



All Laws are not applicable to Jammu & Kashmir: An analysis

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Abstract:

An attempt is made in this paper to analyze the special status to Jammu & Kashmir. State of Jammu and Kashmir came into being as a single political entity in 1846 under the treaty of Amritsar. In 1949 the state Prime Minister Sheikh Abdullah also treated these terms as sacrosanct. But the government of India seemed to take a different view, moving Article-306A (present Article-370) which gave a special status to the state. This paper concluded that the framers of the Indian constitution through their zeal and untiring efforts worked out a constitution of India comprising 395 Articles and Nine Schedules. The working of the constitution for the past 65 years has shown that it is an excellent piece of draftsmanship which has enabled India to steer its way clear of all obstacles and hindrances which it had to face during the period of independence.

Key words: Special status, constitution, Article 370, Constituent Assembly

Introduction

The state of Jammu and Kashmir came into being as a single political entity in 1846 under what is called the treaty of Amritsar. The British government vide this treaty concluded on 16th may of that year, transferred and made over, "forever in independent possession to Maharaja Gulab Singh and the heir male of his body all hilly or mountainous country with its dependencies situated to the eastward of the river Indus and westward of the river Ravi."

In consideration of this transfer Gulab Singh paid to the British government the sum of seventy-five lacs of rupees while Jammu and Ladakh were already being ruled by Gulab Singh, the valley of Kashmir which the Lahore

Durbar had sold to the British government was transferred by the latter to the Dogra ruler who acquired it after stiff local resistance. The boundaries of the new state were further extended by its rulers through a number of military expeditions, of course, with the concurrence of the British government, Ranbir Singh son of Gulab Singh added Gilgit in life time of his father to his dominion. He subdued Yasin in 1863 and Dard valley in 1865. Later during the rule of Maharaja Pratap Singh, grandson of Gulab Singh, his forces defeated the rulers of chitral in 1891 and of Hunza and Nagar in 1895. Who accepted the suzerainty of the Dogra Durbar.

While the Treaty transferred the state to Gulab Singh " in



independent possession" it unambiguously specified British supremacy over his rule. According to Article -4 of the Treaty of Amritsar Maharaja did not change the limit of his territories without concurrence of the British government. He undertook to refer to the arbitration of the British government any dispute in question that may arise between himself and the government of Lahore or any other neighboring state and to abide by the decision of the British government.

According to Article-6, Maharaja engaged for himself and heirs to join with the whole of his military force, the British troops when employed within the hills or in the territories adjoining his possessions. He further engaged in Article-7 never to take or retain in his service by British subject, not the subject of any European or American state with the consent of the British government. Under Article-9 the British government undertook "the responsibility of protecting the territories of Maharaja Gulab Singh from external enemies.

Finally and more specifically according to Article-10 Maharaja Gulab Singh acknowledged the supremacy of the British Government and will in token of such supremacy present annually to British Government, one horse, twelve perfect shawl goats and three pairs of Kashmiri shawls.

About Article- 370:

The Maharaja of the state zealously guarded the terms of the

instrument and believed that he had even a right to withdraw it. After his abdication in 1949 the state Prime Minister Sheikh Abdullah also treated these terms as sacrosanct. But the government of India seemed to take a different view. Moving Article-306A (present Article-370) which gave a special status to the state. N.Gopaldaswamy Ayyangar, a member of the Drafting committee told the constituent Assembly that, "Instrument of Accession will be a thing of the past in the new constitution." He said "In case of practically all states other than the state of Jammu and Kashmir their constitutions also have been embodied in the constitution for the whole of India." Describing the chequered history of the state he observed, "It is the hope of everybody here that in due course even Jammu and Kashmir will become ripe for the same sort of integration as has taken place in the case of other states.

On the question of residuary sovereignty, the union powers committee of the constituent assembly had vested it with the centre only in the case of former British Indian provinces while in the case of princely states it vested with them. While submitting the report of the committee Gopaldaswamy Ayyangar expressed the hope on 21st August 1947, when the status of many states had yet to be settled that, "in due course the Indian states will approximate to provinces and the distinctions that now exist will find themselves removed by common consent."



Likewise, it was hoped that distinction between Jammu and Kashmir and other states would in due course be removed. So a "transitional and temporary" provision of Article-370 was incorporated in the constitution of India. To quote Ayyanger again, "when the constituent Assembly of the state has met and taken its decision both on the constitution of the state and on the range of federal jurisdiction over the state. The president may on the recommendation of that constituent Assembly, issue an order that Article-370 shall cease to be operative or shall be operative only subject to such exceptions and modifications as may be specified by him.

