Governor of Delhi, Jag Mohan was appointed the Governor of the State. Jag Mohan's appointment was made without consulting the State Government and Farooq Abdullah, the Chief Minister of the State was informed after the appointment of the Governor had been made. It is evident that, in the appointment of the Governor, the consultation of the State Government is neither obligatory nor binding on the Union Government. The consultation of the State Government is only a formal process in which the Union Government is not bound to seek the opinion of the State Government and if it is sought, only such weight is given to it that it deserves under the given circumstances.

Convention has grown by virtue of which, the Governor of the State is appointed from outside the State. The main object of the practice to appoint a Governor from outside the State appears to be to ensure the Governor a position of impartiality and independence.³ The Constitution of Jammu and Kashmir before it was amended in 1965, laid down explicit provisions according to which the Sadar-i-Riyasat could only be elected from among the Permanent Residents of the State. The provisions of the Constitution regarding the Sadar-i-Riyasat were, however, repealed in 1965. The Sixth Amendment incorporated provisions in the Constitution which provided for the continuation of Maharaja Karan Singh as the Governor of the State until the remaining period of his term for which he was elected as

the Sadar-i-Riyasat of the State, expired. Karan Singh completed his term in 1967, and the Governors who were appointed in succession to him, were appointed from outside the State.

Subject to the pleasure of the President of India, the Governor holds his office for a term of five years from the date he enters upon his office. The Governor continues to hold office until his successor enters upon his office. The Governor can resign his office by writing under his hand addressed to the President.

The Governor receives a salary of 5,500 rupees per mensem, with other allowances which are specified in the Second Schedule of the Constitution of Jammu and Kashmir. The Governor receives a sumptuary allowance of 50,000 rupees, an allowance of 1,35,000 rupees for his staff and household, tour expenses of 30,000 rupees and a miscellaneous fund of 20,000 rupees per annum. In addition, the Governor also receives substantial allowances for the supply of water and electricity for his use and the maintenance of his vehicles, buildings and gardens. The emoluments of the Governor cannot be diminished during the term of his office.

Article 361 of the Constitution of India is applicable to Jammu and Kashmir and the Governor of the State enjoys the immunities and privileges the other State Governors in India enjoy. The Governor is not answerable to any court of law for the exercise and performance of his powers and duties of his office. Courts cannot compel the Governor to exercise any power or perform any duty, nor can a court compel him to forebear from exercising his powers or performance of his duties. He is not amenable to the mandate or writs or directions issued by any court. The courts are barred to interfere in respect of official acts or omissions of the Governor. Protection is extended in respect of acts or omissions which are considered to be incidental to the exercise of his power.

Section 29 of the Constitution of Jammu and Kashmir lays down that no person is eligible to be appointed the Governor of the State, if he is not a citizen of India and has not completed thirty years of age. Further a Governor cannot be a member of the State Legislature. If a member of the Legislature is appointed the Governor, he is deemed to have vacated his seat in the Legislature from the date he enters upon his office.

Before entering upon his office the Governor is required to subscribe an oath in the presence of the Chief Justice or, in his absence, of a Judge of the High Court of the State. The Governor is required to swear in the name of God or solemnly affirm that he will faithfully execute the office of the Governor or discharge the

functions of the Governor of Jammu and Kashmir and will, to the best of his ability, "preserve, protect and defend the Constitution and the law", and that he will devote himself to "the service and well-being of the people of the State."

The Governor constitutes the State Government. The executive power of the State is vested with the Governor and is exercised by him directly or through his officers.⁴ The executive powers of the State extend to the matters which are not placed within the competence of the Union Government and are reserved for the State Government under Article 370 and the Constitution (Application to Jammu and Kashmir) Order of 1954. All executive action of the State Government is taken in the name of the Governor. However, every executive decision may not formally be expressed, and orders and instruments made and executed in the name of the Governor. The validity of an order or an instrument which is authenticated by the rules made by the Governor cannot be called into question on the ground that it is not made or executed by the Governor. The Governor appoints the Chief Minister of the State. He appoints the other Ministers on the advice of the Chief Minister. The Chief Minister and the other ministers hold office during his pleasure. The Governor makes rules for the transaction of the business of the State Government and for the allocation of the business of the Government among the ministers. He also appoints the Advocate-General of the State and the Chairman and the other members of the State Public Service Commission.

The Governor is also vested with varied and wide legislative powers. He is an integral part of the State legislature. He is empowered to summon and prorogue the two Houses of the State Legislature and dissolve the Legislative Assembly. He nominates two women to the Legislative Assembly if he finds that women of the State are not adequately represented in the House. He also nominates 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. He is entitled to address either House of the Legislature or the two Houses jointly. He is authorised to make enquiries with respect to a Bill pending consideration in either House of the Legislature. All Bills passed by the Legislature are presented to the Governor for his assent and no Bill becomes an Act without his assent.

The Governor causes to be laid before the Legislature the Annual

Financial Statement of the State showing the annual estimated receipts and expenditure. 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 supplementary grants and additional expenditure.

The Governor is empowered to grant pardon, reprieve and remissions of punishment 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 power of the State extends.

The Constitution of the State expressly provides for a parliamentary government and, though, the Governor is entrusted with powers which at the face value are extensive his powers are exercised by the Council of Ministers. The Council of Ministers aids and advises the Governor in the exercise of his powers. The Constitution of Jammu and Kashmir stipulates explicitly that the Governor shall exercise his powers on the aid and advice of the Council of Ministers except in the appointment of the Chief Minister, the other ministers of the Council of Ministers and the deputy ministers, and the promulgation of a state of Constitutional Breakdown on the State. The limitation on the Governor is therefore, absolute. The provision, envisaging the limitation, is original to the Constitution of Jammu and Kashmir and no such limitation is found in the Constitution of India. No obligations bind the Governors of the other Indian States to accept the advice tendered to them by their Councils of Ministers and except for the prescriptive of the parliamentary government, the Governors are not bound to accept the advice of the Councils of Ministers. The Constitution of India provides no remedy against the inability of the Governor to accept the advice of the Council. The question whether any and, if so, what advice is tendered by the Council to the Governor is not liable to be inquired into, by any court. Of course, the Governors do not use their powers in case they do not need to, but in certain crucial matters the Governors have the option to act on their own. "The Governor acts on the aid and advice of the Council of Ministers because the system of the government is based on the conventions that he will not flout the advice tendered to him by his Ministry and the constitutional propriety demands that he upholds the convention. But that is an extra constitutional implication, not a legal guarantee. Besides the technical position, the Governor enjoys, the Constitution of India bestows upon 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 figurehead less dignified than even a nominal constitutional entity."⁵

Section 44 of the Constitution requires the Chief Minister to communicate to the Governor the decisions of the Council of Ministers relating to the administration of the State and the proposals for legislation. The Governor is empowered to call for any information from the ministry pertaining to the State Government. The Governor is also reserved the right to return any decision taken by a minister to the Council of Ministers for its consideration, if he feels that the decision should receive such consideration. Obviously, these functions cannot be performed by the Governor on the advice of the ministers, because any such course defeats the very purpose for which the provisions of Section 44 are incorporated in the Constitution of Jammu and Kashmir. But that is precisely what the Governor is compelled to do. The constitutional limitation placed on the Governor, therefore, effects the most vital of the functions the Governor performs as the constitutional head of the parliamentary government in the State.

Besides the power to summon and prorogue the Legislative Assembly, which the Governor accomplishes on the aid and advice of the Council of Ministers, he also exercises the power to dissolve the Assembly. In the other Indian States, the practice has varied and the Governors have generally exercised their discretion in the exercise of their power to dissolve the Assembly. It is an established practice that the advice of the Chief Minister is accepted by the Governor, when the Chief Minister has a solid majority in the Assembly with the exception that if the Chief Minister advises the dissolution immediately before the beginning of the Budget session, the Chief Minister's advice is not accepted unless he submits his resignation. The dissolution is refused on the ground that the Ministry would stay in office till the elections are held, without getting the budget passed. Practice has also shown that the Governors do not generally accept the dissolution in eventualities where the Chief Minister has a shaky or doubtful majority in the Legislative Assembly, though

instances are there when the practice was not followed. No uniform practice is followed in case the Chief Minister loses the confidence of the Legislative Assembly. By and large the accepted principle is that ultimately it is the discretion of the Governor to accept or reject the advice of the Chief Minister in such a case. The position of the Governor in Jammu and Kashmir is, however, fundamentally different. The stipulation of the Constitution that the Governor will act on the aid and advice of the Council of Ministers, underlines the powers of the Governor to dissolve the Legislative Assembly. In 1977, after the Congress party, which had an absolute majority in the Legislative Assembly, withdrew its support from the ministry headed by Sheikh Mohammad Abdullah, the Chief Minister advised the Governor to dissolve the Assembly. The Congress staked its claim to form an alternative government on the plea that it had a majority in the House and Sheikh Mohammad Abdullah, who had been elected the leader of the party as a sequel to the Kashmir Accord of 1975, did not have the mandate of the people and therefore, could not use the prerogative to seek the dissolution of the Assembly. The Governor, Lakshmi Kant Jha dissolved the Assembly but declared a constitutional breakdown in the State under Section 92 of the Constitution of Jammu and Kashmir. In a way, it would have been a travesty of ministerial responsibility, if Sheikh Mohammad Abdullah, who had only one man, Mirza Afzal Beg with him in the entire House of Seventy-five members, would have been permitted to continue in office as the head of the care taker government. In June 1984, when twelve Assembly members of the National Conference repudiated the leadership of the Chief Minister, Dr. Farooq Abdul'ah, he advised the Governor, Jag Mohan, to dissolve the Legislative Assembly. Jag Mohan refused to accept the advice of the Chief Minister on the ground that Farooq Abdullah had lost the mandate of the majority in the Legislative Assembly. The Governor invited the leader of the break-away group of the National Conference, Gulam Mohammad Shah, to form a new government. Gulam Mohammad Shah was supported by the Assembly members of the Congress-1 besides an independent member.

The Governor is vested with the power to promulgate Ordinances during the recess of the Legislature if he is satisfied that the circumstances exist which necessitate interim legislation.⁶ The Ordinances promulgated by the Governor have the force and sanction of law made by the State Legislature. The Ordinances must be laid before the State legislature within six weeks of the reassembly of the two Houses of the Legislature. The Ordinances cease to operate in case

they are not presented to the two Houses of the Legislature within six weeks or are not approved by the State Legislature. Before an Ordinance is issued, the Governor has to satisfy himself that the circumstances warrant its promulgation. The Ordinance can be promulgated by the Governor only in respect of the matters which are reserved for the legislative competence of the Jammu and Kashmir State by virtue of Article 370 of the Constitution of India and the Constitution (Application to Jammu and Kashmir) Order, 1954. The power to promulgate Ordinances is exercised by the Governor on the aid and advice of the Council of Ministers. Under the Constitution of India, the satisfaction of the Governor is a subjective factor and the validity of such satisfaction is not liable to be questioned by a court of law.

The powers of the Governor to promulgate ordinances were radically modified by the Fifteenth Amendment to the Constitution of Jammu and Kashmir. Before the Fifteenth Amendment, the power to promulgate Ordinances was, in reality, vested with the Council of Ministers. The Governor's satisfaction within the meaning of Section 35(2) of the Constitution of Jammu and Kashmir, was, before the Fifteenth Amendment, construed to constitute the advice of the Council of Ministers tendered to the Governor in the exercise of his powers to promulgate Ordinances. The Fifteenth Amendment added a proviso to sub-section 2 of section 91, which stipulates:

Notwithstanding anything in this Constitution the satisfaction of the Governor mentioned in sub-section (1) shall be final and conclusive and shall not be questioned in a court of law.

The inclusion of explicit provisions in the Constitution of Jammu and Kashmir, which render the satisfaction of the Governor into a subjective act, raises problems of crucial issue. The Governor's power to promulgate Ordinances is subject to the principle that the Governor exercises his powers on the aid and advice of the Council of Ministers. The Fifteenth Amendment leaves a wide margin for the Governor to act in his own discretion and promulgate Ordinances.

The Governor exercises a number of discretionary powers, some of which are vested in the Governor by the Constitution. The other discretionary powers are, however, inherent in the Governor as the Head of the parliamentary government in the State. The Constitutional discretion is exercised by the Governor in:

- (i) the appointment of the Chief Minister;
- (ii) promulgation of constitutional breakdown;
- (iii) reporting a constitutional breakdown in the State and recommending the imposition of emergency due to constitutional breakdown in the State, under Article 356 of the Constitution of India.

The discretionary powers, which are inherent in the Governor as the chief of parliamentary government, are slightly wider than the constitutional discretion vested with him. The inherent discretion also known as the "situational discretion" arises out of the functions of the Governor, which the Governor cannot, but exercise in his discretion. The Governor exercises discretion to:

- (i) dismiss the ministry;
- (ii) encourage, advise and warn the ministry;
- (iii) seek information from the Chief Minister regarding legislative and administrative matters;
- (iv) refuse assent to the Bills passed by the Legislature or return Bills to the Legislature for its reconsideration;
- (v) give assent to the constitutional amendments.

The Council of Ministers holds office "during the pleasure of the Governor". In a parliamentary government the pleasure of the Governor coincides with the principle of responsibility. The Council of Ministers enjoys the pleasure of the Governor till it enjoys the confidence of the Legislative Assembly. The pleasure of the Governor ends when the Assembly withdraws its support from the government in power. There are, however, certain eventualities in which the Governor has the right to withdraw his pleasure and dismiss his ministry. The Governor can withdraw his pleasure if the ministry is defeated but does not resign. After the defeat of the ministry in the Punjab, on the Appropriation Bill in 1970, the Chief Minister Gurnam Singh, did not tender his resignation for a day. The next day the Governor asked him to submit his resignation which the Chief Minister did. The Governor of Jammu and Kashmir, Jag Mohan dismissed the National Conference Government headed by Dr. Farooq Abdullah because the latter did not resign till late in the day on 2 July, 1984, after twelve Assembly members of the National Conference had repudiated his leadership. In August 1984, the Governor of Andhra Pradesh dismissed the Ministry headed by N. T. Rama Rao, after the latter refused to resign from his office

following a split in the Telugu-Desam parliamentary party. Hardly a month after, the Governor asked the Chief Minister Bhaskar Rao, who had replaced N.T. Rama Rao, to submit his resignation because the former had failed to muster a majority to support him in the Legislative Assembly. The Governor can also dismiss the ministry on the refusal of the Chief Minister to face the Assembly. In November, 1967, P.C. Gosh, the Minister for Food Supplies along with seventeen of his supporters left the United Front Ministry of Ajoy Mukherji in Bengal. Gosh claimed a majority and informed the Governor, Dharam Vir that he enjoyed the support of the majority in the Assembly and would form the Government. Dharam Vir advised the Chief Minister Ajay Mukherji to summon the Assembly session and demonstrate the strength of the United Front Ministry on the floor of the Assembly. The Chief Minister informed the Governor that the Assembly would be convened on December 18, 1967. The Governor did not approve of the long gap the United Front wanted and repeatedly asked Ajoy Mukherji to convene the Assembly. The United Front ministry, however, declined to accept the Governor's advice. The Governor promptly dismissed the United Front ministry and invited P.C. Gosh to form a new government.

The Governor can also withdraw his pleasure in case the ministry sought to remain in office by corrupt or unfair means or when he is convinced that a ministry is acting in a way which is prejudicial to the interests of the State. In a parliamentary government where the government is drawn from the legislature and is responsible to it, the issue of whether the government represents the will of the people, may arise on occasions when vital political issues are involved in the politics of the State. The Governor has the prerogative to determine whether the ministry represents the "sense of the electorate". This is reinforced by the fact that the Governor is an agent of the Centre and therefore, stands apart from the controversies and stresses of the State politics and is expected to judge more objectively the direction the State Government assumes. Obviously, he will not act till he apprises the President of India about the developments in the State and secures his sanction that is the sanction of the Government of India, for the action he intends to take. Such action was taken first in Jammu and Kashmir, when the Sadar-i-Riyasat dismissed the ministry headed by Sheikh Mohammad Abdullah in 1953, and in Kerala when the ministry headed by E.M. Namboodiripad was dismissed in the wake of agitation which rocked the State in July 1959.

