



Framing of J&K Constitution – An Historical Perspective

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The modern State of Jammu and Kashmir came into being through the treaty of Amritsar on 16 March, 1846¹. It was the largest princely state of India and its rulers were enjoying near despotic powers like rulers of other princely states. The early Dogra rulers inherited a crude and primitive system of administration. The machinery of the government remained unorganized, arbitrary and medieval until internal and external factors compelled its democratization.

Therefore, Gulab Singh (1846-57) neither reorganized the administration of the state nor did he consult the popular element in the administration of the state. However his son and successor Maharaja Ranbir Singh (1857-1885) reorganized the administration of the state in sound footings. He introduced a sort of state constitution by codifying laws, set up a new department of judiciary known as Nizamat. The existing departments were over hauled, he also enlarged his council of advisors. However, like his father, he too did not thought of associating the popular will in the administration. It was however, during the time of Maharaja Pratap Singh (1885-1925) the British Indian Government got an opportunity to appoint a British Resident in the state. The British Resident officer along with the Maharaja improved the other departments.

Maharaja Pratap Singh was succeeded by his nephew Hari Singh. Maharaja Hari Singh was influenced by western education, philosophy and thought. Thus in the beginning of his rule, in the absence of the legislative organ in the state, the young Maharaja attempted to associate the popular representatives of all communities residing in the state. However, before July 1931, there was no

demand from the masses for the formation of the legislature in the state. Therefore, the Maharaja made an announcement for the appointment of a Grievances and Complaints Commission, to examine the grievances of the different communities residing in the state. Bertrend J. Glancy was appointed as the Chairman of this Commission. On the same day, Maharaja ordered the setting up of the Kashmir Constitutional Reform Conference to examine the feasibility of political reform in the state. However, Mr. Glancy was appointed its president as well².

The conference started its business on March 14, 1932; it had fourteen sittings and completed its work on April 7, 1932³. Therefore, in May 1932, Mr. B.J. Glancy presented to the Maharaja the recommendations of the Kashmir Constitutional Reforms Conference. In pursuance of the recommendations Mr. Glancy recommended a Franchise Committee, which was appointed by the Maharaja to report on the quantum and content of the elected membership in the proposed assembly, for the determination of the qualifications for Franchise and delimitation of the separate electorate. Sir Barjor Dalal, the Chief Justice of the State High Court was appointed as the Chairman of this committee. This the Franchise Committee was constituted of L.A. Jardine, a civil service official of the Government of India, who was appointed Vice President of the Committee and Franchise Officer⁴.

The Franchise Committee recommended the institutions of a Legislative Assembly composed of seventy five members of which Thirty Three were elected and forty two were to be nominated. The committee recommended that among the nominated, the Maharaja reserved the right to appoint twelve official members to the Assembly among them six would be the ministers. According to the recommendations of the committee, the other six non-official were to be appointed on the basis of their expert knowledge on the various spheres of legislation⁵. Therefore, the Jammu Kashmir Regulation No. 1 of 1991 Samvat, corresponding to the Constitution of 1934, came into force on April 20, 1934⁶. The Constitution Act was passed on the recommendation made by the Constitutional Reforms Conference and the Franchise Committee. The Constitution Act envisaged the institution of a legislative body, which comprised:

- 1) The Council of Ministers⁷ and
- 2) The Legislative Assembly (the Praja Sabha)

The Praja Sabha was to consist of seventy five members out of which thirty three members were to be elected through separate communal electorate that included twenty one Muslims, ten Hindus and two Sikhs. However the Maharaja could nominate forty two members to the Assembly on different grounds. Among these nominated, fourteen were to be nominated for the communities or areas specified⁸ to the Regulation.

On March 29, 1936, All Jammu and Kashmir Muslim Conference met in Srinagar. The conference appealed to the Maharaja to widen the scope of the constitutional provisions enacted in the Act of 1934 which the committee stated, had done considerable harm to the development of the representative and responsible administrative institutions in the state. The working committee of the Muslim Conference demanded transfer of effective powers to the Praja Sabha, extension of franchise and abolition of the separate electorates⁹.

Therefore, Maharaja Hari Singh on February 11, 1939 announced his decision to take further steps to enable his subjects to make orderly progress in the direction of attaining the ideal of active co-operation between the executive and the legislature of the state in ministering to the maximum happiness of his people. The main features of the constitutional advance thus sanctioned and proclaimed were that¹⁰.

