

CHAPTER XVII

CONSTITUTIONAL POSITION OF JAMMU AND KASHMIR

SYNOPSIS

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A. ART. 370 OF THE CONSTITUTION

Jammu and Kashmir is a constituent State of the Indian Union, but its constitutional position, and its relation with the Central Government, somewhat differ from that of the other States.

The instrument of accession signed by the Ruler of Jammu and Kashmir was accepted by the Governor-General of India on 27-10-1947. Under this instrument, only three subjects—external affairs, defence and communications—were surrendered by the State to the Dominion.

The two characteristic features of the special relationship are:

- (1) the State has a much greater measure of autonomy and power than enjoyed by the other States; and
- (2) the Centre's jurisdiction within the State is more limited than what it has with respect to the other States.

Due to these special features not all the provisions of the Indian Constitution apply to the State; some of the provisions apply, some do not apply at all, while others apply in a modified form.

The constitutional position of the State has not remained static since it became a constituent unit of the Indian Union. It has been growing with time towards a closer affinity of the State with the Indian Union,¹ and more and more provisions of the Constitution have been applied to it in course of time.

1. See, JAGOTA, Development of Constitutional Relations between Jammu and Kashmir and India : 1950-1960, 2 *JILI*, 519 (1960); A.S. ANAND, THE CONSTITUTION OF JAMMU & KASHMIR, (III Ed., 1998).
Also, *Md. Maqbool v. State of J.K.*, AIR 1972 SC 963 : (1972) 1 SCC 536.

In 1950, when the Indian Constitution was on the anvil, the future picture of the relationship between India and the State was not very clear due to many complications existing at the time. Therefore, the Constitution contains Art. 370 which enables the constitutional position of the State *vis-a-vis* the Indian Union to be defined from time to time without much difficulty.²

Art. 370 makes “temporary provisions” with respect to the State. Art. 370 clearly recognises the special position of the State of Jammu and Kashmir. Art. 370 makes Art. 1 of the Constitution which defines the territory of the Union, and Art. 370 itself, applicable to the State at once.

Art. 370(1)(b) limits the power of Parliament to make laws for the State to the following:—

(i) Those matters in the Union List³ and the Concurrent List,⁴ as correspond to the subjects specified in the State’s Instrument of Accession.

The elaboration of these subjects in terms of the entries in the two Lists is to be done by the President by order in consultation with the State Government.

In the Instrument of Accession three major heads have been mentioned, *viz.*, defence, foreign affairs and communications. Each of these broad heads has a number of items which are also listed in the Instrument.

Besides the three major heads, a number of ancillary matters have also been mentioned in the Instrument of Accession, *e.g.*, election of the President. It was necessary to identify those items in the Union and Concurrent Lists and this task was left to the President to be performed by him in consultation with the State Government.

(ii) Such other subjects in the Union or Concurrent Lists as the President may by order specify with the concurrence of the State Government.

This clause means that subjects other than those mentioned in the Instrument of Accession [as envisaged in (i) above] can be brought within the purview of Parliament. But while in (i) above, only *consultation* with the State Government is required, in (ii), the *concurrence* of the State Government has been stipulated.

Art. 370(1)(d) lays down that other provisions of the Constitution, besides the above, can be applied to the State with or without *modifications* by order of the President. Such an Order is not to be issued by the President—

(1) without consulting the State Government if matters to be specified in the Order relate to those mentioned in the Instrument of Accession;

(2) without the concurrence of the State Government if the matters to be specified in the Order relate to matters other than those mentioned in the Instrument.

Art. 370(2) further provided that if the State Government gave its concurrence, as mentioned above, before the convening of the State Constituent Assembly, “it shall be placed before such Assembly for such decision as it may take on”. As the Constituent Assembly exists no more, Art. 370(2) has exhausted itself.

2. For comments on Art. 370, see, *S.M.S. Naqishbandi v. ITO, Salary Circle*, AIR 1971 J & K 120.

3. *Supra*, Ch. X, Sec. D.