The power to encourage, advise and warn the ministry and seek

information from the Chief Minister regarding legislation and administration or return legislation for the reconsideration of the legislature, are functions which the head of a parliamentary government exercises in his discretion. Such functions, obviously cannot be exercised on the advice of the Ministry. The power to refuse assent or return a Bill for the reconsideration of the legislature is only partly discretionary. B.K. Nehru, Governor of Jammu and Kashmir, returned the controversial Resettlement Bill to the State Legislature for its reconsideration. The ministry headed by Farooq Abdullah severely criticised the Governor and passed the Bill a second time to place it on the Statute Book. The discretion of the Governor to refuse assent to a Bill seeking to amend the Constitution of Jammu and Kashmir, is absolute and unfettered.⁸

Constitutional Breakdown

The Constitution of Jammu and Kashmir envisages provisions which vest power in the State Governor to proclaim a state of constitutional breakdown in the State in case he is satisfied that a situation had arisen in the State in which the Government of the State cannot be carried on in accordance with the provisions of the Constitution.⁹ Section 92 of the Constitution empowers the Governor:

- (i) to assume to himself, all or any of the functions of the Government of the State and all or any of the powers vested in or exercisable by any body or authority in the State;
- (ii) to make such incidental and consequential provisions as appear to him to be necessary or desirable for giving effect to the Proclamation; and
- (iii) to make provisions for suspending in whole or in any part, the operation of the Constitution of the State, relating to anybody or any authority in the State;
- (iv) to assume to himself the powers of the State Legislature to make laws.

The Governor is not empowered to assume to himself any of the powers vested in, and exercised by the High Court of the State or suspend in whole or in part, the operation of the provisions of the Constitution of the State with regard to the High Court. Every Proclamation issued under section 92 of the Constitution, is required to be placed before each House of the State Legislature, as soon as the Houses are convened. The State Legislature is not vested with the power to approve the Proclamation, extend it further, or revoke

it. The Proclamation ceases to operate on the expiration of six months from the date it is issued by the Governor. A Proclamation can be revoked, or varied by a subsequent Proclamation. In case the Governor assumes to himself the power to make laws for the State, all such laws, as are made by the Governor during the Proclamation, remain in force for a period of two years after the Proclamation is made, unless such laws are sooner repealed or reenacted by an act of the Legislature.

A significant limitation is placed on the Governor in regard to the Proclamation of a Constitutional Breakdown in the State. The Governor can impose a Proclamation of Constitutional Breakdown in the State with the concurrence of the President of India. The powers vested in the Governor under Section 92 of the Constitution cannot, therefore, be exercised by him independently. He has to seek the approval of the President of India for a Proclamation which he intends to make under Section 92 of the Constitution. The initiative to act under Section 92 of the Constitution is vested with the Governor, but his initiative is subject to the authority which the Constitution has vested in the President. The President cannot initiate action under Section 92 of the Constitution, but he can withhold his approval and frustrate the initiative taken by the Governor.

The Constitution of Jammu and Kashmir lays down expressly that the power to impose a Proclamation of Constitutional Breakdown on the State under Section 92 is exercised by the Governor in his discretion and not on the aid and advice of his Council of Ministers. Obviously, there would be few situations in which the Council of Ministers would advise him to impose a Proclamation of Constitutional Breakdown in the State and ask him to assume to himself the powers of the Government. Apparently the Governor is not expected to take over the State Government without taking into account the situational factors which would ordinarily warrant a Proclamation of the Constitutional Breakdown. In 1977, when the Ministry headed by Sheikh Mohammad Abdullah resigned and the Chief Minister advised Lakshmi Kant Jha the Governor of the State to dissolve the Assembly, the Governor imposed a Proclamation of Constitutional Breakdown under Section 92 of the Constitution of Jammu and Kashmir.

The powers exercised by the State Governor under Section 92 of the Constitution of Jammu and Kashmir, are similar to the powers which the Provincial Governors were vested with, in accordance with Section 93 of the Government of India Act, 1935.¹⁰ The Provincial Governors under the Government of India Act 1935, were empowered

to impose a state of emergency in the Provinces with the concurrence of the Governor-General of India. The Governor-General on his own, did not exercise any powers to interfere in the event of a constitutional breakdown in the State. The Government of India Act of 1935, also provided that the emergency in a province would continue to be in operation for a period of six months without the approval of the Central Legislature. The Governor was empowered to assume all or any of the powers vested in or exercisable by any authority except the High Court and he exercised his powers in his discretion.

In addition to the powers vested with the Governor of the State by Section 92 of the Constitution of Jammu and Kashmir, the Governor is also empowered to exercise the crucial functions which the Governors of other Indian States exercise by virtue of Article 356 of the Constitution of India.¹¹ Under Article 356 of the Constitution of India, the President, on a report from the Governor of the State, or on his own satisfaction can assume to himself the powers of the State Government. In consequence of the proclamation of an emergency the President of India can:

- (i) assume to himself all or any of the functions of the State Government, all or any of the functions of the Governor or functions exercised by any other executive authority in the State;
- (ii) declare that the powers of the State Legislature be exercised by Parliament of India;
- (iii) make any other incidental or consequential provisions necessary to give effect to the object of the Proclamation of Emergency.

Article 356 provides that the President cannot assume to himself any powers vested in the Court of the State. It provides further that the Proclamation of Emergency shall be placed before each House of the Indian Parliament and shall cease to operate at the expiration of two months unless it is approved by a resolution of both the Houses of Parliament. If the Proclamation is made at a time when the House of the People has been dissolved or the House suffers dissolution during the period of two months after the declaration of the Proclamation, the Proclamation ceases to operate within thirty days after the House of the People is reconstituted, unless the Proclamation is approved by the House. In case the Parliament approves the Proclamation, it remains in operation for six months and can be extended by a period

of six months, subject to a total period of three years.¹² The Forty-fourth Amendment to the Constitution of India, undertaken in November 1978, which reduced the period for which the emergency, due to constitutional breakdown imposed in a State, could be extended in the first instance by six months and after that only if the Election Commission certified that the elections to the Legislative Assembly could not be held, was not made applicable to the State of Jammu and Kashmir. Article 356 of the Constitution of India is applicable to the State as it was envisaged prior to the Forty-fourth Amendment of the Constitution of India.

Article 356, imposes an obligation on the President of India to ensure that the government in the Indian States is carried on in accordance with the Constitution. Though the President is vested with exclusive powers to determine whether the government in the states is carried according to the constitution, yet the governors of the states possess a wide initiative to report to the President and recommend the desirability to remove the state governments and suspend or dissolve the state legislative assemblies. The governors wield discretion in determining whether events have occurred which involve the responsibility to protect the constitutional machinery of the states. It is difficult to visualise a situation in which the state ministry would be able to judge finally, if the government in the state was being carried on in accordance with the constitution and recommend to the governor that the President be called upon to assume the powers of the state government.

The Governor of Jammu and Kashmir is vested with two sets of powers to deal with constitutional breakdown: the power to assume the government of the State to himself under Section 92 of the Constitution of Jammu and Kashmir and the power to advise the President of India to assume the government of the State. The powers which the Governor does not exercise under Article 356 of the Constitution of India are, therefore, exercised by him under Section 92 of the Constitution of Jammu and Kashmir. In both cases, however, the Governor acts in the capacity of the agent general of the President of India, and it can hardly be assumed that a situation can arise in which the Governor can exercise any of the powers vested in him by the Constitution of India or the Constitution of Jammu and Kashmir, on his own initiative and without the approval of the Central Government.

Council of Ministers

The Constitution of Jammu and Kashmir provides for the

appointment of a Council of Ministers to aid and advise the Governor in the exercise of his powers.¹³ The Council of Ministers is headed by Chief Minister. The Council of Ministers is appointed from among the members of the State Legislature. Ordinarily, the leader of the political party commanding a majority in the Legislative Assembly is invited by the Governor to constitute the government and appointed the Chief Minister. The other members of the Council are appointed on the advice of the Chief Minister. A person who is not the member of either House of the Legislature may also be included in the Council of Ministers. However, the Ministers so appointed stay in their office for six months within which time they are required to be elected or nominated to either House of the State Legislature. Every minister has the right to speak, in the legislature, take part in the proceedings of either House of the Legislature and participate in the deliberations of any committee of the Legislature. The number of ministers of the Council is not fixed by the Constitution and is left to be determined by the Chief Minister. The Constitution of Jammu and Kashmir, enumerates the categories of the Ministers which constitute the Council. The constitution of Jammu and Kashmir classifies the members of the Council of Ministers into ministers and deputy ministers. Before a minister enters upon his office, he is required to subscribe to an oath of office and secrecy administered to him by the Governor of the State.

The Chief Minister of the State and the other members of the Council of Ministers hold office during the pleasure of the Governor. The pleasure of the Governor cannot be construed to mean that the Council of Ministers can be dismissed at the will of the Governor. "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."¹⁴

In so far as the ministers, other than the Chief Minister are concerned, their dismissal is the prerogative which is enjoyed by the Chief Minister rather than the Governor. The pleasure of the Governor vests in the Chief Minister the power to advise the Governor to dismiss any minister, and the Governor will not ordinarily refuse to follow the advice of the Chief Minister and in case he acts against the advice of the Chief Minister, the latter may resign.

The convention that within the Council of Ministers, the senior and politically more influential ministers form a Cabinet, is also

followed in the State. The Constitution does not provide for the institution of a Cabinet. Most of the Chief Ministers in the State, from Sheikh Mohammad Abdullah, to others who followed, were men of stature and comprised their cabinets of men, many among whom did not wield much influence in their party hierarchies. Usually, the Cabinet Ministers were entrusted with a larger number of departments and wider functions than their counterparts in the other States of India. Almost all the Chief Ministers in the Jammu and Kashmir State preferred to load their closer collaborators and confidants in the party, with a larger number of substantive portfolios, usually piling upon them the burdens which were not effectively undertaken.

Apparently the Council of Ministers is presumed to function on the principle of administrative responsibility. Administrative responsibility is envisaged in Section 37 of the Constitution of the State which stipulates that "the Council of Ministers shall be collectively responsible to the Legislative Assembly." Collective responsibility is based on the principle that the ministers individually as well as collectively are absolutely and irretrievably responsible to the Legislative Assembly. Collective responsibility fosters collective leadership. In the Council, there is no justification for any difference of opinion. The Council acts as a unit. The absolute responsibility for every decision devolves on every member of the Council who after a decision has been taken, is bound by it.

Collective responsibility does not absolve the ministers from their individual responsibility which is both political and legal.¹⁵ Inside the Legislature, the ministers cannot plead innocence for any wrongs done or errors committed by their departments or shift their responsibilities to civil service officers or any other instrument of the government. The minister is accountable to the Legislature for the function of his department and is required to answer questions and give information to the House in respect of his department, whenever any information is sought. In case any minister fails to discharge his responsibility the moral course for him is to request the Chief Minister to relieve him of his office.

The individual as well as collective responsibility of the executive to the legislature has, however, not been effectively undertaken in the State. The ministerial responsibility has been institutionalised and forged into instruments of political manoeuvre, mainly aimed to secure balances of interest, the ruling majorities are able to strike with the men in the Council of Ministers. From the time the Interim Government was instituted in March 1948, the State Governments exercised unrestricted authority and enjoyed unbound support of the

Government of India for their actions irrespective of the political implications. The National Conference and after 1965, the National Congress leaders, did not only claim absolute right to govern, but they also claimed the power to define the limits of political responsibility, a process which impeded substantially, the growth of representative and responsible state policies in the State.

The Council of Ministers cannot function unless it is united. The strength of the cabinet government emanates from the principle of collective responsibility. There is considerable room for debate and deliberation of political issues in the ministry but the collective decision, which is inspired or expressed by the Chief Minister, is the only voice the Council has. Exigencies do arise in which (i) the ministers might individually differ with the decisions of the Cabinet; (ii) the ministers might publicly disapprove cabinet policies and decisions; and (iii) the ministers might refuse to carry out the decisions in the manner the Council has laid down. In all the circumstances, the will of the Council prevails and the ministers who disagree, walk-out of the Government. In 1957, Ghulam Mohammad Sadiq, Durga Prasad Dhar and Girdhari Lal Dogra, quit the Ministry, after they disagreed with Bakshi Ghulam Mohammad and the rest of his Cabinet colleagues. In 1978 Mirza Afzal Beg, a close associate of Sheikh Mohammad Abdullah quit the State Government after he lost the confidence of the Chief Minister, Sheikh Mohammad Abdullah.

In the parliamentary form of government the Council of Ministers performs a number of functions:

- (i) controls and directs the executive function of the government;
- (ii) coordinates different functions of the Government as well as the various departmental operations;
- (iii) determines the legislative policy of the government.

The evolution of the parliamentary government in the State has been marked by many special features, which have reshaped the entire content and texture of the parliamentary government in the State. Apart from the inversion of administrative accountability, the government in the State has, over the years after independence, assumed legislative sanctions which have been in essence, only formal and highly questionable. Many of these developments mainly grew out of historical and sociological factors, such as the dispute with Pakistan over the accession of the State, the occupation by Pakistan of a large part of the territory of the State, perpetual threat of

subversion from across the cease-fire line and the borders with Pakistan, the incipient movements inside the State for cessation of the State from India and the communal and regional imbalances which the successive State Governments fostered to channelise patronage to secure political support, economic advantage and community recognition. The ministers, collectively as well as individually, assumed community leadership, undertook responsibility to consolidate party units and cadres and acquired widespread interest in almost all the channels of social control, subverting the entire process of political responsibility.

Chief Minister

Originally the Constitution of Jammu and Kashmir provided for a political executive constituted of a Council of Ministers which was headed by the Prime Minister.¹⁶ The Constitution of Jammu and Kashmir was amended in 1965, and the office of the Prime Minister was abolished and replaced by the office of the Chief Minister. The provisions of the Constitution, pertaining to the procedure of appointment, tenure and the powers of the Prime Minister were not effected and the Chief Minister actually assumed the powers and prerogatives which the Prime Minister enjoyed before the Constitution was amended.¹⁷

The Constitution of Jammu and Kashmir lays down that the Chief Minister of the State shall be appointed by the Governor of the State and shall remain in office during the pleasure of the Governor. The process of accountability, on which the parliamentary government is based, binds the Governor of the State, to appoint the leader of the party which enjoys the majority in the Legislative Assembly of the State Chief Minister. There is no bar on a person, who is not a member of the State Legislative Assembly, to be appointed the Chief Minister of the State, so long as he commands the support of the Legislative Assembly. Sheikh Mohammad Abdullah was appointed the Chief Minister of the State in 1975, after he was elected the leader of the Congress Parliamentary Party in the State Legislative Assembly, though he himself was not a member of the Legislative Assembly.

The most important factor, which has actually determined the appointment of the Chief Minister of the State has been the choice of the Central government. The tradition was laid down when the Interim Government was constituted in 1948, and later when Bakshi Ghulam Mohammad was appointed the Prime Minister of the State after the ministry headed by Sheikh Mohammad Abdullah was dismissed

in 1953. When Bakshi Ghulam Mohammad relinquished office under the Kamaraj Plan in 1963, the parliamentary party of the National Conference elected Shamus-ud-Din, the leader in the Legislature, and he was appointed the Prime Minister of the State in 1963. The Central Government did not approve of the appointment of Shamus-ud-Din and taking advantage of the Sacred Relic Agitation, dislodged him from his office and installed Ghulam Mohammad Sadiq in his place. Ghulam Mohammad Sadiq remained in power till he died in 1971. Syed Mir Qasim followed Sadiq, but the Indira-Abdullah Accord of 1975, cut short Qasim's term and he relinquished office to make way for Sheikh Mohammad Abdullah who was appointed the Chief Minister of the State in March 1975. Sheikh Mohammad Abdullah passed away in September 1982, and within minutes of his death, his son, Farooq Abdullah, the Minister for Health in the Sheikh's ministry, was sworn in as the Chief Minister by the then Governor of the State, B.K. Nehru. Farooq Abdullah was elected the leader of the parliamentary party of the National Conference, some days after he had assumed office.