- a) The elected elements in a house of seventy five members were raised from thirty three to forty.
- b) The Sabha was given the right to electing a Deputy President from amongst its non-official members.

The National Conference leadership sharply criticized the provision of the Constitutional Act of 1939 and alleged that the Constitution Act did not provide for any effective constitutional and administrative reforms in the state. In the meantime the National Conference evolved a programme of reforms and reconstruction for the state. The programme was entitled the “Naya Kashmir”. In February 1944, the All Jammu and Kashmir National Conference adopted it as its manifesto¹¹.

However in October 1944, the ruler of the State, Maharaja Hari Singh made an announcement through which he expressed his attention to appoint two of his ministers to his council from among the members of the Praja Sabha¹². The scheme envisaged by the proclamation came to be called dyarchy.

However in 1947 India was divided into separate Nations, India and Pakistan and Maharaja Hari Singh, the ruler of Jammu and Kashmir could not decided his future course and, therefore, tried to conclude a Stand Still Agreement with both the Dominions. As a result of economic blockade and tribal attack from the territory of Pakistan, the ruler of the State Maharaja Hari Singh on October 26, 1947 signed by Instrument of Accession and acceded to India and on October 30, 1947, the Maharaja appointed Sheikh Mohammad Abdullah as the Prime Minister of the State of Jammu and Kashmir. The Maharaja appointed an Emergency Administration headed by Sheikh Mohammad Abdullah¹³.

However, in November, 1947, the Government of India advised the Maharaja to appoint an Interim Government under the Leadership of Sheikh Mohammad Abdullah until a model of representative administrative institutions were evolved. The interim government was instituted by a proclamation, which Maharaja Hari Singh issued on March 5, 1948¹⁴. The Interim Government was constituted of a Council of Ministers that was headed by Sheikh Mohammad Abdullah who was appointed the Prime Minister of the State of Jammu and Kashmir. The proclamation did not refer to the arrangements that were made for the functioning of the Interim Government¹⁵. However, within days the Interim Government ran into trouble. In April 1949, Sardar Patel, the Home Minister and Deputy Prime Minister of India suggested Maharaja Hari Singh to leave Jammu and Kashmir and make his son Yuvraj Karan Singh the Regent¹⁶. Accordingly, on June 9, 1949, Maharaja Hari Singh abdicated in favour of his son. Thus Sheikh Mohammad Abdullah got free hand to manage the administration of the State.

At the time Maharaja Hari Singh was advised to leave the state, the Constitution of India was in final stages of its completion. Either, the Indian leaders took no decision or the State leaders about the position of the State 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, until normalcy was restored in the State¹⁷.

In May 1949, 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 Delhi¹⁸. 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 Government of Jammu and Kashmir, the institution of separate Constituent Assembly for the state and the location of residuary powers came up for discussion in the conference.

However, later on, 1949 Jammu and Kashmir State nominated four of its representatives to the Constituent Assembly of India when it was passing through its last phase. 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 communications. They claimed that the State had executed limited accession to the Indian Dominion, leaving the factor of sovereignty of the state¹⁹.

The Indian leaders finally relented and Gopalswamy Ayangar drew up fresh proposals, in consultation with Mirza Afzal Beg, the Revenue Minister of the state. 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 I 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 as Article 370 of the Constitution of India²⁰.

On January 26, 1950, the Constituent Assembly of India implemented the Constitution of India. The special provisions were included in the draft for the Jammu and Kashmir State. Provisions of the Constitution of India, pertaining to the princely states, which had acceded to the Indian Union and were listed in Part B of the first schedule appended to the Constitution, were not made applicable to the State. The State of Jammu and Kashmir reserved the right to constitute a Constituent Assembly

and to frame a separate constitution. The powers of the Parliament to legislate about the State were limited to the matters that were declared by the President in consultation with the Government of the State to correspond to the Instrument of Accession. The residuary powers were retained by the State.

Article 370 envisaged four major sets of Constitutional provisions that provided for the constitution of the 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 provision of Article 370 and the amendment and abrogation of Article 370. In pursuance of Article 370 Yuvraj Karan Singh ordered by a proclamation on November 25, 1949 that the relationship between the state and the Union of India be governed by the Constitution of India in so far as it is applicable to State of Jammu and Kashmir²¹.