4. *Supra*, Ch. X, Sec. F.

In a way, Art. 370 empowers the President to define the constitutional relationship of the State in terms of the provisions of the Indian Constitution, subject to the stipulation that he can do so with reference to the matters in the Instrument of Accession in *consultation* with, and with reference to other matters with the concurrence of, the State Government.

The word ‘modification’ in Art. 370 is to be given the widest amplitude. Thus, the President has power to vary, amend or modify a constitutional provision, in any way he deems necessary, while applying it to the State. The power to ‘modify’ is co-extensive with the power to amend and is not confined to minor alterations only.

Art. 370 is a special provision for amending the Constitution in its application to the State of Jammu and Kashmir. Art. 368⁵ does not curtail the power of the President under Art. 370. Even a radical alteration can be made in a constitutional provision in its application to the State.

The Supreme Court has refused to interpret the word ‘modification’ as used in Art. 370(1) in any “narrow or pedantic sense”. The Supreme Court has observed on this point:⁶

“We are therefore of opinion that in the context of the Constitution we must give the widest effect to the meaning of the word “modification” used in Art. 370(1) and in that sense it includes an amendment. There is no reason to limit the word “modifications” as used in Art. 370(1) only to such modifications as do not make any “radical transformation”.

Further, Art. 370 authorises the President to modify a constitutional provision not only when it is applied to the State for the first time, but even subsequently after it has been applied.⁷

An amendment made to the Constitution does not automatically apply to the State of Jammu and Kashmir. It can apply only with the concurrence of the State Government, and when the President issues an order under Art. 370.⁸

Thus, Art. 370 empowers the President to adapt the constitutional provisions applied or to be applied to the State of Jammu and Kashmir in the light of the situation existing in the State from time to time. This is a flexible arrangement under which the constitutional position of the State can be defined from time to time.

B. THE CONSTITUTION (APPLICATION TO JAMMU & KASHMIR) ORDER, 1954

Under Art. 370(1)(b)(ii), the Constitution (Application to Jammu and Kashmir) Order, 1950, was promulgated by the President of India in consultation with the Government of Jammu and Kashmir. The Order specified the matters with respect to which the Union Parliament was to be competent to make laws for the State.

The Order of 1950 was then replaced by an Order with the same title in 1954. This is the basic Order which, as amended and modified from time to time, regulates the constitutional status of the State.

5. For discussion on Art. 368, see, *infra*, Ch. XLI.

6. *Puranlal Lakhanpal v. Union of India*, AIR 1961 SC 1519, 1521 : (1962) 1 SCR 688.

7. *Sampat Prakash v. State of Jammu & Kashmir*, AIR 1970 SC 1118 : (1969) 1 SCC 562.

8. *Ibid.*, at 1124.

Today not only those provisions of the Indian Constitution which pertain to the matters mentioned in the Instrument of Accession, but many other provisions relating to several matters not specified in the Instrument, apply to the State. Briefly, the essentials of the constitutional position of the State are as follows.

(a) Provisions of the Constitution relating to the Central Government apply to the State with a few modifications. The State has six members in the Lok Sabha elected directly by the people of the State.

(b) The jurisdiction of the Supreme Court extends over the State except for Arts. 135⁹ and 139.¹⁰

(c) The State is governed under a Constitution of its own drafted by its Constituent Assembly. This Constitution came into force on January 26, 1957, and it is patterned closely on the model of the Indian Constitution. Therefore, the provisions of the Indian Constitution relating to the State Governments (Legislature, Executive and High Court) do not apply to the State except for the following provisions concerning the High Court Judges:

- (i) The Judges of the State High Court can be removed from office in the same manner as the Judges of any other High Court.¹¹
- (ii) Restriction on retired High Court Judges to plead and act before any Court or authority except the Supreme Court and other High Courts apply to the Judges of the State High Court.¹²
- (iii) A Judge may be transferred to or from the State High Court after consultation with the Governor.¹³
- (iv) The State High Court has been given power along with the Supreme Court of India to issue writs for the enforcement of the Fundamental Rights.¹⁴ This power is in *pari materia* with the power of other High Courts under Art. 226 with this difference, however, that the State High Court can issue writs only for the enforcement of the Fundamental Rights and not 'for any other purpose.'¹⁵

(d) In the field of the Centre-State relationship, the legislative power of Parliament *vis-a-vis* the State extends to the matters specified in List I excluding entries 8, 9, 34, 60, 79, 97.¹⁶ In a few other entries, such as (3, 67, 81), some modifications have been made in their application to the State.

Parliament has no residuary power *vis-a-vis* the State.¹⁷

9. Art. 135 refers to the Federal Court : *supra*, Ch. IV, Sec. I(b).

10. Art. 139 refers to conferment to writ jurisdiction on the Supreme Court in addition to Art. 32 : *supra*, Ch. IV, Sec. I(i).

11. *Supra*, Ch. VIII, Sec. A

12. *Ibid.*

13. *Ibid.*

14. Art. 32(2A).

15. *Supra*, Ch. VIII.

16. *Supra*, Ch. X, Sec. D.

17. *Supra*, Ch. X, Sec. I.

Originally List III was also made not applicable to the State under the Order of 1954.¹⁸ But, subsequently, through amendments of the 1954 order,¹⁹ the Concurrent List has been made applicable to the State to some extent.²⁰

Parliament can legislate for the State in the Concurrent List except for entries 2, 3, 5 to 10, 12 to 15, 17, 20, 21, 27, 28, 29, 31, 32, 37, 38, 40, 44. In entries 1, 30 and 45, slight modifications have been effected.²¹

The State List has been dropped in the State.²²

It means that Parliament can legislate with reference to the entries in List I and List III (except those excluded) and all the rest of the legislative power vests in the State Legislature.

Parliament's power to legislate to enforce a treaty is subject to the limitation that no decision affecting the disposition of the State is to be made by the Government of India without the consent of the State Government.

(e) A Proclamation of Emergency under Art. 352(1) cannot have any effect in relation to the State (except in regard to the distribution of revenue) unless it has been made at the request or with the concurrence of the State Government.²³

A Proclamation can be made by the President under Art. 356 if he is satisfied that the Government of the State cannot be carried on in accordance with the provisions of the Constitution of India, or the Constitution of the State. When a Proclamation under Art. 356 is in operation, Parliament becomes entitled to legislate for matters not enumerated in the Union List.²⁴

No Proclamation under Art. 360 applies to the State.²⁵

(f) The power of Parliament to re-organise the boundaries, etc., of the State is conditioned by the restriction that no Bill for such a purpose is to be introduced in Parliament without the consent of the State Legislature.²⁶

(g) The executive power of the Centre *vis-a-vis* the State extends to the matters within the Parliamentary legislative field.²⁷

The State is to 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.

(h) Art. 365 does not apply to the State.²⁸

(i) The State is also bound to acquire or requisition property for the Union if required.

(j) Within the ambit of its administrative power, Centre can do all those things in the State which it can do in relation to the other States.

18. *Supra*.

19. The Constitution (Application to Jammu and Kashmir) Amendment Order, 1963; The Constitution (Application to Jammu and Kashmir) Amendment Orders issued subsequently from time to time.

For the text of these Orders, see, App. IX to ANAND, A.S., THE CONSTITUTION OF J & K, 472-508.

20. ANAND, A.S., THE CONSTITUTION OF J&K 145.

21. *Supra*, Ch. X, Sec. F.

22. *Supra*, Ch. X, Sec. E.

23. *Supra*, Ch. XIII.

24. *Supra*, Ch. X, Sec. D.

25. *Supra*, Ch. XIII.

26. *Supra*, Ch. V.

27. *Supra*, Ch. XII, Sec. A.