In the appointment of the other ministers of the Council, the Chief Minister enjoys the powers and privileges which he is entitled to, as the Chief of the political executive. The Constitution explicitly provides that the ministers and the deputy ministers shall be appointed on the advice of the Chief Minister.¹⁸ The chief ministers in the State have exercised their prerogative to select their colleagues with due consideration of community representation, regional representation and representation of factional interests in the ruling party. Formally the ministers hold office during the pleasure of the Governor. Actually, however, they hold their office during the pleasure of the Chief Minister. The Chief Minister has the right to advise a minister to resign. The resignation of the minister does not effect the composition of the Council of Ministers. Generally if a minister loses the confidence of the Chief Minister or disagrees with his policies, he has no other option but to resign from his office. Ghulam Mohammad Sadiq Girdhari Lal Dogra and Durga Prasad Dhar, senior ministers in the ministry headed by Bakshi Ghulam Mohammad had to give up their office in 1957, because of their differences with the Chief Minister. In 1978 Mirza Afzal Beg, a close associate of Sheikh Mohammad Abdullah and the seniormost minister in the Council was compelled by the Chief Minister to resign from his office, because Sheikh Abdullah did not want Beg to continue in office.

The Chief Minister is the head of the Council of Ministers. He presides over the meetings of the Council. If there are differences in

the ministry, the decisions of the Chief Minister prevail. Sheikh Mohammad Abdullah and Bakshi Ghulam Mohammad dominated their Cabinets and there was hardly any decision which they did not take personally.

The Chief Minister exercises the prerogative of allocating portfolios among the ministers. This is the power which the Chief Minister exercises in his discretion. The Chief Minister coordinates the function of the various ministers and ensures that the decisions of the ministry are implemented. The decisions of the Council are filtered down to the administrative agencies through the Chief Secretary of the State.

The Chief Minister, in the capacity of the chief political executive of the State, acts, as a link between the Governor and the Council of Ministers. He is required to communicate to the Governor, the decisions of the Council of Ministers, furnish him the information relating to the administration of the affairs of the State and proposals for legislation as the Governor calls for and if the Governor so desires submit for the consideration of the Council of Ministers any matter on which a decision has been taken by a minister.¹⁹

The Chief Minister is the leader of his party in the Legislature. He is also the leader of the Legislature. He, generally, determines the Legislative policy of the Government. He advises the Governor to summon and prorogue the Legislative Assembly.²⁰ The Chief Minister exercises the prerogative to advise the dissolution of the Legislative Assembly. In 1977, when the Congress Parliamentary Party repudiated the leadership of the Chief Minister, Sheikh Mohammad Abdullah, he promptly advised the Governor of the State, Lakshmi Kant Jha, to dissolve the Legislative Assembly. Jha dissolved the Legislative Assembly and imposed a state of Constitutional Breakdown in the State under Section 92 of the Constitution of Jammu and Kashmir.

The prerogative of the Chief Minister to seek the dissolution of the Legislative Assembly should be distinguished from the advice tendered by the State Council of Ministers to the Governor for the dissolution of the Legislative Assembly. The prerogative of the Chief Minister is a right which the conventions of the parliamentary government bestow upon the Chief Minister and is always subject to the discretion of the Governor. The Governor has the discretion to accept the advice of the Chief Minister seeking the dissolution of the Legislative Assembly. The advice tendered by the Council of Ministers seeking dissolution of the Assembly is a constitutional power which the Council of Ministers exercises by virtue of Section 35 of the Constitution of Jammu and Kashmir.

On 2 July 1984, twelve National Conference members of the State Legislative Assembly, two of whom were nominated to represent women in the Legislative Assembly, repudiated the leadership of Dr Farooq Abdullah, the Chief Minister of the State, and withdrew their support from his government. Dr Farooq Abdullah advised the Governor of the State, Jagmohan, to dissolve the Assembly and call for fresh elections. The Governor refused to accept the advice of the Council of Ministers on the ground that it had lost the mandate of the Assembly and therefore, it had lost the right to tender advice to the Governor in the exercise of his powers. The Ministry headed by Dr Farooq Abdullah was dismissed later in the day.

The Chief Minister is primarily the leader of his party and it is generally the strength, the ideological commitment and the texture of the political party, to which the Chief Minister owes his office. The National Conference provided the political base to Sheikh Mohammad Abdullah and after him to Bakshi Ghulam Mohammad. Ghulam Mohammad Sadiq and Syed Mir Qasim drew their support from the Conference turned to the Pradesh Congress Unit of the State. During the tenure of Sheikh Mohammad Abdullah and Bakshi Ghulam Mohammad, the office of the Chief Minister, the State Government and the party organisation, were fused into monolithic power structure. The Chief Minister assumed the proportions of a colossus. The organisational grip on the government relaxed during the tenure of Ghulam Mohammad Sadiq, who tore him self off the trappings which had bound his office to the party organisation during the tenure of his predecessors. However, Sadiq allowed things to go too far and his indifference towards the consolidation of the organisational ranks weakened his power base, increased his dependence on bureaucracy and ultimately undermined the Congress in Kashmir. By the time Sheikh Mohammad Abdullah assumed office in 1975, the elements which had resisted him, were almost neutralised. Sheikh Mohammad Abdullah, immediately after he assumed office, revived the National Conference and set out to refurbish its flanks.

The Chief Minister occupies a pivotal position in the political organisation envisaged by the Constitution of Jammu and Kashmir. He is not a *primus inter pares*, first among equals; he is the fulcrum of the State Government. He is the leader of the Ministry he heads and controls its function. The powers exercised by him are manifold and outstrip the powers enjoyed by the chief ministers in other Indian States. He enjoys extensive statutory powers vested in him by the Constitution of Jammu and Kashmir. He exercises powers reserved for the State Government by the Constitution of India. He wields a wide

measure of extra-constitutional authority which he has arrogated to himself due to the unsettled political conditions which marked the history of the political development in the State after independence. The successive chief ministers of the State, except Syed Mir Qasim, rose to power with the support of the local party organisations and therefore, were not subject to any intra-party restrictions. In the absence of constitutional checks, otherwise placed on the parliamentary executives, they widened their power and converted their office into a capital centre of State power and overspread the bounds of both parliamentary supremacy and executive responsibility.

The Legislature

The Constitution of Jammu and Kashmir provides for a bicameral legislature which is vested with the powers to legislate on the subject which are reserved for the State in accordance with Article 370 of the Constitution of India and the Order of the President of India (Application to Jammu and Kashmir), 1954.²¹ The two Houses of the State Legislature are: the Legislative Assembly and the Legislative Council. The two Houses are constituted on separate and different principles and sit separately. The Assembly is constituted of the representatives elected by the people of the State on the basis of universal adult franchise. The Legislative Council is constituted of indirectly elected members and nominated representatives, giving weightage to territorial divisions of the State, functional groups, local bodies and unorganised social and economic interests.

Legislative Council

The Legislative Council is composed of thirty-six members²² and is constituted in the following manner:

- (i) Eleven members of the Council are elected by the Legislative Assembly from among the residents of the Kashmir division with at least one member each from the tehsils of Ladakh and Kargil.
- (ii) Eleven members of the Council are elected by the Legislative Assembly from among the residents of the Jammu division with at least one member each from the districts of Doda and Poonch.
- (iii) Two members, one each from the two divisions of the State i.e., Jammu and Kashmir, are elected to the Council by the electorate constituted of the Municipal Councils, the Town Area Committees and the Notified Area Committees of the two divisions.
- (iv) Two members for each of the two divisions are elected to the Council by electorate constituted of the members of the Panchayats and such other local bodies of the two divisions of Jammu and

Kashmir as the Governor of the State may specify.

(v) Eight members of the Council are nominated by the Governor. Not more than three of the nominated members are chosen to represent the socially and economically backward classes of the people of the State. The remaining five nominated members are selected from among the persons who have made outstanding contribution to art, science, literature, cooperative movement and social services.

The elections to the Council are held in accordance with the system of proportional representation with single transferable vote. The sitting members of the Legislative Assembly are not eligible to be elected to the Council.

The Constitution lays down certain specific qualifications for the membership of the Legislative Council. A person is deemed to be qualified for the membership of the Legislative Council if;

- (i) he is a Permanent Resident of the State;
- (ii) he subscribes before a person authorised in that behalf by the Election Commission of India, an oath or affirmation according to the form set out for the purpose in the Fifth Schedule of the Constitution of Jammu and Kashmir;
- (iii) he is not less than thirty years of age; and
- (iv) he possesses such other qualifications as may be prescribed by or under any law made by the State Legislature.

The Legislative Council is a permanent House and is not subject to dissolution. The members of the Council are elected for a term of six years. One-third of the members of the Council retire after every two years.

The Legislative Council elects two members from among its members, as the Chairman and the Deputy Chairman of the Council. The Chairman and the Deputy Chairman vacate their office, if they cease to be the members of the House. The Chairman and the Deputy Chairman "can resign their office at any time by writing under their hand, addressed in case of the Chairman to the Deputy Chairman and in case of the Deputy Chairman to the Chairman." The Chairman and the Deputy Chairman are liable to be removed from their office by a resolution of the Council passed by a majority of "the then members of the Assembly." At least fifteen days notice is required to be given in case a resolution for the removal of the Chairman or the Deputy Chairman is sought to be moved in the Council. While such a resolution is moved in the Council, and is under the consideration of the Council, the Chairman and the Deputy

Chairman, do not preside over the Council even if they are present. The Chairman is entitled to speak in the Council when a resolution for his removal is under consideration and is also entitled to vote on such a resolution. He is however, not vested with a right to cast a second vote in case there is an equality of votes cast on the resolution for his removal. The Chairman and the Deputy Chairman of the Council are entitled to receive such salaries and allowances as are respectively fixed by the State Legislature.

Legislative Assembly

The Legislative Assembly of the State is constituted of one hundred members.²³ For the purpose of election to the Legislative Assembly, the State is divided into territorial constituencies in a manner that the ratio between the population of each constituency and the number of seats allotted to it are, so far as practicable, the same throughout the State. In this connection population is construed to mean the population ascertained at the last preceding Census of which relevant figures have been published. After every Census, the representation of the territorial constituencies in the Assembly is readjusted. The readjustment is made by an authority and in a manner as the Legislature determines by law. Such readjustment, however, does not effect the representation in the Legislative Assembly until the existing Legislative Assembly is dissolved.

Twenty-five seats in the Legislative Assembly are reserved for the people inhabiting the territories of the State under the occupation of Pakistan.²⁴ The territories occupied by Pakistan are not included in the delimitation of the constituencies for the elections to the Legislative Assembly and the reserved seats are not taken into account for reckoning of the total membership of Assembly.

Seats are also reserved in the Legislative Assembly for the 'Scheduled Castes' in the State.²⁵ The reservation for the 'Scheduled Castes', is made in a ratio which is to bear as nearly as possible the same population to the total number of seats in the Assembly as the population of the Scheduled Castes bears to the population of the State. The Scheduled Castes in the State are construed to mean the Castes, races or tribes or groups which are defined by the Constitution of India as the Scheduled Castes in the State. Article 341 of the Constitution of India is applicable to the State and Scheduled Castes are defined by the Constitution (Jammu and Kashmir) Scheduled Castes Order, 1956. The reservation for the Scheduled Castes, was according to the Constitution of Jammu and Kashmir, to cease at the expiration of twenty years from the commencement of the

Constitution of Jammu and Kashmir. However, the reservation was extended by twenty-three years by virtue of Eleventh Amendment to the Constitution of Jammu and Kashmir.

The qualifications for the membership of the Legislative Assembly are:²⁶

- (i) the person is a permanent resident of the State;
- (ii) the person subscribes an oath of affirmation in the form set out in the Fifth Schedule of the Constitution, before an authority, appointed by the Election Commission of India;
- (iii) the person is not less than twenty-five years in age; and
- (iv) the person possesses such other qualifications as are prescribed in that behalf by or under any law made by legislature.

The term of the Legislative Assembly is six years.²⁷ Originally, the term of the Assembly was fixed at five years. The Forty-second Amendment to the Constitution of India among other things, extended and the term of the Legislative Assemblies in the States in India to six years. The Constitution of Jammu and Kashmir was also amended the tenure of the Legislative Assembly of the State was extended to six years. The Forty-fourth Amendment to the Constitution of India restored the original term of the Legislative Assemblies in the other Indian States to five years, but no amendment was made in the Constitution of Jammu and Kashmir and the term of the Legislative Assembly continues to be six years. The expiration of the term of the Legislative Assembly operates as a dissolution of the Assembly.²⁸

The Legislative Assembly meets twice a year and the Constitution of the State provides that not more than six months should intervene in between the two sessions of the Assembly. The Legislative Assembly is summoned or prorogued by the Governor of the State. The Governor is also vested with the power to dissolve the Assembly.²⁹

Speaker

The Legislative Assembly is presided over by the Speaker and in his absence the Deputy Speaker.³⁰ In accordance with the provisions of the Constitution both the Speaker and the Deputy Speaker are elected by the Legislative Assembly from among its members. After the Assembly is constituted, the date for the election is fixed by the Governor. The notices of the election are sent to all the members of the House by the Secretary of the House. A motion for the election of the Speaker is submitted to the Secretary by a member of the

Assembly. The motion is required to be accompanied by a statement of acceptance of the member whose name is proposed for the election. The motion is also required to be seconded by another member of the Assembly. The Speaker is elected when a motion is passed by the Assembly. Conventions of the parliamentary government require that in the election of the Speaker, the leaders of the ruling party consult the leaders of the opposition. This is done to select a Speaker who commands wider respect among the members of the Assembly, and is acceptable to the opposition. However, the political conditions in the State always constrained the operatives of the parliamentary government, and the Chief Ministers and the senior leaders of the party in power had scant respect for the wishes of the opposition. Assad-Ullah Mir, a nominee of the National Conference was elected the Speaker of the first Legislative Assembly on 27 July 1957, on a motion tabled by Bakshi Ghulam Mohammad, the Prime Minister of the State and the leader of the National Conference in the Assembly. Mir's nomination was seconded by Shyam Lal Saraf, another senior leader of the Conference.³¹ Only six members of the Assembly sat in the opposition, five of them belonging to the Praja Parishad and one belonging to the Harijan Mandal. Sixty-eight of the seventy-five members of the Legislative Assembly were National Conference men and forty-one of them had been returned to the Assembly unopposed. In 1960, Assadullah Mir was inducted into the ministry headed by Bakshi Ghulam Mohammad.

The term of the Speaker is governed by Section 58 of the Constitution of the State. The Speaker vacates his office if he ceases to be a member of the Legislative Assembly. He is free to resign from his office at any time. He can be removed by a resolution of the Assembly supported by a majority of all the members of the Assembly. Fourteen days' notice is required to be given before a resolution is moved in the Assembly for the removal of the Speaker. The Speaker does not preside over the Assembly when a motion for his removal is under the consideration of the Assembly. He is, however, entitled to be present in the Assembly, speak and defend himself when the motion for his removal is considered by the Assembly. The Speaker does not vacate his office on the dissolution of the Assembly, but continues to be in his office till a new Speaker is elected by the Assembly after fresh elections. When the Speaker is not present in the Assembly, or the office of the Speaker is vacant, the Deputy Speaker performs the duties of the Speaker. If the office of the Deputy Speaker is also vacant, the Assembly is presided over by a person who is appointed by the Governor. When the Speaker as well as the

Deputy Speaker is not present in any sitting of the Assembly, a person deputed under the rules of the procedure of the Assembly presides over the Assembly. In case, however, such a person also is not present in the House, a person deputed by the Assembly, acts as the Speaker and presides over the Assembly.

The Speaker is the representative and the spokesman of the Assembly in its collective capacity. "The Speaker represents the House. He represents the dignity of the House, the freedom of the House and because the House represents the nation, in a particular way, the Speaker becomes the symbol of the freedom and liberty. Therefore, it is right that that should be an honoured position, a free position and should be occupied always by men of outstanding ability and impartiality."³² The Speaker is expected to be completely impartial and to rise above the considerations of party politics. He is expected to cease to be a member of the political party to which he belongs, after he is elected the Speaker of the Assembly.