Article-370 limits the power of parliament to make laws for Jammu and Kashmir to such of the matters as are enumerated in the union List and concurrent list, which the president in consultation with the government of the state, declares to be corresponding with the matters specified in the Instrument of accession governing the accession of the state to the union of India, and to such other matters as the said list as the president may with the concurrence of the government of the state specify. The article in no way affects the state's status as a unit of the Republic of India. For Article-1 of the constitution which defines the territory of India was made applicable to the state under Article-370 and included its territory.

No provision of the Indian constitution has been a subject of such heated controversy, within the state and

the country as its Article-370. The passions aroused for and against it were the major cause of disrupting the emotional unity of the state and the process of Indian federalization therein. This highly emotive issue of Kashmir politics figured as late as in the Assembly Election campaign of 1977 when the National Conference leader Abdullah threatened secession of the state from India if there was any move to abrogate the controversial Article. Indiscreet references to its abrogation by some erstwhile Jana Sangh leader despite later disclaimers by some senior Janata leaders are generally believed to have provoked the electorate in the valley to swing in favour of the conference so massively.

At the time of the opinion survey, for the present study (1975-76) an overwhelming number of Muslim respondents as large as 95% favoured a special status for the state under Article-370. The major reason cited by most of them that to support their behalf was to honour the pledge given by the Indian leaders to the people of the state. The opinion in the state gradually tended to reconcile to the constitution of the Article, but at the time of the survey it was still opposed by as many as 57% of the Hindu respondents. Finally when the Janata government at the centre of which the erstwhile Jana Sangh which had spearheaded the campaign against the Article was a constituent part supported the continuation of the Article, the Hindu opposition to it became muted.



In the past, provisions of the Indian constitution and laws passed by parliament relating to matters specified in the Instrument of accession were applied to the state in consultation with the state government and relating to other matters with its concurrence. In fact original objective of Article-370 was stated to enable application of Indian constitution to the state in the light of its constitution and the sphere of union jurisdiction over it determined by the state constituent assembly that was to be setup.

The Article incorporated the decision taken at a meeting between the representatives of the state government and the government of India in May 1949. The broad particulars agreed upon by the two sides stipulated the following:--

- (1) The constitution of the state would be framed by the constituent assembly representing all the people of the state.
- (2) The future of the dynastic rule would be determined by state constituent Assembly.
- (3) Division of powers between the government of India and the state government would be covered under the provisions of the instrument of accession.
- (4) Constituent Assembly of the state would be empowered to determine other powers to be transferred to government of India.

- (5) Provisions with regard to citizenship, Fundamental rights and Directive principles of state policy, envisaged by the constitution of India would be uniformly applicable to this state. And
- (6) The operation of administrative control of the state armies would be taken over by the government of India.

When the constitution of India was promulgated on 26th January 1950, the president simultaneously issued an order under article-370 with the consultation of the government of Jammu and Kashmir, which defined the jurisdiction of the union parliament and the provisions of the constitution applicable to the state. While parts of the constitution relating to subjects like Defence, external Affairs, Communications and Foreign trade were fully applied to the state, other subjects like commerce, Audit, Judiciary, election and Finance were applied with modifications. Provisions of the constitution regarding Fundamental Rights and Directive Principles were specifically not applied to the state.

The constituent Assembly of the state was setup under a proclamation issued by Karan Singh who was acting as the Regent after the abdication of Maharaja Hari Singh on 1st May 1951, he ordered:-- "The constituent Assembly consisting of representatives of the people, elected on the basis of adult franchise shall be constituted forthwith for the purpose of framing



constitution of Jammu And Kashmir State.”

Application of Indian Constitution:-

After the governmental change over in the state its Assembly resumed the task of constitution making on the basis of its interim recommendations, the president of India proclaimed on 14th May 1954 the constitution (Application to Jammu and Kashmir) order 1954 which defined the jurisdiction of the Indian constitution over the state under article-370. The order broadly implemented the provisions of the Delhi Agreement and inter alia included the following:

(1) Provisions of the constitution of India regarding citizenship were extended to the state subject to the condition that the permanent residents of the state who had migrated to the territory now under the occupation of Pakistan on return to state for settlement were reserved the right to acquire Indian citizenship on “permanent return” permit issued to them by and under the authority of law made by the legislature of the state. The state legislature also reserved the right to define the “permanent residents” and confer on them special rights and privileges or impose restrictions on any other persons in regard to implementation and settlement in the state and right to scholarship and other forms of aids provided by the state government.

(2) Provisions of the constitution of India regarding fundamental rights were extended to the state subject to such restrictions as the state legislature deemed necessary. Besides no law with respect to preventive detention made by the legislature of the state before or after the commencement of the constitution (Application to Jammu and Kashmir) order shall get nullified on the ground that it was inconsistent with the constitutional provisions regarding fundamental rights for a period of five years.