28. *Supra*, Ch. XII., Sec. E.

(k) As regards the sharing of revenue between the Centre and the State, the general scheme applies.²⁹

(l) Provisions relating to freedom of trade and commerce,³⁰ services³¹ and citizenship³² apply to the State.

(m) The Election Commission has jurisdiction over elections held in the State under its Constitution.³³ Like the rest of India, election petitions in the State are heard by the High Court from where an appeal lies to the Supreme Court.

(n) No provisions regarding Minorities apply to the State except those for the Scheduled Castes and Backward Classes; seats are to be reserved in the Lok Sabha for the Scheduled Castes.³⁴

(o) Provisions of the Constitution relating to the Official Language apply to the State only in so far as they relate to—(i) the Official Language of the Union; (ii) the Official Language of inter-State and Central-State communication; and (iii) the language of the Supreme Court proceedings.³⁵

(p) An amendment made to the Constitution under Art. 368 does not take effect in the State unless applied by a Presidential order under Art. 370(1).³⁶

(q) Directive Principles of State Policy do not operate in the State.³⁷

(r) Fundamental Rights operate in the State with slight modifications,³⁸ some of the important ones being:

(i) the power of legislation regarding preventive detention vests in the State Legislature alone and not in Parliament, and Art. 22 stands modified to this extent.³⁹

(ii) The State Legislature, notwithstanding any Fundamental Right, has power to define persons who may be permanent residents of the State and to confer on them any special rights, or impose on others any restrictions, as respects employment under the State Government, acquisition of property within the State, settlement in the State and right to scholarships provided by the State.

It will be apparent from the above that from time to time through Presidential orders passed under Art. 370, a large number of the provisions of the Constitution have already become applicable to the State of Jammu and Kashmir. The only condition precedent for the exercise of this power by the President is the concurrence of the State Government. There is no limitation on the exercise of the power by the President in relation to one or more of the remaining provisions of the Constitution. The process of extending the various provisions of the Constitution to the State has been gradual and as a result of consensus between the

29. *Supra*, Ch. XI, Sec. K.

30. *Supra*, Ch. XV.

31. *Infra*, Ch. XXXVI.

32. *Infra*, Ch. XVIII.

33. *Infra*, Ch. XIX.

34. *Infra*, Ch. XXXV.

35. *Supra*, Ch. XVI.

36. *Infra*, Ch. XLI.

37. *Infra*, Ch. XXXIV.

38. *Infra*, Chs. XX-XXXIII.

39. *Infra*, Ch. XXVII, Sec. B.

Government of India and the State as dictated by experience and mutual advantage of both.

On February 24, 1975, Prime Minister Indira Gandhi made a Statement on the future relationship between the State and the Indian Union.⁴⁰ The highlight of the Statement is that this constitutional relationship will continue as hitherto, and that the extension of further provisions of the Constitution to the State will continue to be governed by the procedure prescribed in Art. 370.

C. STATUS OF ART. 370

Art. 370 has been characterised in the Constitution as being of a temporary nature. Art. 370(3) says that the President, by public notification, may declare that Art. 370 shall cease to be operative, or shall be operative only with such exceptions, and modifications, and from such date as he may specify. But before the President can issue any such notification, the recommendation of the Constituent Assembly of the “shall be necessary”.

Since the Constituent Assembly of the State exists no more, Art. 370(3) is no longer operative. Therefore, if any modification is to be made to Art. 370, recourse will have to be had to Art. 368 regarding amendment of the Constitution.

But, a moot point is whether any amendment made to Art. 370 under Art. 368, without the concurrence of, or consultation with, the State Government will be effective. The Constitution (Application to J & K) Order, 1950, lays down that any amendment to the Constitution does not apply to the State unless it is extended there- to by a Presidential Order under Art. 370(1) which again involves “concurrence of”, or “consultation with”, the State Government.

40. THE TIMES OF INDIA, Feb. 25, 1975, p. 7.