In the prevailing political conditions of the State, however, few of the Speakers were able to dissociate themselves from their party affinities. Not only did the party interests dominate in the election of the Speakers of the successive Legislative Assemblies, few of the men elected to preside over the Assemblies could abandon their party loyalties. Most of the Speakers found their way into the State Ministries and actively participated in party affairs. "Most of the Speakers held ministerial positions either before becoming Speakers or after relinquishing the office. Three of the six Speakers were ministers before they became Speakers, one was a Chief Minister (though for a relatively brief period (Shamas-ud-Din from 1964 to 1964), two of them became ministers after having served as Speakers, and one (G.R. Renzu) joined the civil service and later became Home Secretary. Under these circumstances it is difficult for a Speaker to remain absolutely impartial for he always has an eye on a ministerial post or some other office and cannot therefore, afford to displease the Chief Minister by being firm and fair in upholding the dignity of the House and asserting its authority vis-a-vis the executive."³³ In 1979, the Speaker, Malik Mohi-ud-din, who was elected to the Assembly on the mandate of the National Conference, was charged of disloyalty to the party leadership and removed from his office.

The Speaker performs a number of functions and wields a number of powers.³⁴ He is not under any obligation to give reasons for his decisions and his rulings. His decisions cannot be challenged by any member of the Assembly. With respect to the discharge of his powers and functions, the Speaker is not amenable to anyone except the

Assembly. Courts of law cannot go into the merits of the rulings delivered by the Speaker in the Assembly.

The proceedings of the Assembly are conducted under the orders and guidance of the Speaker. All the powers to regulate the conduct of business in the Assembly are exercised by him and he is responsible to enforce the rules which govern the conduct of the business of the Assembly and maintain order during the debates. He interprets the standing orders and the rules of the business of the Assembly and disposes of the points of orders raised during the debates. He admits motions tabled in the Assembly. He enjoys the power to admit adjournment motions relating to matters of urgent public importance and allow debates on such motions. He calls upon members wishing to speak and exercises his discretion in selecting the Speaker. He ensures that indecent and unofficial language is not used in the Assembly during the course of its proceedings. If any expressions are used which are unparliamentary the Speaker is vested with the power to order such expressions to be expunged from the Assembly records.³⁵

The supervisory functions of the Speaker include the appointment of several committees and supervision of their workings.³⁶ Though the members of the Estimates Committee and the Public Accounts Committee are elected by the Assembly, the Speaker is assigned the powers of supervision over the functions of the two Committees. The Speaker nominates the members of the Business Advisory Committee and is the Chairman of the Committee. The Business Advisory Committee is the main functionary for the planning of the business of the Assembly. The Speaker is also empowered to issue directions to the chairmen of the various Committees, as he considers necessary, for regulating the procedure of the organisation of their work. The doubts arising about any points of procedure, are referred to the Speaker whose decision in this regard is final.

The functions of the Speaker, in directing and controlling the procedure of raising questions in the Assembly, are wide and important. The Speaker exercises almost absolute powers regarding the assignment of time for questions, waive the period of notice for asking or answering questions, decide whether any question is within the rules, direct that starred questions be treated as unstarred questions, modify the questions, direct the order of the questions to be entered in the list of questions, permit ministers to answer questions at the end of the Question Hour, permit the answers to be given to the question of absent members, and disallow any supplementary questions. All the questions are invariably examined by the Speaker, who

decides the admissibility or the inadmissibility of the questions.

The Speaker is the guardian of the privileges of the members of the Assembly.³⁷ He can insist that an action must be taken if a privilege of any member of the Assembly is violated by the executive or any other personal authority. The other functions, the Speaker performs are:

- (i) acts as the channel of communication between the Assembly and the Governor;
- (ii) protects the Assembly against encroachment of the Government;
- (iii) adjourns the House if the quorum of the House is not complete;
- (iv) determines whether a Bill is a Money Bill;
- (v) he is vested with the power to endorse or certify every Money Bill before it is transmitted to the Legislative Council for consideration or presentation to the Governor for his assent;
- (vi) the Speaker is empowered in his discretion to permit a member of the Assembly, who is not able to express himself adequately in English or in Urdu, to address the House in Hindi or if he is not able to express himself in Hindi, address the Assembly in his mother-tongue.

Disqualification of Members

The Constitution lays down the disqualifications which bar the election of a person to the State Legislature.³⁸ A person is disqualified for being chosen a member of the Legislature:

- (i) if he holds any office of profit under the Government of India, provided such an office is not declared by the State Legislature as an office which does not entail any disqualification for the elector or nomination to the Council;
- (ii) if he is an undischarged insolvent;
- (iii) if he is not a Permanent Resident of the State or has voluntarily acquired the citizenship of a foreign State or is under any acknowledgement of allegiance of adherence to a foreign State;
- (iv) if he is disqualified by or under any law made by the State Legislature.

A person cannot be a member of both the Houses of the State Legislature and any person who is a member of both the houses has

to vacate one of the two seats according to the law prescribed by the Legislature. A member of the State Legislature ceases to be so if he resigns his seat by writing under his hand. A member of the Legislature is also deemed to have ceased to be so, if he remains absent from the meetings of the House, of which he is a member for a period of sixty days, without the permission of the House.³⁹

In case disputes arise as to whether a member of the Legislature is subject to the disqualification envisaged by the Constitution, such disputes are required to be referred to the High Court of the State for its decision.⁴⁰ In this regard the provisions of the Constitution of Jammu and Kashmir are different from the provisions of the Constitution of India, under which the disputes pertaining to disqualifications of the members of the State Legislatures, are referred to the Governor of the State who is required to seek the opinion of the Election Commission before the dispute is decided.

If any member of the State Legislature, who is disqualified, or a member, who has not taken the oath specified by the Constitution or a member who is prohibited from sitting in either of the two Houses of the State Legislature, by law made by the Legislature, sits and votes in the Legislature, he is liable to a penalty of a hundred rupees, for each day he sits in the Legislature. The penalty is liable to be recovered as a debt due to the State.⁴¹

Parliamentary Privileges

The Constitution of Jammu and Kashmir confers a number of privileges on the two Houses of the Legislature and their members. The privileges and immunities are conferred on the members individually and Houses collectively, to enable them to discharge their functions. "Privileges are enjoyed by individual members because the House cannot perform its functions without unimpeded use of the services of members, and by each House for the protection of its members and the vindication of its own authority and dignity."⁴² The privileges enumerated by the Constitution fall into three sets:

- (i) Freedom of speech on the floor of the two Houses of the Legislature;
- (ii) Right of publication of the proceedings of the Legislature; and
- (iii) Privileges which are, from time to time, defined by the Legislature and until that was done the privileges of the Parliament of India and its members and its committees.

The freedom of speech in the Legislature is constituted of two parts. First, Clause (1) of Section 72 of the Constitution ensures freedom of speech on the floor of the two Houses of the Legislature. Second, Clause (2) of Section 72, ensures immunity of the members of the Legislature from any proceedings for anything said or any vote given by them in the Legislature. Freedom of speech envisaged by Clause (1) of Section 72, is restricted by the provisions of the Constitution and rules and Standing Orders regulating the procedure of the Legislature. Section 88 of the Constitution lays down that "no discussion shall take place in the Legislature with respect to the conduct of any Judge of the Supreme Court or the High Court in the discharge of his duties." The Rules of Procedure and Conduct of Business of the two Houses framed under Section 85 of the Constitution lays down a number of subjects in respect of which the freedom of speech of the members of the Legislature is restricted. However, no action can be taken against a member of the Legislature in any court of law, because Clause (2) of Section 72 of the Constitution specifically provides that the members of the Legislature are not liable to any proceedings in any court in respect of anything said by them or vote given by them. The only remedy available is the power of the Speaker to take suitable action against any member under rules framed by the House. Clause (2) of Section 72 of the Constitution actually provides absolute immunity to the members of the Legislature. A member of the Legislature, who violates the limitation envisaged by Section 88 of the Constitution, is not liable for any action in any court. The immunity enjoyed by the members extends only to anything said or vote given by the members on the floor of the Houses of the Legislature. It does not extend to any criminal act committed by the members outside the Legislature.

The right to publication of the proceedings of the Legislature is also embodied in Clause (2) of Section 72 of the Constitution. Clause (2) of Section 72 provides that no person is liable to any action in respect of the publication of any reports, papers, votes or proceedings of the State Legislature which are published by or under the authority of the Legislature. The Parliamentary Proceedings (Protection of Publication) Act of 1956, extends to the Jammu and Kashmir State, and no person is liable to any proceedings, civil or criminal, in respect of a true report of the proceedings of either House of the State Legislature, unless it is proved that the publication was made with malice. The privileges of the Legislature in this regard prevail over the fundamental rights to freedom of speech and expression embodied by the Constitution of India.

The Constitution of Jammu and Kashmir confers on the members of the Legislature certain other immunities which are defined by the State Legislature.⁴³ These immunities are:

- (i) freedom from arrest of the members of the Legislature;
- (ii) right to exclude the strangers from any of the two Houses of the Legislature;
- (iii) right to prohibit the publication of the proceedings of the Legislature;
- (iv) right of the two Houses to regulate their own constitution;
- (v) right to regulate internal proceedings; and
- (vi) right to punish members for contempt and breach of privileges.

Powers of the Legislature

The State Legislature enjoys the power 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." The Legislature is also vested with the power to legislate on the subjects enumerated in the Concurrent List of the Seventh Schedule of the Indian Constitution. The provisions of Article 249 of the Constitution of India, are not applicable to Jammu and Kashmir State and Parliament cannot assume to itself any powers to legislate on the subjects reserved for the State Government. Article 249, empowers Parliament to legislate on matters specified in the State List, on a resolution which is passed by the Council of States to that effect.

The powers of legislation enjoyed by the Legislative Assembly are wider than the powers exercised by the Legislative Council. Legislative measures can originate in the Legislative Council, and Bills which originate in the Legislative Assembly and are passed by the Assembly are required to be approved by the Council. However, if a Bill which is passed by the Legislative Assembly is rejected or detained by the Legislative Council by more than three months, is deemed to have been passed by both the Houses of the Legislature if the Bill is passed a second time by the Legislative Assembly and it is again rejected by the Legislative Council or detained for more than one month. In case Bills are amended by the Legislative Council, but the Legislative Assembly does not agree with the amendments, the Bills are deemed to have been passed by both the Houses of the Legislature, if the Bills are passed by the Legislative Assembly a second time with or without taking into consideration the amendments proposed by the

Legislative Council.⁴⁴

The Legislative Assembly exercises exclusive control over the finances of the State. No taxes and levies can be imposed in the State and expenditure can be authorised without the consent of the Legislative Assembly. All Money Bills originate in the Legislative Assembly. After a Money Bill is passed by the Legislative Assembly, and transmitted to the Legislative Council, for its consideration, the Council is required to return the Money Bill with its recommendations within fourteen days from the date of its receipt. If the Money Bill is not returned by the Council within fourteen days, the Bill is deemed to have been passed by both the Houses of the Legislature in the form it was passed by the Legislative Assembly. The Legislative Assembly is also reserved the right to reject the recommendations of the Council and the Money Bill is deemed to have been passed by the Legislative Assembly.⁴⁵

Every year, the Annual Financial Statement or the Budget, is laid before the two Houses of the Legislature. The Annual Financial Statement shows the estimated receipts and expenditures of the State for the current financial year. The expenditure envisaged by the Financial Statement is divided into two parts: the expenditure charged upon the Consolidated Fund of the State and the expenditure proposed to be made from the Consolidated Fund of the State. The estimates relating to the expenditure proposed to be made from the Consolidated Fund of the States, are subject to the vote of the Legislative Assembly. The estimates are submitted to the Legislative Assembly in the form of demands for grants and the Assembly is empowered to sanction, reduce or reject the demands. The expenditure charged upon the Consolidated Fund of the State is not subject to the vote of the Legislative Assembly, but the Constitution does not impose a prohibition on discussions on such expenditure in the two Houses of the Legislature.⁴⁶

The Constitution of the State embodies a parliamentary form of government. The Council of Ministers is responsible to the Legislative Assembly.⁴⁷ The Legislative Assembly exercises technically absolute control over the Council of Ministers of the State. The Legislative Council has no authority to enforce responsibility. The ministry remains in office, so far as it enjoys the confidence of the Legislative Assembly. The moment the ministry loses the confidence of the Assembly, it has to resign.

The State Legislature is vested with the power to amend the Constitution of the State. However, a Bill for the amendment of the Constitution can only be introduced in the Legislative Assembly. A

Bill to amend the Constitution is passed by a two-thirds majority of the total membership of each House of the Legislature.⁴⁸

The constitutive powers of the State Legislature also extend to the amendments of the Constitution of India. Amendments to the Constitution of India, pertaining to the election of the President, executive of the States, Union Judiciary, and High Courts in the States and the Union Territories, legislative relations between the Union and the States, Seventh Schedule to the Constitution of India, representation of the State in Parliament and the procedure for the amendment of the Constitution of India, require the ratification by the State Legislature including the Legislature of the Jammu and Kashmir State.

The State Legislature is vested with certain important powers with regard to the return and resettlement of the State Subjects, who after having migrated to the territories included in Pakistan after March 1946, return to the State for settlement. Article 7 of the Constitution of India lays down the procedure for the return of the migrants to Pakistan who return to India under a "permit for resettlement or permanent return issued by or under the authority of any law." Article 7 of the Constitution of India in its application to Jammu and Kashmir, is appended with a proviso which empowers the State Legislature to enact laws with regard to the return of the State Subjects of class I and class II, who having migrated to the territories included in Pakistan after March 1947, return to the State. Any State Subject of Class I or Class II of Jammu and Kashmir, who migrated to the territories included in Pakistan after 1 March 1947, can return to the State "under a permit for resettlement in that State or permanent return issued by or under the authority of any law made by the Legislature of the State and every such person shall be deemed to be a citizen of India." All such migrants to Pakistan, who return to the State under permits of resettlement or permanent return, assume the citizenship of India. The State Legislature is therefore, empowered to:

- (i) make laws in regard to the State Subjects who having migrated to Pakistan after 1 March 1947, return to the State for permanent resettlement;
- (ii) confer on such State Subjects the citizenship of India.

The Constitution (Application to Jammu and Kashmir) Order, 1954, vests special powers with the State Legislature, in regard to the application of the provisions of the Constitution of India which

embody the fundamental rights.⁴⁹ A fresh Article 35-A is added to Part IV of the Constitution of India after Article 35, which empowers the State Legislature:

- (i) to define the classes of persons who are the Permanent Residents of the State; and
- (ii) to confer on such Permanent Residents special rights and privileges and impose restrictions on persons who are not Permanent Residents in respect of employment under the State Government, acquisition of immovable property in the State, settlement in the State or the right to scholarships and such other forms of aid as the State Government provides.

No laws made by the State Legislature which define the classes of the Permanent Residents of the State or confer special rights and privileges on the Permanent Residents or impose restrictions on persons who are not Permanent Residents, can be held void on the ground, that such laws are inconsistent with or take away or abridge rights conferred on the other citizens of India by the provisions of Part IV of the Constitution of India.

Powers are also vested with the State Legislature by the Constitution of Jammu and Kashmir to:⁵⁰

- (i) make laws defining the classes of persons who are, or shall be, the Permanent Residents of the State;
- (ii) define or alter the definition of the classes of persons who are or shall be the Permanent Residents of the Jammu and Kashmir State;
- (iii) confer on the Permanent Residents any special rights or privileges; and
- (iv) regulate or modify any special rights or privileges enjoyed by the Permanent Residents.

All such legislation is, however, required to be passed by a two-thirds majority of the total membership of either House of the State Legislature.

The Legislative Assembly exercises exclusive powers in respect of the election of the members of the Legislative Council and the election of the President of India. The Legislative Assembly elects twenty-two members of the Legislative Council. The elected members of the Legislative Assembly also participate in the election of the President of India.

Legislative Procedure

Legislation, including the imposition of taxes, and the appropriation of moneys, is one of the two main functions of the State Legislature. The other function is the enforcement of executive responsibility. The legislative proposals for legislation and the imposition of taxes and appropriation of finances are initiated in the Legislature in the form of Bills. The Constitution lays down certain broad principles pertaining to the passage of the Bills in the Legislature. The detailed procedure is laid down in the Rules of Procedure which have been framed by the two Houses of the Legislature for the conduct of their business.