(3) The constitution of India with respect to the emergency powers of the president of India were made applicable to the state with the exception that no proclamation of Emergency be made on the ground of internal disturbances or danger and have effect in relation to the J&K state without the concurrence of the state.

(4) The right to make special provision with regard to the agrarian and economic policy in respect of socially backward classes were reserved for the state legislature. The provisions of the Indian constitution pertaining to its territories are applied to the state with the exception that power of parliament to increase or diminish the area of the state or to alter its name were restricted to the extent that the consent of the state was necessary before doing so.



(5) The provision of the constitution of India regarding official languages were extended to the state for the following purposes :--

- (a) Official language of the Union.
- (b) Official language for communication between the state government and other states or between the state or union.
- (c) Language of the proceedings of the Supreme Court.

(6) The provisions of the constitution of India in its application to the state included the following exceptions:

- (a). The representatives of the state for the House of the people were to be appointed by the president on the recommendation of the state legislature unlike other states where they were elected.
- (b). Power of parliament to extend the appellate jurisdiction of the Supreme Court was limited to the extent it was requested by the state legislature, the Supreme Court was not vested with power to issue directions, orders and writs for purposes not pertaining to the enforcement of the fundamental rights.
- (c). The jurisdiction of the auditor and comptroller general and election commissioner were not extended to the state.

The presidential order of 1954 was generally received with a sense of relief in parliament and political circles of India. Even Jana Sangh which had

campaigns against the special status of the state welcomed it for making "a distinct advance in the existing position" and as a step advanced towards "determination of the relationship of the state with the central government." Its president Pandit Mauli Chander Sharma criticized the order for conceding to the state the right "to discriminate against the citizens of the rest of India in the matter of entry, residence, employment and acquisition of immovable property in the state." He also took exception to the right given to the state legislature to permit and regularize the entry of those who had left the state and gone over to Pakistan.

The newly set-up democratic socialist party, a break away group of Jammu National conference which later merged with the Praja socialist party, condemned the presidential order for "restrictions on civil liberties, limited jurisdiction of Supreme court, elections of the states representatives to parliament as well as of Sadar-i-Riyasat through majority decision of the Kashmir constituent assembly and not by the people's direct vote. In a detailed note on the subject released on 25th September 1956, chairman of the state unit of the PSP Om Prakash Saraf observed:---"the presidential order does neither go beyond nor falls short of the Delhi Agreement in any significant sense. For this alone Bakshi Ghulam Mohammad deserves neither more credit nor more blame than did his predecessor." He added, " The so called autonomy does not offer any right to the



people of Kashmir but simply adds to the repressive power of the state government and indirectly to the executive of the union government, PSP leader opposed denial of basic freedoms to the autonomous union institutions over the state:

The order provoked a strong protest from Pakistan who challenged India's right to issue it. Though presidential order of 1954 did not radically alter centre state constitutional relations as envisaged in Delhi Agreement, it was a forerunner of the process of further constitutional integration of the state with the union. Twenty-eight constitution (Application to Jammu and Kashmir) orders were issued by the president since 1954 up to 1977 to amend his order of 1954, of course on the recommendation of the state assembly. Each order extended more provisions of the Indian constitution to the state. Parliament also extended 262 central laws to the state up to 1973 in concurrence with the state government. All these measures for application of the Indian constitution and central laws to the state were hailed by the central and the state governments as steps towards further integration of the state with the country.

Scope of article-370: The Constitution of India:

This article was included in the constitution as a special provision in view to the problems arising in respect of the state of Jammu and Kashmir and also the fact that government of India

had given their assurance to the people of the state that their political future would be finally determined by themselves. The policy of the constitution which appears from this article is that the constitution was framed for the entire union of India but the provisions of the constitution should not apply to the territories of the state of Jammu and Kashmir until and unless the president made an order that they shall apply.

The effect of the article was to give jurisdiction to the union parliament to make laws for the state on matters specified either in the instrument of accession or by later additions made with the concurrence of the state government. It is no way altered the basis of relationship between the state and the union government and left the state to be governed by its own laws and constitution in the residuary field. This article was inserted as a temporary provision until the constituent assembly of the state met and decided the political future of the state. The president was empowered by the article itself to decide at the appropriate moment whether the article should be abrogated or be retained subject to exceptions and modification. Now the constituent Assembly of the state has decided that Jammu and Kashmir is and shall be an integral part of the "Union of India". and also law pass by parliament not applicable to J & K fully.