However on May 1, 1951, Yuvraj Karan Singh issued a proclamation and ordered the Institution of the Constituent Assembly for the State²². The proclamation envisaged that Assembly would be constituted of the representatives of the people elected on the basis of universal adult franchise and secret ballot. In accordance with the proclamation, the state was to be divided into electoral districts each covering forty thousand of population voting age was fixed at twenty one. General elections to the Assembly were held in September 1951²³. On November 5, 1951, Sheikh Mohammad Abdullah inaugurated the Constituent Assembly of the State²⁴.

Therefore, on November 7, 1951, the Constituent Assembly of the State set up Basic Principles Committee and an Advisory Committee on fundamental Rights and citizenship. The basic principles committee was charged with the task of finalizing the principles on which the Constitution of the State would be based. The Advisory Committee on fundamental rights and citizenship was asked to formulate the criteria for citizenship in the State and define the scope and content of the rights, the people in the state, would be given as well as the related legal guarantees the Constitution would envisage to safeguard those rights²⁵.

Sheikh Mohammad Abdullah was elected as a Chairman of both these 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 founded²⁶. While the efforts were made for enacting the Constituent Assembly of the State, Yuvraj Karan Singh amended the Constitution Act of 1939 to incorporate the provision of the proclamation in pursuance of which the Interim Government was constituted and the Constituent Assembly was convened²⁷.

However, immediately after the establishment of the National Conference 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 Principle Committee submitted an Interim Report to the Constituent Assembly on June 10, 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 state²⁸.

On June 12, 1952, the Constituent Assembly adopted the Interim Report of the Basic Principles Committee, 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 committee²⁹.

The presentation of the Basic Principles Committee Report in the Constituent Assembly brought to surface a number of political issues. The abolition of the Dogra rule involved the dissolution of the prerogatives and the powers, the Maharaja vested with. Meanwhile 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 organization of India³⁰.

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. An agreement was reached between the leaders of Kashmir and the Government of India, a summary of which was read out by Nehru in the

Indian Parliament on July 24, 1952 and by Sheikh Abdullah in the Kashmir Constituent Assembly on August 11, 1952³¹.

On August 11, 1952, Sheikh Mohammad Abdullah placed the Delhi Agreement before the Constituent Assembly. On August 19, 1952, the Drafting Committee of the Constituent Assembly presented its report to the Constituent Assembly. The Committee presented its report and the report stipulated³².

- i) That the head of the state would be the person recognized so by the President of India on the recommendations of the Legislative Assembly of the State;
- ii) That the Head of the State would be designated Sadar-i-Riyasat of Jammu and Kahsmir;
- iii) That the recommendations of Legislative Assembly would be made by election;
- iv) That the Sadar-i-Riyasat would exercise the powers and undertake functions that were exercised by the Maharaja of the State under the Constitution Act of 1939 as amended by the Constitution Amendment Act of 1951 till the Constitution of the State was framed by the Constituent Assembly and the powers of the Sadar-i-Riyasat were specified and defined therein.

In November 1952, the Constitution Act of 1939 was amended to incorporate the provisions of the resolution passed by the Constituent Assembly. 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 repealed³³. Fresh provisions that stipulated substituted section 4:

- 1) The Head of the State shall be designated as the Sadar-i-Riyasat.
- 2) All Rights authority and jurisdiction which appertain or were 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 State³⁴.

However, 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 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 framed³⁵.

The Drafting Committee presented its report to the Constituent Assembly on February 11, 1954. An annexure, which defined the jurisdiction of the Union, was appended to the report. The annexure embodied the provisions of the Delhi Agreement with the modifications that were introduced in it after the Advisory Committee on Citizenship, Fundamental Rights was reconstituted and the approval of the Union Government was secured. The report, along with the annexure was presented to the President of India after it was approved by the Constituent Assembly on May 14, 1954, the President of India promulgated the Constitution (Application to Jammu and Kashmir) Order 1954³⁶. The application of the provisions with regard to the citizenship, fundamental rights, the jurisdiction of the Supreme Court and the Emergency powers of the President of India, to the State, necessitated consequential amendment in the existing constitutional provisions in the State. On April 8, 1955, the Jammu and Kashmir Constitutional Act of 1939, was again amended to incorporate in it, the changes brought about by the President's Order of 1954³⁷. The Amendment Act was given retrospective effect and was deemed to have come into effect from May 14, 1954, the day the Presidential order was promulgated.

The Constituent Assembly of the State completed its work in November 1956. On November 17, 1949, the Assembly of the State adopted it. Finally, it was brought into force on January 26, 1957³⁸.

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