The Constitution of Jammu and Kashmir provides for different procedure for the passage of ordinary Bills of legislation, Bills which are defined as Money Bills and the Financial Bills. The Constitution specifically defines the Money Bills and the Financial Bills. Money Bills deal with the imposition, abolition, remission, alteration or regulation of taxes, appropriation of moneys, borrowing of money, and giving of guarantees by the State, custody of the Consolidated Fund of the State and the Contingency Fund, expenditure charged upon the Consolidated Fund and the receipt, custody, issue or audit of public accounts and other incidental matters. A Bill, however, is not a Money Bill, if it deals with the imposition of fines or other primary penalties, or the payment of fees for licences or for services, or the imposition, abolition, remission, alteration or regulation of taxes imposed by local authorities for local purposes. Whether a Bill is a Money Bill, is finally determined by the Speaker of the Legislative Assembly. A Bill is a Financial Bill, which in addition to the matters specified for a Money Bill, deals with other matters also, which cannot be incorporated by an Ordinary Money Bill.

An ordinary Bill can be incorporated in either of the two Houses of the State Legislature. Such Bills are either Government Bills or Private Members Bills. The Government Bills are initiated by the ministers. A Private Member's Bill is preceded by one month's notice. A Bill is usually accompanied by a statement of objects and reasons for which the enactment is needed to be made. The Bill is then ordered to be included by the Speaker of the Legislative Assembly or the Chairman of the Legislative Council, in the List of Business and a date is fixed for its introduction. The Bill is introduced in the House after a motion for leave is tabled and granted by the House. The introduction of the Bill in the House, completes the first reading of the Bill.

The introduction of the Bill is followed by the Second Reading.

The Second Reading of the Bill may commence with any of the following courses:

- (i) it is taken into consideration;
- (ii) it is referred to a Select Committee;
- (iii) it is published and circulated for electing public opinion.

If the Bill is taken into consideration, a clause to clause discussion of the Bill takes place. At this stage amendments to the Bill are taken up for consideration. Certain conditions are laid down which govern the admission of motions proposing amendments to a Bill. An amendment to a Bill is required to be within the scope of the Bill and relevant to the subject matter of the Clause to which it relates. The amendment is not to be inconsistent with any previous decision of the House on the same question. The amendment is also not to be such as to make the clause to which the amendment is proposed, unintelligible and ungrammatical. The Presiding Officers of the two Houses determine the place in which an amendment is moved. The Presiding Officers may refuse to allow a proposed amendment which in their opinion is unintelligible, frivolous or meaningless. An amendment may be proposed to an amendment which is already admitted by the Presiding Officers of the two Houses.⁵¹ After the amendments to the Bill are considered and disposed off, the Bill is put to vote of the House. The Bill is put to vote either as a whole or clause by clause.

The Bill is referred to a Select Committee or a Joint Select Committee of the two Houses of the Legislature on a motion adopted by the House that the Bill be referred to a Select Committee or a Joint Select Committee of the two Houses.⁵⁵ Consideration of such a motion is generally restricted to the debate on the broad principles the Bill is based upon, and the changes it seeks to achieve. The Select Committee is appointed by the House. The House also fixes the date by which the Select Committee is asked to submit its report. The Chairman of the Committee is appointed by the Speaker from among the members of the Committee. The Committee sits at the time and on the days fixed by its Chairman. The procedure of the Committee is almost the same as that followed by the House. The Committee meets from time to time and hears evidence and representatives of the special interests likely to be affected by the Bill. The members of the House can be present during the deliberations of the Committee though they are not its members. Ministers can address the Committee with the permission of the

Chairman of the Committee. The Committee submits a report to the House within the time limit fixed by the House. The report includes the minutes of sitting of the Committee, amendments presented and other papers. In the event of a difference of opinion among the committee members the report is drawn up on the basis of the majority opinion in the Committee. The dissenting members of the Committee are entitled to enter a minute of dissent after the draft report is considered and adopted. After the presentation of the report of the Select Committee, the Bill can be recommitted to the Committee for further consideration, sent for circulation to elicit public opinion or taken up for consideration by the House. The members of the Joint Select Committee of the two Houses are appointed on a motion passed by one House and the concurrence of the other with the motion to the effect that a Joint Select Committee be appointed for the consideration of a Bill. The members of the Joint Select Committee are appointed according to a proportion of two is to one. If a message is received that the other House does not concur in referring the Bill to a Joint Select Committee, the Bill may then be referred to a Select Committee of the House where the Bill has originated.

The report of the Select Committee, is presented to the House which has constituted it, by the Chairman of the Committee or any one of its members authorised by the Chairman. The Chairman or the member of the Committee who presents the report of the Committee can, with the permission of the presiding officer, give the House a brief resume of the important changes recommended by the Committee. No discussion is allowed on the report at this stage. Only questions are allowed which seek clarifications and elucidations in regard to the report. Clause-wise discussion of the Bill begins after the House adopts a motion for the consideration of the Bill as reported by the Select Committee or a Joint Select Committee.

A Bill may be published for circulation to elicit public opinion, if the member in charge of the Bill desires to do so. The member is required to give notice to the House and move a resolution that the Bill be circulated for eliciting public opinion. A date is fixed by which the process of eliciting public opinion is to be completed. After the date, the Bill is referred to a Select Committee or a joint Select Committee for consideration. The clause by clause discussions on the Bill follow the presentation of the report of the Select Committee or the Joint Select Committee.

After a Bill has been considered clause by clause, during the second reading and all the clauses and schedules have been approved,

the Bill is submitted for the third reading. The third reading of the Bill begins when a motion is tabled in the House. The third reading gives the House an opportunity to review the Bill as it has emerged after the clause-wise consideration during the second reading. No amendment, except those which are formal, verbal or consequential, are allowed to be moved at this stage. The third reading is complete when the motion for its passage is tabled and the Bill is passed.

When a Bill passed by one House is transmitted to the other House for consideration, it is laid on the table of the House, which indicates that the House takes official cognizance of the Bill. The procedure for the passage of a Bill is almost the same for both the Houses. However, a Bill, which has been passed by one House, cannot be circulated for eliciting public opinion, when it is being considered by the other House. Further, a Bill, which has been already referred to a Joint Select Committee by one House and passed, cannot be recommitted to a Joint Select Committee by the House to which it is transmitted for consideration. The Bill is considered to have been passed if it has been approved by both the Houses, either without amendments or with such amendments as are agreed to by both the Houses.

The power of the Legislative Council in regard to the Bills passed by the Legislative Assembly and transmitted to the Council for its consideration, is specifically limited. If a Bill passed by the Legislative Assembly is rejected by the Council, or detained for more than three months without passing it or passed with amendments which are not accepted by the Legislative Assembly, the Legislative Assembly is empowered to pass the Bill again in the same session or in a subsequent session with or without the amendments suggested by the Legislative Council and resubmit it again for the consideration of the Council. In such an eventuality, the power of the Legislative Council to block the legislation any further is completely curtailed. The Bill passed by the Legislative Assembly a second time, is deemed to have been passed by the Legislative Council, if the Council rejects the Bill again or detains it for more than one month or passes it with amendments, with which the Legislative Assembly does not agree.⁵⁴

When a Bill is passed by the Legislative Assembly and the Legislative Council, it is presented to the Governor for his assent.⁵⁵ Without the Governor's assent no Bill can be placed as an Act on the Statute Book. The Governor may give his assent to the Bill or withhold it. The Governor of the State does not enjoy the power to reserve any Bill for the consideration of the President of India.

In case the Governor withholds his assent he may return the Bill to the Legislature with a message requesting the Houses to reconsider the Bill or any specific provision of the Bill. In his message the Governor may recommend amendments to the Bill. It is incumbent on the State Legislature to reconsider the Bill on the receipt of the message from the Governor. If the Legislature passes the Bill again, with or without the amendments recommended by the Governor, and presents the Bill to the Governor for his assent, the Governor cannot withhold his assent. The Governor can return a Bill to the Legislature for reconsideration only once and he has to give his assent to the Bill which is passed by the Legislature a second time.

Money Bills

The Constitution provides for special procedure for the passage of Money Bills.⁵⁶ A Bill is defined as a 'Money Bill' if it contains provisions with respect to all or any of the following matters:

- (i) the imposition, abolition, remission or regulation of any tax;
- (ii) the regulation of borrowing of money, giving of guarantees by the Government of the State or the amendment of law pertaining to financial obligations undertaken by the State Government;
- (iii) the custody of the Consolidated Fund of the State and the payment of moneys or the withdrawal of moneys from the Fund;
- (iv) the appropriation of money out of the Consolidated Fund of India;
- (v) the declaration of expenditure charged upon the Consolidated Fund of the State;
- (vi) the receipt, custody and issue of money on account of the Consolidated Fund of the State; and
- (vii) the matters incidental to any of the matters listed above

A Bill is not deemed to be a Money Bill if it provides for the imposition of fines or other pecuniary penalties, or for the demand of payment of fees for licences or fees for services rendered or if it provides for imposition, abolition, remission, alteration, or regulation of any tax by any local authority or body for local purposes. In case a dispute arises about whether a Bill is a Money Bill, the decision of the Speaker is final. The Constitution requires that on every Money Bill, which is transmitted for the consideration of the Legislative

Council or sent to the Governor for his assent, the Speaker affixes an endorsement certifying that the Bill is a Money Bill.

A Money Bill can be introduced only in the Legislative Assembly. After a Money Bill is passed by the Legislative Assembly, it is transmitted to the Legislative Council for its recommendations. The Council is required to return the Bill to the Legislative Assembly within a period of fourteen days with its recommendation. In case the Bill is not returned by the Council to the Legislative Assembly in fourteen days, the Bill is deemed to have been passed by both the Houses of the State Legislature in the form it was passed by the Legislative Assembly. If the Council returns the Bill to the Assembly with its recommendations, the Legislative Assembly has the exclusive discretion to accept the recommendations, or a part of the recommendations, or reject them. If any recommendations are not accepted, the Money Bill is deemed to have been passed in the form it was envisaged by the Legislative Assembly. However, if any recommendations are accepted by the Legislative Assembly, the Bill is deemed to have been passed with the amendments proposed by the Council.

The Money Bill, after it is passed by the two Houses of the Legislature, is presented to the Governor for his assent. The Governor may give his assent to the Money Bill or withhold it. However, he cannot return a Money Bill for the reconsideration of the Legislature.

Procedure in Financial Matters

In respect of every financial year, the Governor causes to be laid before both the Houses of the Legislature, the Annual Financial Statement.⁵⁷ The Annual Financial Statement shows the estimated receipts and the expenditure of the Government of the State. The statement of expenditure shows separately, the "expenditure charged upon the Consolidated Fund of the State" and the "sums required to meet other expenditure proposed to be made from the Consolidated Fund of the State." The expenditure charged on the Consolidated Fund of the State includes:

- (i) The emoluments and allowances of the Governor; and other expenditure relating to his office;
- (ii) The salaries and allowances of the Speaker and Deputy Speaker of the Legislative Assembly and of Chairman and the Deputy Chairman of the Legislative Council;
- (iii) 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 services and the redemption of debt;
- (iv) The expenditure in respect of the salaries and allowances of the Judges of the High Court;
 - (v) The sums required to satisfy any judgement, decree or award of any court or arbitral tribunal;
 - (vi) Any other expenditure declared by the Constitution or by the Legislature of the State by law to be so charged.

Estimates relating to the expenditure charged upon the Consolidated Fund of the State is not submitted to the vote of the Legislature. However, the Legislature is not barred from having a discussion on any of the estimates. The estimates of expenditure proposed to be met from the Consolidated Fund of the State, are presented to the Legislative Assembly in the form of grants. The Legislative Assembly is vested with the power to approve or refuse the demands for grants or assent to them subject to reduction of the amounts demanded. No demand is to be made except on the recommendation of the Governor.

After the demands for grants are passed by the Legislative Assembly, an Appropriation Bill, which envisages the demands for grants, is presented to the Legislative Council. The Appropriation Bill provides for the appropriation out of the Consolidated Fund of the State, of all sums required to meet the expenditure charged on the Consolidated Fund of the State and the grants approved by the Assembly. Amendments, which effect the amount of expenditure charged on the Consolidated Fund of the State or other grants approved by the Assembly, are not proposed to the Appropriation Bill. Whether the amendment is admissible, is decided by the presiding officer of the House in which the Bill is pending. When an Appropriation Bill is passed by the Legislature, it is called the Appropriation Act.⁵⁸

The Legislative Assembly also enjoys the powers to:

- (i) make any grant in advance in respect of the estimated expenditure for a part of any financial year pending the completion of the procedure laid down by law;
- (ii) make a grant for meeting an unexpected demand upon the resources of the State when the demand cannot be stated with details either on account of the magnitude or indefinite character of the service;
- (iii) make an exceptional grant which does not form a part of

- the current service of any financial year;
- (iv) pass supplementary or additional grants to the grants envisaged by the Annual Financial Statement.

High Court

The Constitution of the Jammu and Kashmir State provides for a High Court of Judicature. The High Court is the highest court of judicial authority in the State. The High Court, though it is provided for by the Constitution of the State, constitutes a part of the single integrated judicial system of India and is placed directly under the Supreme Court of India. The Constitution of Jammu and Kashmir does not vest any administrative authority with the Supreme Court of India over the High Court of the State.

The High Court of the State is constituted of a Chief Justice and two or more Judges.⁵⁹ The Constitution of Jammu and Kashmir provides for the appointment of additional Judges to cope with any temporary increase in the business of the court or to clear any pending arrears of work. However, the period for which the additional Judges are appointed cannot exceed two years. The Constitution of Jammu and Kashmir also provides for the appointment of duly qualified acting Judges in case a permanent Judge is unable to perform the duties of his office.

The Chief Justice of the High Court of the State is appointed by the President of India by warrant under his hand after consultations with the Chief Justice of India and the Governor of the State. The other Judges of the High Court are appointed by the President of India, in consultation with the Chief Justice of the Supreme Court of India, the Governor of the State and the Chief Justice of the State High Court.⁶⁰ A different procedure, has, however, been followed in practice, and the judges of the High Court are appointed on the initiative of the Chief Minister of the State. Usually, the Chief Justice of the High Court sends his recommendations to the Chief Minister of the State, who consults the Governor and forwards the recommendations to the Ministry for Home Affairs of the Government of India. There is hardly any doubt about the fact that the recommendations of the Chief Justice of the State, are made on the advice of the Chief Minister. The Home Ministry consults the Chief Justice of India and thereafter, advises the President who formally makes the appointment of the Judges of the High Court. Ultimately, the decision of the appointment of the Chief Justice and the other Judges of the High Court lies with the Union Government. In 1983, the Union Government refused to confirm Justice Balau-Din Farooqi, the acting Chief

Justice of the State and appointed in his place Justice V. Khalid as the Chief Justice of the State High Court in the teeth of opposition from the Chief Minister of the State Dr Farooq Abdullah and his Government. Justice Bahau-Din Farooqi was appointed the Chief Justice of the High Court of Sikkim.

The Chief Justice and the judges of the High Court hold office till they attain the age of sixty-two years, in case they do not resign their office earlier.⁶¹ The Constitution of Jammu and Kashmir does not envisage any provisions for the removal of the judges of the High Court. The judges of the High Court of the State are liable to be removed from their office in accordance with the provisions of Article 218 of the Constitution of India, which is applicable to the State and which provides that the judges of the High Courts in the Indian States are liable to be removed according to Article 124 of the Constitution of India.⁶² Article 124 of the Constitution of India lays down the procedure for the removal of the judges of the Supreme Court of India. The judges of the High Courts in the Indian States, including the State of Jammu and Kashmir, are liable to be removed, in the manner in which the judges of the Supreme Court are liable to be removed. By virtue of Article 124 of the Constitution of India, the judges of the Supreme Court of India are liable to be removed from their office by an order of the President of India, after an address is presented to him, by each House of Parliament of India, in the same session, on grounds of proved misbehaviour or incapacity. The address is required to be passed by each House by a majority of its total membership and also by a two-thirds majority of its members present and voting. Obviously, an address presented to the President of India for the removal of a judge, can only be presented to him after the allegations of misbehaviour or incapacity are ascertained. The Parliament is empowered to prescribe by law, the procedure for the presentation of the address for the removal of the judges of the High Court. Accordingly, the judges of the High Court of Jammu and Kashmir are liable to be removed from their office by the President, on the grounds of proved misbehaviour or incapacity or an address, presented by each House of the Indian Parliament to him. The stringent procedure laid down in the Constitution of India, for the removal of judges of the Supreme Court and the judges of the High Court, is aimed to secure the judges their independence and also ensure that they are not subject to whims and caprices of the executive or the legislature both at the Centre and in the States.