Temporary provisions with respect to the state of Jammu and Kashmir: Notwithstanding anything in this



constitution:--1st (a). The provision of article-238 shall not apply in relation to the state of Jammu and Kashmir , (b) The power of parliament to make laws for the said state shall be limited to those matters in the union list and the concurrent list which in consultation with the government of the state, are declared by the president to correspond to matters specified in the Instrument of Accession governing the accession of the state to the Dominion of India as the matters with respect to which the Dominion legislature may make laws for that state and; such other matters in the said lists as, with the concurrence of the government of the state, the president may by order specify.

For the purposes of this article, the government of the state means the person for the time being recognized by the president as the Maharaja of Jammu and Kashmir acting on the advice of the council of Ministers for the time being in office under the Maharaja's proclamation dated the fifth day of March,1948. The provisions of article-1 and of this article shall apply in relation to the state. Such of the other provisions of this constitution shall apply in relation to that state subject to such exceptions and modifications as the president may by order specify; Provided that no such order which relates to the matters specified in the Instrument of Accession of the state referred to in Paragraph (I) of sub-clause (b) shall be issued except in consultation with the government of the state; Provided further that no such order

which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that government.

If the concurrence of the government of the state referred to in Paragraph (II) of sub-clause (b) of clause-1 or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the constitution of the state is convened, it shall be placed before such Assembly for such decision as it may take thereon. Notwithstanding anything in the foregoing provisions of this article, the president may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the constituent Assembly of the state referred to in clause (2) shall be necessary before the president issues such a notification.

(1). In exercise of the powers conferred by this article the president, on the recommendation of the constituent assembly of the state of Jammu and Kashmir, declared that as from the 17th day of November, 1952, the said article-370 shall be operative with the modification that for the Explanation in clause(1) thereof the following explanation is substituted namely: For the purpose of this article the government of the state means the person for the time being recognized by the president on the recommendation of



the legislative Assembly of the state as the Sadar-i-Rayasat or governor of Jammu and Kashmir, acting on the advice of the council of Ministers of the state for the time being in office.

(2). The constitution (Application to Jammu and Kashmir) order 1954 (C.O.-48) as amended from time to time.

Operation of article 370:

The president acting under Article-370 promulgated the constitution (Application to Jammu and Kashmir) order, 1950. This order was replaced by the constitution (Application to Jammu and Kashmir) order, 1954. This order has been amended and modified by the president from time to time, regulating the constitutional status of the state. As a result, several provision of the Indian constitution has been extended to the state of Jammu and Kashmir.

The constitutional position of the state under the constitution (Application to Jammu and Kashmir) order, 1954 may be stated as follows:

- (a) The state of Jammu and Kashmir shall continue to be governed under the constitution of the state which came into force on January 26th, 1957.
- (b) The High court of the state shall have all powers and jurisdiction as enjoyed by the other High courts in India except that it cannot issue a writ for "any other purpose".
- (c) The jurisdiction of the Supreme Court extends to that state (except Article-135 and 139).

- (d) The parliament can legislate for the state with respect to all Entries in the union list (Excluding – 8,9,34,60,79,&97) and all Entry in the concurrent List(except—Entries-2,3,5 to 10, 12 to15,17,20,21,27,28,29,31,32,37,38,40,&44).
- (e) A proclamation of Emergency under Article-352(1) cannot have any effect in relation to the state unless it has been made at the request or with the concurrence of the state government.
- (f) The provision for imposing the president's rule under Article-356 applies to the state.
- (g) No proclamation can be made under article-360 with respect to the state.
- (h) The executive power of the union extends to the state, in respect to matters with respect to which parliament has power to make laws. The state shall exercise its executive power so as to ensure compliance with the laws made by parliament and as not to impede or prejudice the exercise of the executive power of the union if required.
- (i) Provisions relating to the freedom of trade, commerce and intercourse services and citizenship apply to the state.
- (j) Provisions relating to elections apply to the state. The election commission has jurisdiction over elections held in the state under its constitution.



- (k) Provisions of the constitution relating to official Language apply to the state.
- (l) The Directive principles of state policy do not apply to the state.
- (m) An amendment of the constitution enacted under Article-368 shall not apply to state until applied by a presidential order made under Article-370(1). The Fundamental Rights apply to the state with slight modifications

Conclusion:

Constitutional relations of Jammu And Kashmir State with the centre have been a good measure for the success of the process of India federalization. The constitutional status of the state was almost similar to that of 544 princely states that acceded to the Indian union after independence of the country in 1947. But political compulsions created divergent expectations about the future of this status among people belonging to different regions and communities of the state. The framers of the Indian constitution through their zeal and

untiring efforts worked out a constitution of India comprising 395 Articles and Nine Schedules. The working of the constitution for the past 65 years has shown that it is an excellent piece of draftsmanship which has enabled India to steer its way clear of all obstacles and hindrances which it had to face during the period of independence.

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