The Constitution of Jammu and Kashmir envisages a number of qualifications for the appointment of the judges of the High Court.

A person is qualified for the appointment as a judge of the High Court of the State, provided:

- (i) he is a citizen of India;
- (ii) he has ten years experience as a Judicial officer in the State, or any other part of India; and
- (iii) he has a standing of ten years as an advocate of the High Court in India.

In computing the ten years period for purpose of the appointment as a judge of the High Court, the experience of an advocate is combined with the experience accumulated in the capacity of a Judicial officer.

The Chief Justice of the High Court is paid a salary of 4,000 rupees per month and the other judges draw a salary of 3,500 rupees per month. In addition to their salaries, the judges are also entitled to other allowances and a pension on their retirement. 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. After their retirement, the Judges of the High Court cannot practise in the High Court of the State, or the High Court in which they have served for more than five years, immediately before their retirement. They can practise in the Supreme Court and all other High Courts, where the limitation is not applicable.

Article 220 of the Constitution of India is applicable to the Jammu and Kashmir State and the limitations, the Constitution of India imposes upon the judges to practice after their retirement, apply to the judges of the High Court of Jammu and Kashmir also. The Constitution of India, originally placed a complete ban on the practice of the High Court Judges after their retirement. In accordance with the Seventh Amendment to the Constitution of India, the retired judges of the High Courts are entitled to practise in the Supreme Court and the High Courts in India, where they have not served for more than five years, immediately before retirement.

The provisions of the Constitution of India which deal with the transfer of the Judges of the State High Courts are applicable to the Jammu and Kashmir State with certain important modifications.⁶³ Article 222 of the Constitution of India which deals with the transfer of the Judges of the High Courts, empowers the President to transfer the judges of one High Court to another High Court after consultation with the Chief Justice of India. In its application to the Jammu and

Kashmir State, Article 222 is appended with a fresh clause, which provides that transfer of the Judges of the High Court of Jammu and Kashmir to other States in India, and the transfers of the Judges of the High Courts from the other States to Jammu and Kashmir, is required to be made in consultation with the Chief Justice of India and the Governor of Jammu and Kashmir State. The provisions that the President is required to consult the Governor of the State in case of an intended transfer to and from the High Court of the State, raises major constitutional issues. Primarily, the provisions of the Constitution do not place the President of India under any obligation to follow the counsel given to him by the Governor of the State. The constitutional requirement to consult the Chief Justice is an identical provision and does not place any obligation on the President to accept the counsel of the Chief Justice. Secondly, the Constitution of the State lays a specific limitation on the Governor of the State, that except for the powers, he exercises in regard to the appointment of the Council of Ministers and the Proclamation of Constitutional Breakdown, he is bound to act on the advice of the Council of Ministers. It is doubtful whether the Governor would, in the face of the explicit constitutional provisions, tender counsel to the President which is not based on the advice of the Council of Ministers. In fact, the experience in the State shows that the successive Governors never questioned the propriety of actions which they were advised to undertake by their governments, though some of their acts had far-reaching constitutional consequences, for the parliamentary government in the State. In actual practice the provisions of the Constitution which vest the authority with the Governor to give his counsel to the President extends the shadows of the executive influence over the judges of the High Court in the State. Perhaps the protracted controversy which followed the transfer of Justice Bahaudin Farooqi, the acting Chief Justice of the High Court of Jammu and Kashmir in 1983, to Sikkim, arose out of these constitutional anomalies.

The High Court of Jammu and Kashmir exercises jurisdiction conferred on it by the Constitution of Jammu and Kashmir as well as the Constitution of India. The jurisdiction vested in the High Court of Jammu and Kashmir by the Constitution of India pertains to the enforcement of the fundamental rights. The rest of the jurisdiction, exercised by the High Court, is vested in it by the Constitution of Jammu and Kashmir.

The jurisdiction to enforce fundamental rights is vested in the High Court of Jammu and Kashmir by Article 32 of the Constitution of India, which embodies the provisions pertaining to the jurisdiction of

the Supreme Court to issue writs and orders for the fundamental rights envisaged by the Constitution of India. Article 32 of the Constitution of India was made applicable to the Jammu and Kashmir State in 1954, when the Constitution (Application to Jammu and Kashmir) Order, 1954, was promulgated and the provisions of the Constitution of India with regard to the fundamental rights were extended to the States. In its application to Jammu and Kashmir, Article 32 of the Constitution of India is appended with an additional clause which empowers the High Court of Jammu and Kashmir to issue "to any person or authority including in appropriate cases, any government, 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 enumerated in Part III of the Constitution of India. The jurisdiction vested in the High Court of Jammu and Kashmir, is exercised concurrently with the jurisdiction which Article 32 vests in the Supreme Court of India.⁶⁴

The powers of the High Courts in the other Indian States to enforce the fundamental rights, are provided for by Article 226 of the Constitution of India. Article 226 of the Constitution of India vests powers in the High Courts of the Indian states; to issue writs and orders in the nature of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari* for the enforcement of the fundamental rights, enumerated in Part III of the Constitution of India. However, Article 226 of the Constitution of India was not rendered applicable to the State of Jammu and Kashmir in 1954, and was not made applicable to the State thereafter.

The writs of *habeas corpus*, *mandamus*, prohibition, *quo warranto* and *certiorari*, are prerogative writs and provide remedies in cases where legal redress is not adequate. The writ of *habeas corpus* requires a person, who has detained another person, to produce the detained person before the Court and justify the detention and order the release of the detained person in case valid reasons for detention are not established. A writ of *mandamus* is an order of the court by virtue of which the court orders a public authority to perform a duty or refrain from performing a duty, which the public authority is obliged to perform. The basis of the writ is that the performance or non-performance of a public authority is not allowed to effect the legal interests of a person and wherever such interests are effected redress is made available. The writ of *certiorari* is issued by the High Court to correct errors of jurisdiction or cure the abuse of jurisdiction or remedy an error of law manifest on the record on an action which is mala fide. Writ of prohibition lies against a court or a tribunal

exercising judicial or quasi judicial functions. The writ of *quo warranto* is issued to prevent a person who has wrongfully usurped an office, from continuing in the office. The writ examines the legal right of an incumbent to hold office and if the court determines that the incumbent holds office in violation of law, he is ordered to vacate his office.

The additional clause appended to Article 32 of the Constitution of India, in its application to Jammu and Kashmir, does not vest in the High Court any powers for the enforcement of legal rights other than the fundamental rights. The High Courts in the other Indian states are vested with the powers to enforce legal rights other than fundamental rights, by Article 226 of the Constitution of India. Since Article 226 is not applicable to Jammu and Kashmir the powers for the enforcement of the legal rights other than fundamental rights are vested in the High Court of Jammu and Kashmir by Section 103 of the Constitution of Jammu and Kashmir.⁶⁵

Section 103 of the State Constitution stipulates:

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*, *Mandamus*, *Prohibition*, *Quo warranto*, *Certiorari* or any of them, for any purpose other than those mentioned in Clause (2-A) of the Article 32 of the Constitution of India.

The High Court is vested with the power to issue orders and writs to provide redress against any violation of law or statute or any illegality, which causes failure of justice or injury to any person within its jurisdiction. The High Court is thus empowered to examine the validity of the various acts of the administrative officials, whether of the State Government or of any other public body and provide appropriate relief to the aggrieved party. Section 103 of the Constitution of Jammu and Kashmir confers upon the High Court "a discretion of a most extensive nature". The High Court, however, exercises the powers according to certain established principles of law. These are:

- (i) redress is made available for violation of any provision of the Constitution or a statute, in case the petitioner has suffered substantial injury;
- (ii) redress is provided against any other illegality, when such illegality has caused substantial failure of justice; and
- (iii) the petitioner has no other alternative remedy.

The powers conferred upon the High Court under Section 103 of the Constitution cannot be taken away or abridged by any law or except by the amendment of the Constitution of the State.

The Constitution of Jammu and Kashmir preserves the original and appellate jurisdiction, the High Court of Jammu and Kashmir exercised before the commencement of the Constitution in 1957. The High Court is vested with the original jurisdiction to hear cases, which are of more than twenty thousand rupees in value. The High Court exercises original jurisdiction in matters of probates of wills and testaments and letters of administration of assets of persons dying intestate. The High Court is also vested with original jurisdiction to take up for adjudication suits falling within the jurisdiction of any subordinate courts.⁶⁶

The appellate jurisdiction of the High Court extends to all cases of revision of revenue, civil and criminal matters in accordance with the provisions of the enactments in force in the State.⁶⁷ In civil cases, appeals lie to the High Court in the first instance as well as in the second instance. Appeals from the decisions of the District Judges and from the decisions of subordinate judges in case of a higher value of the case, lie direct to the High Court on point of fact as well as on point of law. Appeals also lie to the High Court from a lower appellate court, in questions of law and procedure. In criminal cases, the appellate jurisdiction of the High Court extends to the cases decided by the Sessions Court or Additional Sessions Court where the punishment exceeds imprisonment for seven years. Appeals also lie to the High Court, in criminal cases, from the decisions of the Assistant Sessions Judges and Judicial Magistrates on certain specified matters.

The High Court of the State is a Court of record and its records and proceedings are enrolled as "perpetual memorial and testimony" and are admitted to be of evidentiary value.⁶⁸ The records of the High Court are not questioned when they are produced before any court. As a court of record the High Court enjoys the power to punish for contempt. In India, it is recognised that the power to institute proceedings for contempt, is inherent in all the courts of record. The power to punish for contempt is vested explicitly in the High Court of the State by the Constitution of Jammu and Kashmir. Section 94 of the Constitution of Jammu and Kashmir stipulates:

The High Court shall be a court of Record and therefore, has all the powers of such court including the power to punish for contempt, itself or of the courts subordinate to it.

In all cases of contempt the High Court enjoys the power to deal with contempt summarily and adopt its own procedure. It is obviously expected that the procedure for the disposal of the cases of contempt is fair and the person guilty of contempt is informed of the charge levelled against him and is given a reasonable opportunity to defend himself.

The Constitution of Jammu and Kashmir confers upon the High Court of the State, the power of superintendence over all subordinate courts within its territorial jurisdiction.⁶⁹ Section 105 of the Constitution of Jammu and Kashmir, which envisages the powers of the High Court of superintendence over the subordinate courts, reproduces the provisions of Article 227 of the Constitution of India, with the exception that the power of superintendence is not extended to tribunals. The High Court has the power:

- (i) To call for return from the subordinate courts;
- (ii) to make and issue general rules and prescribe forms for regulating the practice and proceedings of the subordinate courts;
- (iii) to prescribe forms in which books, entries and accounts are kept by the officers of the subordinate courts;
- (iv) to settle the fee to be allowed to the Sheriffs and clerks and officers, attorneys, advocates, and pleaders practising in the subordinate courts;
- (v) to control the District Courts, and the subordinate courts, including the postings and promotion 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 also vested with the power to control its staff and regulate the conditions of service of such staff.⁷⁰ The Chief Justice is empowered to appoint the officers and 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 of the court, subject to laws made by the State Legislature. The approval of the Governor is required for any rules that the court may make regarding the salaries, allowances, leave and pension of its officers. All the administrative expenses of the court are charged on the Consolidated Fund of the State.

The High Court is empowered to withdraw cases from the

subordinate courts if it is satisfied that the cases involve substantial questions of law and the interpretation of the Constitution.⁷¹ The Court is vested with the power to dispose of the cases after having determined the constitutional issues involved and return them to the subordinate courts for final disposition. The Constitution empowers the High Court to interpret the Constitution and avoid 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.

Services

The provisions of the Constitution of India with regard to the services are not applicable to the State and the expression "to States" in Part XIV of the Constitution does not refer to Jammu and Kashmir. The Constitution of Jammu and Kashmir empowers the State Legislature to regulate the recruitment and the conditions of service of the personnel recruited to the public service of the State.⁷² The members of the civil service hold office during the pleasure of the Governor. The doctrine of pleasure is the legacy of the British colonial organisation in India and is a common law rule, which means that a civil servant holds office during the pleasure of the Crown. The State Constitution reproduces the provisions of the Constitution of India with regard to the doctrine of pleasure. "Except expressly provided by this Constitution, every person who is a member of a civil service of the State or holds any civil post under the State holds office during the pleasure of the Governor." The doctrine of pleasure is pure, lifeless and bad in import, and connotes that the civil servant undertakes obligations without any reciprocal responsibilities and there is hardly any remedy available to him against acts which impinge upon his interests. Under the doctrine of pleasure, the civil servant can be turned out of his service without assigning any reason and he has no remedy to claim damages for wrongful dismissal, nor is he in a position to enforce any of the conditions of his service. The Constitution of the State follows the doctrine of pleasure embodied in the Constitution of India. However, there are two limitations placed on the doctrine of pleasure:

(i) The persons employed in the civil services of the State are not liable to be removed or dismissed from their office by an authority subordinate to the authority which has appointed them; and

(ii) The persons employed in the civil service of the State, are not liable to be removed or dismissed or demoted until they are informed of the charges levelled against them; an enquiry is instituted to investigate the charges; reasonable opportunity is given to them to defend themselves and in case a penalty is imposed upon them, they are given an opportunity to appeal.

These safeguards are not available in case a public servant is dismissed or demoted on a criminal charge, or the authority empowered to dismiss or remove a public servant or demote him, is satisfied that it is not expedient to hold an inquiry for reasons, put in writing, or where the Governor is satisfied that it is not expedient to hold an inquiry, for reasons of the security of the State.

Public Service Commission

Provisions are made by the Constitution of Jammu and Kashmir for the establishment of a Public Service Commission.⁷³ The members of the Commission are appointed by the Governor of the State. The number of the members of the commission as well as the conditions of their service, is also determined by the Governor. The term of the members of Commission is fixed at five years or until a member attains the age of sixty-five years. As nearly as may be, half the number of the members of the Commission are required to be the persons who at the time of the appointment had been public servants of the Government of the State for at least ten years. To ensure impartiality 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 the Chairman is liable to be removed from his office by the Governor on the ground of misbehaviour after the High Court, on a reference made to it, by the Governor, has after an enquiry, reported that the Chairman or a member of the Commission deserves to be removed. The Governor is also empowered to remove the Chairman or any member of the Commission, if the Chairman or the member is adjudged insolvent or 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 Government of the State or the Union Government or assume profits arising out of such an agreement.

The Public Service Commission is empowered to advise the State Government on:⁷⁴

- (i) matters relating to the methods of recruitment to civil services;
- (ii) principles followed in making appointments, promotions and transfers from one service to another and the suitability of the candidates for such appointments, promotions and transfers;
- (iii) all disciplinary matters affecting the public servants including the memorials or petitions relating to such matters; and
- (iv) any other matter specifically referred to the Commission by the Governor.

The scope of the functions of the commission can be extended by the Legislature of the State.⁷⁵ The State Legislature can extend the functions of the Commission in respect of the services of the State and matters connected with the services of public institutions such as the local bodies or public corporations under the State Government. The provisions are mainly aimed to cover the public corporations and other institutions which have come to assume a wider role in the national development and employ increasingly larger number of personnel.

The Commission submits to the Governor an annual report on its work.⁷⁶ 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.

The Public Service Commission is subjected to a severe limitation and the government is empowered by the Constitution of Jammu and Kashmir 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 service of the State." Regarding such reserved appointments and posts, the government is not required to consult the Commission.⁷⁷ The Constitution has not specified the scope of the authority vested in the State government in this regard and the State government exercises wide discretion and power to fix the number of appointments and posts to be reserved and to determine the composition of the classes not adequately represented in the services of the State.

The government is also vested with the absolute discretion to make appointments to the reserved posts from among the classes not adequately represented in the services of the State without any reference to the Commission. The government is, actually, vested with unfettered authority to lay down the principles and also determine the conditions in which such inadequately represented classes are recruited to the reserved posts.⁷⁸

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74. *ibid.*, Sec. 133.

75. *ibid.*, Sec. 135.
 76. *ibid.*, Sec. 137.
 77. *ibid.*, Sec. 133 (3).
 78. **Makhan Lal Waza vs. The State of Jammu and Kashmir, 1971, ISCC 749; Triloki Nath vs. State of Jammu and Kashmir, AIR 1967 SC 1238; Lalita Shwari vs. The State of Jammu and Kashmir Writ Petition No. 66 of 1965, Supreme Court.**

CONSTITUTIONAL AMENDMENT

The procedure for the amendment of the Constitution of Jammu and Kashmir, is embodied in Part XII of the Constitution. For the purpose of an amendment, the provisions of the Constitution are classified in three separately defined categories. The categories are:¹

- (i) the provisions which are amended by two-thirds majority of the total membership of each House of the State Legislature;
- (ii) the provisions, which are amended by a majority of the total members of the Legislative Assembly with a two-thirds majority of the members of the Assembly present and voting; and
- (iii) the provisions of the Constitution which are saved from any amendment permanently.

The provision of the Constitution amended by a two-thirds majority of the total membership of the two Houses of the State Legislature are:

- (i) the Preamble of the Constitution of Jammu and Kashmir;
- (ii) the Permanent Residents of the State;
- (iii) the Directive Principles of State Policy;
- (iv) the Executive;
- (v) the State Legislature;
- (vi) the Council of Ministers;
- (vii) the High Court;
- (viii) Finance, Property and Contracts;
- (ix) the Public Services;
- (x) the Flag of the State; and
- (xi) the Official Language.

A Bill seeking to amend any of the provisions mentioned above can be introduced only in the Legislative Assembly of the State. After

the Bill is passed by the two-thirds majority of the total membership of the Assembly, it is sent to the Legislative Council for its consideration. If the Legislative Council passes the Bill by a two-thirds majority of the total membership of the House it is presented to the Governor of the State for his assent. After the Governor gives his assent to the Bill, the Constitution stands amended to the extent of the provisions of the Bill.

The provisions of the Constitution amended by the Legislative Assembly pertain to the abolition of the Legislative Council. A Bill seeking to abolish the Legislative Council is required to be introduced in the Legislative Assembly. After the Bill is passed by a simple majority of the total members of the Legislative Assembly and a two-thirds majority of the members present and voting, the Bill is presented to the Governor of the State for his assent. If the Governor gives his assent to the Bill the Legislative Council is abolished.

The Provisions of the Constitution, which are permanently exempted from amendment relate to:

- (i) the provisions of the Constitution of India applicable to the State;
- (ii) the provisions of Section 3 of the Constitution of Jammu and Kashmir which stipulate that the Jammu and Kashmir State is and shall always be an integral part of India;
- (iii) provisions of Section 5 of the Constitution which envisage the division of the powers between the Union and the Jammu and Kashmir State;
- (iv) provisions of Part XII of the Constitution which embodies the procedure for the amendment of the Constitution.

The procedure for the amendment of the Constitution vests with the State Governor, the power of ultimate veto over all Bills which seek to amend the Constitution. The Constitution stipulates:

An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in the Legislative Assembly and when the Bill is passed in each House by a majority of not less than two-thirds of the total membership of the House, it shall be presented to the Governor for his assent and upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of the Bill.

The Constitution of India provides that after a Bill seeking to

amend the Constitution is passed by both the Houses of Parliament in accordance with the procedure laid down in Article 368 of the Constitution of India and it is presented to the President for his assent, the President is bound to give his assent to the Bill which seeks to amend the Constitution. The constituent power of the Parliament to amend the Constitution is not, therefore, subject to the veto of the President. The Constitution of Jammu and Kashmir, evidently, envisages no obligations on the State Governor to give his assent to a Bill seeking to amend the Constitution after any such Bill is passed by the State Legislature in accordance with the procedure laid down for the amendment of the Constitution by Part XII of the Constitution.

The provisions of Part XII of the Constitution have a wider significance as they impose a limitation on the State Legislature to initiate or consider a Bill or an amendment which seeks to make any change in:

- (i) Section 3 of the Constitution which stipulates that Jammu and Kashmir is an integral part of the Union of India;
- (ii) Section 5 of the Constitution which stipulates that the 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;
- (iii) provisions of the Constitution of India applicable to the Jammu and Kashmir State by virtue of Article 370 as amended by the Constitution (Application to Jammu and Kashmir) Order, 1954 and the subsequent Presidential Orders.

It is clear, therefore, that the Constitution of Jammu and Kashmir does not vest in the State Legislature powers to initiate any modifications or changes in the applicability of the Constitution of India to the State under Article 370, which the Constituent Assembly of Jammu and Kashmir enjoyed. By virtue of Article 370, the President of India is empowered:²

- (i) to extend to Jammu and Kashmir the application of the provisions of the Constitution of India with the concurrence of the State Government, subject to the condition that such concurrence is approved by the Constituent Assembly of Jammu and Kashmir;
- (ii) to delegate to the Union Government any such matters in the Union List and the Concurrent list which are included in the residuary powers reserved for the State, with the concurrence

of the State government, subject to the condition that such concurrence is approved by the Constituent Assembly of Jammu and Kashmir;

- (iii) to order that Article 370 would "cease to be operative or be operative only with such exceptions and modifications and from such date as he may specify subject to the condition that any such order is issued only on the recommendations of the Constituent Assembly of the State."

Impliedly, Article 370, envisages a perpetual Constituent Assembly.

The framers of the Indian Constitution, perhaps, laboured under the impression that the temporary provisions with regard to the State would subsist only for a relatively short duration and their operation would hardly extend beyond that time, the Constituent Assembly of the State would take to frame the Constitution for the State. Perhaps they visualised that in case the temporary provisions under Article 370 were perpetuated beyond the tenure of the Constituent Assembly, the Constituent Assembly would by a resolution initiate amendment in the provisions and recommend to the Parliament of India to vest the powers of the Constituent Assembly in an instrument accredited to undertake the function. This, however, was not done.³

The Constituent Assembly of the State dissolved itself in 1957, when it framed the Constitution of Jammu and Kashmir. The Constitution of Jammu and Kashmir, stipulates in explicit terms that the Legislature of the State is not empowered to exercise any constitutive powers which the Constituent Assembly exercised in regard to the operation of Article 370 of the Constitution of India. The State legislature has, therefore, not succeeded to any of the constitutive powers the Constituent Assembly exercised, and cannot at any time initiate amendment or changes in the applicability of Article 370 or the subsequent Presidential Orders which were promulgated on the initiative of or with the approval of the Constituent Assembly. The President is obviously, left with the alternative to ask his government to move a Bill in Parliament of India to effect the required changes whenever the necessity arises.

The Constitution First Amendment

The Constitution of Jammu and Kashmir (First Amendment) Act, was enacted on 13 October 1959, and brought into force on 26th

January 1960.⁴ The First Amendment Act, effected changes in the provisions of the Constitution regarding the appointment tenure, retirement and the emoluments of the Chief Justice and the other Judges of the High Court of the State and the superintendence, direction and the control of the elections to the two Houses of the State Legislature.

The First Amendment Act modified the provision of Section 95 of the Constitution in order to incorporate in it, provisions with regard to the tenure of the Acting Judges and Additional Judges of the High Court. Section 95, as it was originally framed, did not provide for Acting Judges or the Additional Judges. Provisions for the appointment of Acting Judges and the Additional Judges were made by the First Amendment. The First Amendment omitted sub-section 2 of Section 100 of the Constitution and in its place incorporated in the Constitution a fresh section namely 100-A. Section 100-A stipulated that if by reason of any temporary increase in the business of the High Court or by reason of arrears of work, it appeared to the President of India to increase the number of Judges of the Court, he could appoint duly qualified persons the Additional Judges of the High Court for such period as he specified not exceeding two years. The President was also empowered to appoint Acting Judges, if a Judge of the High Court, other than the Chief Justice, was by reason of leave, or for any other reason, unable to perform the duties of his office. The Acting Judges were to remain in office till the permanent Judges resumed their duty. The Additional Judges as well as the Acting Judges were in any case, to hold their office till they attained the age of sixty years.⁵

The First Amendment omitted sub-section (2) of Section 98 of the Constitution and abrogated provisions which vested powers with the State Legislature to determine the allowances and the rights in respect of leave of absence and rights of pension of the Judges of the High Court.⁶ Accordingly the allowances and the rights in respect of leave of absence and rights of pension were, after the amendment, to be determined by the provisions of the Fourth Schedule of the Constitution of Kashmir.

The First Amendment also omitted sub-sections (2) and (3) of Section 99 and divested the State Legislature of the powers to present an address to the President for the removal of Judges of the High Court. The amendment was made in consequence of the application of Article 218 of the Constitution of India to the State in 1958. Article 218 lays down the procedure for the removal of the Judges of the High Courts in the Indian States. Sub-section (2) of Section 99 stipulated:

A Judge of the High Court shall not be removed from his office except by an order of the President passed after an address by each House of the legislature supported by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, has been presented to the President in the same session for such removal on the ground of proved misbehaviour or incapacity.

Sub section (3) of Section 99, empowered the State Legislature to regulate by law, the procedure for the presentation of the address to the President for the removal of the Judges of the High Court and procedure for the investigation and the location of proof of the misbehaviour or incapacity of a Judge.

The First Amendment Act repealed Section 106 of the Constitution which barred the Judges of High Court to plead or act in any Court or before any authority in the State.⁸ Section 106 was repealed in consequence to the application of Article 220 of the Constitution of India to the State which lays down the limitation on Judges of the High Court in pleading in Court or any authority in India except the Supreme Court or the High Court of other States.

The First Amendment Act replaced the Fourth Schedule by a fresh Schedule.⁹ The Fourth Schedule laid down the salaries of the Chief Justice and the other Judges of the High Court, their leave and the condition of their service. The new Schedule brought the salaries and the other terms and conditions of the services of the Chief Justice and the judges of the High Court at par with the Judges of the High Courts in the other States of India. According to the new Schedule, the salary of the Chief Justice was fixed at 4,000 rupees per month and the other judges of the High Court at 3,500 rupees per month. The rights in respect of leave of absence, allowances, pension and other conditions of service of the judges of the High Court, were to be governed by the provisions of the High Court Judges (Conditions of Service) Act, of the Government of India, 1954, and the rules made under the Act.

The amendment of the Constitution of Jammu and Kashmir effected by the First Amendment Act regarding the superintendence and the control of the elections, was undertaken to give effect to the application of the jurisdiction of the Election Commission of India to the State. The Constitution of Jammu and Kashmir vested the powers of the superintendence and control of the elections to the State Legislature, in an Election Commission which was appointed by the Sadar-i-Riyasat of Jammu and Kashmir under Section 138 of the

Constitution of Jammu and Kashmir. Section 138 stipulated:

- (i) that the superintendence, direction and control of the preparation of the electoral rolls for the conduct of elections to the State Legislature, would be vested in an Election Commissioner who was appointed by the Sadar-i-Riyasat;
- (ii) that the Sadar-i-Riyasat, could appoint one or more Deputy Election Commissioners to assist the Election Commissioner in the performance of his duties;
- (iii) that subject to the law made by the State Legislature, the conditions of service of the Election Commissioner and the Deputy Election Commissioners would be determined by the Sadar-i-Riyasat.

The provisions of Section 138 of the Constitution was repealed and substituted by a fresh section which stipulated:

The superintendence, direction and control of the preparation of electoral rolls for, and the conduct of elections to either House of the State Legislature held under this Constitution, including the appointment of the Election Tribunals for the decision of doubts and disputes arising out of; or, in connection with, such elections shall vest in the Election Commission of India.

The Constitution Second Amendment

The Second Amendment to the Constitution of Jammu and Kashmir was made, when the Constitution of Jammu and Kashmir (Second Amendment) Act of 1960, was passed in March, 1960.¹⁰ The Second Amendment Act, amended the Second Schedule of the Constitution and the allowances of the Sadar-i-Riyasat of Jammu and Kashmir. The emoluments of the Sadar-i-Riyasat were fixed at 5,500 rupees per mensem. The allowances, which the Sadar-i-Riyasat was entitled to, were fixed at the maximum of:

- (i) Sumptuary Allowance of 50,000 rupees per annum;
- (ii) Staff and Household expenses of 1,35,000 rupees per annum;
- (iii) Tour expenses of 30,000 rupees per annum; and
- (iv) Allowances for Miscellaneous expenses of 20,000 rupees per annum.

The Second Schedule also laid down that the Sadar-i-Riyasat would be entitled to a rent free official residence with an annual

allowance of 12,000 rupees for its maintenance.¹¹

The Constitution Third Amendment

The Third Amendment to the Constitution of Jammu and Kashmir was made when the Constitution of Jammu and Kashmir (Third Amendment) Act of 1961, was passed in March 1961.¹² The third amendment increased the period of reservation of seats for the Scheduled Castes in the Legislative Assembly of the State. The Constitution, as it was originally formulated, fixed the period for which the seats were reserved for the Scheduled Castes to thirteen years.

The Constitution Fourth Amendment

The Fourth Amendment to the Constitution of Jammu and Kashmir, was effected when the Constitution of Jammu and Kashmir (Fourth Amendment) Act of 1963, was passed in March, 1963.¹³ The fourth amendment modified the Fourth Schedule of the Constitution. The necessity to amend the Fourth Schedule arose out of the extension of the application of Article 222 of the Constitution of India to the Jammu and Kashmir State by the Constitution (Application to Jammu and Kashmir) Order of 1960, Article 222 of the Constitution of India provides for the transfer of the judges of the High Courts in India from one State to another State. The Fourth Amendment effected the following changes in the Constitution of Jammu and Kashmir:

- (i) In the calculation of the service of a judge transferred to Jammu and Kashmir, the service was to include such service, as the judge had put in any other High Court of India;
- (ii) In the calculation of the leave to the credit of a judge transferred to Jammu and Kashmir, the leave due to him in the High Court in the other States of India, where he had served, was to be added to his credit as the judge of the High Court of Jammu and Kashmir State.

The Constitution Fifth Amendment

The Fifth Amendment to the Constitution of Jammu and Kashmir was effected by the Constitution of Jammu and Kashmir (Fifth Amendment) Act of 1963.¹⁴ The Fifth Amendment Act was passed in October 1963. The Fifth Amendment deleted from the Constitution of Jammu and Kashmir, sub-clause 4(c) and 4(d) of Section 50, which envisaged provisions with regard to the representation of teachers in the Legislative Council of the State. Sub-clauses 4(c) and

4 (d) of Section 50, delimited a teacher's constituency for the election of a teacher's representative to the Legislative Council of the State. The clauses also stipulated that the teachers' constituency would be constituted of the Permanent Residents of the State, who were engaged in teaching for three years in educational institutions recognised by the State Government.

The Constitution Sixth Amendment

The sixth amendment to the Constitution of Jammu and Kashmir was made in April, 1965.¹⁵ The amendment introduced drastic changes in the Constitution of Jammu and Kashmir.

The amendment abolished the office of the Sadar-i-Riyasat and incorporated provisions in the Constitution of Jammu and Kashmir which provided for a Governor to head the State and the State Government. Section 2 of the Constitution was amended and a fresh sub-section: sub-section (3) was added to it after sub-section (2). Sub-section (3) stipulated:

Any reference in this Constitution to the Sadar-i-Riyasat, shall unless the context otherwise requires, be construed as references to the Governor.¹⁶

The sixth amendment amended Section 26 of the Constitution to provide:

- (i) that the Head of the Jammu and Kashmir State would be designated as the Governor; and
- (ii) the executive power of the State would be vested in the Governor and would be exercised by him either directly or through officers subordinate to him in accordance with the Constitution.¹⁷

The sixth amendment abrogated the provisions of Section 27 of the Constitution which laid down the procedure for the election of the Sadar-i-Riyasat and his recognition by the President of India.¹⁸ The provisions of Section 27 were replaced by fresh provisions which stipulated that the Governor of the State would be appointed by the President of India by warrant under his seal and signature. Changes were also made in Section 29, which enumerated the qualifications of the person who would be appointed the Governor of the State. A person was eligible to be appointed the Governor of the State if he was a citizen of India and above thirty-five years or more, of age.

Section 29 as it was originally formulated, enumerated the qualifications of the person who could be elected the Sadar-i-Riyasat of the State.

In accordance with the Sixth Amendment, provisions of Section 32, which envisaged provisions for the removal of the Sadar-i-Riyasat, were repealed.¹⁹ Section 32 provided for the removal of the Sadar-i-Riyasat by the the President of India, on an address presented to him by the Legislative Assembly after it was adopted by a majority of not less than two-thirds of the total membership of the Assembly. Provisions of Section 33 which provided for the recognition of an acting Sadar-i-Riyasat in case of death, removal or illness of the Sadar-i-Riyasat were also repealed.²⁰ Section 33 was replaced by fresh provisions which empowered the President to make arrangements for the discharge of the functions of the Governor, in contingencies which were not provided for by the Constitution.

The second major change which the sixth amendment brought about, in the Constitution of the State, was that it abolished the office of the Prime Minister. Section 35 of the Constitution was amended and it was provided that the Council of Ministers would be headed by the Chief Minister and constituted of other ministers who were appointed to their office on the advice of the Chief Minister.

The sixth amendment introduced changes in the oath of affirmation to be subscribed by the candidates seeking election to either of the two Houses of the State Legislature. Clause (a) of Section 5 of the Constitution was amended and provisions were incorporated in it which required a candidate for the elections to either of the two Houses of the State Legislature to subscribe an oath to "bear true faith and allegiance to the Constitution of the State as by law established" and to "uphold the sovereignty and integrity of India." An oath was also to be subscribed by members of the Legislative Assembly as well as the Legislative Council of the State, before entering upon their duties which affirmed that they would "bear true faith and allegiance to the Constitution of the State as by law established" and "uphold the sovereignty and integrity of India."²¹

The Sixth Amendment introduced changes in the provisions with regard to the appointment and the tenure of the Judges of the High Court. Section 95 of the Constitution was amended to provide for the appointment of the Chief Justice of the High Court by the President of India by warrant under his seal and signature after consultation with the Chief Justice of India and the Governor of the State, and the other Judges of the High Court by the President in consultation with the Chief Justice of the High Court of Jammu and Kashmir.

The amendment to Section 95 further raised the retirement age of the judges of the High Court, including the Acting Judges and the Additional Judges to sixty-two years. Provisions were added to Section 95 by virtue of which, questions arising about the age of the judges of the High Court were to be decided by the President of India in consultation with the Chief Justice of India.²²

Provisions were also included in the Constitution of the State by the Sixth Amendment, by virtue of which the Chief Justice of the High Court, could, with the previous consent of the President of India, request any retired judge of the High Court of the State or the High Court of any other State in India, to sit and act as judge of the High Court. Every such judge was entitled to allowances as the President would by order determine and exercise the jurisdiction, powers and the privileges of a judge of the High Court.

Changes were also introduced by the Sixth Amendment in the provisions of the Constitution pertaining to the public services. Section 126 was amended and two of its sub-sections, namely, sub-section (2) and sub-section (3) were substituted by fresh provisions. Article 126, in its original form, stipulated:²³

- (1) that no person who was a member of the civil services of the State or held a civil post under the State, could be dismissed or removed by an authority subordinate to that by which he was appointed;
- (2) that no civil servant or a person who held a civil post under the State could be dismissed or removed or reduced in rank until he was given reasonable opportunity of showing cause against the action proposed to be taken in regard to him.
- (3) In cases where questions arose whether it was reasonably practicable to give a civil servant opportunity of showing cause against the action proposed to be taken, the decision of the authority empowered to dismiss, remove or reduce in rank was to be deemed as final; and,
- (4) That the provisions entitling a civil servant to reasonable opportunity to show cause against any proposed action, could not be invoked by persons who were dismissed for conviction on criminal charges, or by persons in whose case it was recorded by the authority in writing that it was not reasonably practicable to give the person the opportunity of showing cause or where the Sadar-i-Riyasat was satisfied that in the interests of the security of the State, it was not expedient to give a civil servant an opportunity to show cause for an action

proposed against him.

The Sixth Amendment placed two restrictions on the prerogative of dismissal or removal:

- (1) No person, who was a member of the civil services of the State, or who held a civil post under the State could be dismissed or removed or demoted except after an inquiry in which he was informed of the charges against him and given a reasonable opportunity of being heard in respect of those charges; and
- (2) Where it was proposed, after an inquiry, to impose a penalty on a civil servant or a person, he was to be given a reasonable opportunity of making representation on the proposed penalty, on the basis of the evidence deduced during the inquiry.

The restrictions placed upon the prerogative of dismissal and demotion envisaged by the Sixth Amendment were constitutional safeguards incorporated in the Constitution for all civil servants. The provisions of the Sixth Amendment, which are in force at present are mandatory and dismissal or removal in violation of the provisions, is void and inoperative. In case of such violations the aggrieved civil servants are entitled to suitable relief from the courts. The civil servant can demand a declaration from the court that an order of dismissal or removal is void and inoperative and that he continues to remain in service from the date of the institution of the suit. The civil servant is also entitled to the arrears of his salary, withheld as a result of the proceeding or action instituted against him. The constitutional safeguards envisaged by the Sixth Amendment are subject to limitations and excepted in case of civil servants in whose case the inquiry was not reasonably practicable and in case of civil servants where the Governor is satisfied that in the interests of the State it is not expedient to institute an inquiry.

The Sixth Amendment abrogated the temporary and transitional provisions of the Constitution, which were embodied by Section 148, 149, 150, 151 and 152.²⁴

The Constitution Seventh Amendment

The Seventh Amendment in the Constitution of Jammu and Kashmir was brought about in April 1965, and followed closely the Sixth Amendment. The Seventh Amendment raised the allowances of the Governor as per a fresh schedule. The fresh schedule incorporated:

- (i) Sumptuary allowances of 50,000 rupees;
- (ii) Staff and Household allowances of 1,35,000 rupees;
- (iii) Tour expenses of 30,000 rupees; and
- (iv) Miscellaneous expenses of 20,000 rupees.

The Constitution Eighth Amendment

The Eighth Amendment to the Constitution of Jammu and Kashmir was adopted in 1967, and incorporated modifications in the provisions pertaining to the elections to the two Houses of the State Legislature. Section 138 of the Constitution vested the powers of superintendence, control and direction of the electoral rolls and the conduct of the elections including the appointment of election tribunals for the decision of doubts and disputes arising in connection with the elections in the Election Commission of India. The Eighth Amendment to the Constitution of Jammu and Kashmir was consequential to the Fifteenth Amendment to the Constitution of India, which removed from the purview of the Election Commission of India, the power to appoint election tribunals to decide disputes and doubts arising out of the elections. The Eighth Amendment removed from the purview of the Election Commission of India, the power vested in it by Section 138 of the Constitution of Jammu and Kashmir. The words "including the appointment of Election Tribunals for the decision of doubts and disputes arising out of or in connection with such election" were deleted from Section 138.²⁵

The Constitution Ninth Amendment

The Ninth Amendment to the Constitution of Jammu and Kashmir was enacted in October 1967.²⁶ The Ninth Amendment sought to save transfers and postings of district judges from the limitations embodied by Section 109 and Section 111 of the Constitution of Jammu and Kashmir. Section 109 stipulates:

- (i) that the appointments, postings and the transfers of District Judges shall be made by the Governor in consultation with the High Court of Jammu and Kashmir;
- (ii) that a person, not in the service of the State, shall be eligible to be appointed as a District Judge if he is an advocate or a pleader of not less than seven years standing and is recommended by the High Court of Jammu and Kashmir for such an appointment.

Section 111 of the Constitution stipulates:

- (i) that the control over the District Courts as well as courts subordinate to the District Courts, including the posting and promotion leave of persons belonging to the judicial service, except the District Judges, Additional District Judges, Assistant District Judges, Sessions Judges, Additional Sessions Judges and Assistant Sessions Judges, shall be vested in the High Court.

The Ninth Amendment added an additional section, namely, Section 109-A, to the Constitution after Section 109. Section 109-A, validated postings and transfers of District Judges not made in accordance with the provisions of Section 109 and Section 111. Section 109-A further validated the jurisdiction exercised by the judges, decrees, sentences and orders passed and acts or proceedings undertaken by the District Judges posted or transferred otherwise than in accordance with the provisions of Section 109 and 111 of the Constitution. Section 109-A stipulates:

- (a) no posting or transfer of a district judge made at any time before the commencement of the Constitution of Jammu and Kashmir (Ninth Amendment) Act, 1967, otherwise than in accordance with the provisions of Section 109 or Section 111, shall be deemed to be illegal or void or ever to have become illegal or void by reason only of the fact that such posting or transfer was not made in accordance with the said provisions;
- (b) no jurisdiction exercised, no judgement, decree, sentence or order, before the commencement of the Constitution of Jammu and Kashmir (Ninth Amendment) Act, 1967, or before, any person posted or transferred as a district judge in the State otherwise than in accordance with the provisions of Section 109 or 111, shall be deemed to be illegal or invalid or ever to have become illegal or invalid, by reason only of the fact that such posting or transfer was not made in accordance with the provisions of Sections 109 and 111.

The Constitution Tenth Amendment

The Tenth Amendment to the Constitution of Jammu and Kashmir was effected in October 1968, when the Constitution of Jammu and Kashmir, (Tenth Amendment) Act of 1968 was adopted.²⁷ The Tenth Amendment made changes in the Second Schedule of the Constitution, and empowered the Governor to sanction reappropriation of additions to grants of his allowances in consultation with the

Government of the State, if it was necessary.

The Constitution Eleventh Amendment

The Eleventh Amendment to the Constitution of Jammu and Kashmir was adopted in October, 1970, in anticipation of the expiry of the period of reservation of seats in the Legislative Assembly of the State for the Scheduled Castes. The Amendment extended the period of reservation of Scheduled Castes by another ten years.²⁸

The Constitution Twelfth Amendment

The Twelfth Amendment to the Constitution of Jammu and Kashmir, was enacted in August 1975.²⁹ The Twelfth Amendment introduced changes in:

- (i) the procedure laid down by Section 47(2) of the Constitution for the division of the State into territorial constituencies;
- (ii) the number of seats left vacant for the people residing in the part of the State under the occupation of Pakistan under Section 48 of the Constitution.

Section 47(2) as it was originally formulated, stipulated:

For the purpose of sub-section (1) the State shall be divided into territorial constituencies in such a manner that the ratio between the population of each constituency and the number of seats allotted to it shall, so far as practicable, be the same throughout the State.

The Twelfth Amendment substituted Section 47(2) by fresh provisions which laid down that division of the State would be undertaken by an authority, which was appointed under law by the State Legislature and in such a manner as was determined by the State Legislature. In effect, therefore, the division of the State into territorial constituencies, was taken out of the discretion of the administrative authority, and placed within the discretion and purview of the authority created by the law of the Legislature, and in accordance with the law made by the Legislature. Section 48(a) as it was originally constituted, stipulated :

Twenty-five seats in the Legislative Assembly shall remain vacant and shall not be taken into account for reckoning the total membership of the Assembly.³⁰

Section 48(a) was modified to the extent that the number of seats reserved for the people living in the territories of the State occupied by Pakistan, was reduced to twenty-four. A fresh Section, namely, Section 48-A, was added to the Constitution after Section 48. Section 48-A provides that in case the Legislative Assembly was ever dissolved before the expiry of its term and after the completion of the Census, but before the readjustment of electoral constituencies, the Governor, in case he was satisfied that the election be held without delay, could, after consulting the Election Commission of India, direct that elections be held in the State, on preceding delimitation of territorial constituencies.

The Constitution Thirteenth Amendment

Thirteenth Amendment to the Constitution of Jammu and Kashmir was also passed in August 1975.³¹ The amendment introduced changes in Clause (b) of Section 142 of the Constitution which laid down provisions regarding the election petitions. Clause (b) of Section 142, stipulated:

No election to either House of the Legislature shall be called in question except by an election petition presented to such authority and in such manner as may be provided for by or under any law made by the legislature.

The Thirteenth Amendment added a proviso to Clause (b) of Section 142 which provided that nothing could preclude a person whose nomination was rejected from preferring an appeal against the decision of the Returning Officer, to such authority as the legislature may by law provide. The proviso further added that the decision of the appellate authority would be final, subject only to the disposal of the election petition, and the decision of the appellate authority, would not be called in question in court of law.

The Constitution Fourteenth Amendment

The Fourteenth Amendment to the Constitution of Jammu and Kashmir was passed in March 1976.³² The Amendment introduced changes in the provisions of the Constitution pertaining to the resignation of the members of the Legislative Assembly. The provisions with regard to the resignation of the members of the Legislative Assembly embodied in Sub-section (2) of Section 68 of the Constitution stipulated:

If a member of a House of the Legislature resigns his seat by writing under his hand addressed to the Speaker or the Chairman, as the case may be, his seat shall thereupon become vacant.

The Sub-section (2) of Section 68 was substituted by a new clause which provided that a member of either House of the State Legislature could resign by writing under his hand addressed to the Chairman of the Legislative Council or the Speaker of the Legislative Assembly. If the resignation was accepted, the member was deemed to have resigned from the membership of the House to which he belonged. In case, however, information was received by the Chairman or the Speaker, or they came to know, that the resignation had not been voluntarily tendered, or it was not genuine, the resignation was not to be accepted by them.

The Constitution Fifteenth Amendment

The Fifteenth Amendment introduced changes in the provisions of the Constitution of Jammu and Kashmir pertaining to the power of the Governor to promulgate Ordinances.³³ The Fifteenth Amendment was adopted in March 1976. The powers of the Governor to promulgate Ordinances are embodied in Section 91 of the Constitution. Section 91 empowers the Governor to promulgate Ordinances during the recess of the State Legislature, if he is satisfied that circumstances exist which render it necessary for him to take immediate action. The power of the Governor to promulgate Ordinances extends to the matters with respect to which the State Legislature has the competence to legislate. All Ordinances promulgated by the Governor are required to be laid before the two Houses of the Legislature, and cease to operate at the expiry of six weeks from the re-assembly of the legislature, or earlier in case the Legislature by a resolution disapprove them or the Governor withdraws them. The Fifteenth Amendment added a proviso to sub-section (2) of Section 91, which stipulates:

Notwithstanding anything in this Constitution the satisfaction of the Governor mentioned in Sub-section (1) shall be final and conclusive and shall not be questioned in a court and on any ground.

The Fifteenth Amendment, therefore, provides that the decision to promulgate an Ordinance is not a justiciable matter which the Courts can be called upon to determine. The Constitution of India does not incorporate any such explicit provisions as the Fifteenth Amendment

to the Constitution of Jammu and Kashmir envisages.³⁴ The inclusion of explicit provisions in the Constitution of Jammu and Kashmir, which render the satisfaction of the Governor into a subjective act, raises problems of crucial issue. The Governor's power to promulgate Ordinances, is subject to the principle that the Governor exercises his power on the aid and advice of the Council of Ministers. The express stipulations of the Fifteenth Amendment to the Constitution of Jammu and Kashmir, however, leaves out enough scope for the Governor, to assume powers and promulgate Ordinances in his own discretion.

The Constitution Sixteenth Amendment

The Sixteenth Amendment to the Constitution of Jammu and Kashmir was undertaken in consequence of the Forty-second Amendment to the Constitution of India.³⁵ The Forty-second Amendment to the Constitution of India was adopted in 1976, during the Emergency. Among the other changes the Forty-second Amendment envisaged, the tenure of the House of the People and the Legislative Assemblies of the States, was enhanced to six years. The Sixteenth Amendment to the Constitution of Jammu and Kashmir was enacted to incorporate these changes in the tenure of the Legislative Assembly of the State. The Sixteenth Amendment modified Section 52 of the Constitution of Jammu and Kashmir and extended the term of the Legislative Assembly to six years. The Amendment Act extended the term of the sitting Legislative Assembly as well. A fresh sub-section was added to Section 52, which stipulates:

The amendment made by Sub-section (1) of Section 52 shall apply also to the Legislative Assembly in existence on the date of coming into force of this Act without prejudice to the power of the State Legislature with respect to the extension of the duration of Legislative Assembly under the provisions of the Sub-section.³⁶

The Constitution Seventeenth Amendment

The Seventeenth Amendment to the Constitution of Jammu and Kashmir was passed in September 1979.³¹ The Amendment modified sub-section (2) of Section 49 with the effect that the period for which the seats in the Legislative Assembly for the Scheduled Castes were reserved, was extended to thirty-three years. Section 49 which embodies the provisions for reservation of the seats for the Scheduled Castes, as it was originally envisaged, reserved the seats for Scheduled

Castes for only five years. The First Amendment to the Constitution of Jammu and Kashmir increased the period of reservation to thirteen years and the Eleventh Amendment increased the period of reservation to twenty-three years.

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