

# Constitutional History of Jammu and Kashmir: An Analysis of Its Integration with India

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## ARTICLE INFO

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### Dates:

Received: 15-04-2023  
Accepted: 08-06-2023  
Published: 30-06-2023

### Keywords:

Jammu and Kashmir,  
Constitution, Accession,  
Maharaja Hari Singh,  
Integration.

### How to Cite:

Pankaj. (2023)  
*Constitutional History of  
Jammu and Kashmir:  
An Analysis of Its  
Integration with India.*  
*DME Journal of Law,*  
*4(1), 67-70.*  
doi: 10.53361/dmejl.  
v4i01.08

## Abstract

A new era began in the political history of India when Indian Independence Act, 1947 was passed and a territory named Dominion of Pakistan unfortunately seceded from British India. More than 550 Princely States were existing at that time wherein the administrative structure was completely different from the administration of British India. With the end of British rule coming near, efforts were taking place to bring the uniformity in governance system and to secure a progressive constitutional structure. This process of coming together of States under an umbrella of uniform government set up in the Dominion of India has been referred to as accession by political theorists, where the rule of law in coming future will be governed by a constitution, which was in making at that time at federal level. Erstwhile State of Jammu & Kashmir (hereinafter referred to as J&K) was no different from other States who joined the Dominion of India through an Instrument of Accession. Over the passage of time, some constitutional developments took place in J&K in allegedly surreptitious manner which changed the course of development for the erstwhile State as well as its residents. In last seven decades, J&K lagged behind in sphere of public policy, governance, transparency and accountability if compared to other hilly States in the northern region. This paper shall be an attempt to survey all the legal and constitutional aspects that played an important role in the process of integration of J&K. Changes that occurred post 5th August 2019 in J&K will also be examined dispassionately.

## INTRODUCTION

### J&k - legal and constitutional integration

Maharaja of Jammu and Kashmir acceded to the Dominion of India on 26<sup>th</sup> Oct, 1947 by executing a Document of Accession, which was ratified on the following day i.e. 27<sup>th</sup> Oct by Governor General of India. With signing of this accession paper, Maharaja Hari Singh surrendered three subjects i.e. Defence, External Affairs and Communication to the government of Dominion of India. The Instrument of Accession signed by Maharaja Hari Singh was the same as was executed by the rulers of other Princely States which had acceded to India.

### Proclamation of maharaja dated 25 nov, 1949

constitution of India was finally drafted in full on 26<sup>th</sup> Nov, 1949, but territory of J&K was under the illegal occupation of Pakistan on account of tribal invasion, which

started from 22<sup>nd</sup> Oct, 1947. In such situation elections for the establishment of Constituent Assembly was next to impossible. So Maharaja Hari Singh, like rulers of other States (where Constituent Assembly was not elected yet) issued a proclamation on 25<sup>th</sup> Nov, 1949 (a day before the Constitution of India was to be signed by Constituent Assembly members) announcing the application of Constitution of India on Jammu and Kashmir as settled in Part B of Schedule 1 of COI. With the announcement of this proclamation of Maharaja Hari Singh, Jammu and Kashmir became a constituent unit of India as its 15<sup>th</sup> number of State under schedule 1 of the Constitution of India.

## Common process for integration of all princely states

When States were gradually coming under the Constitution of India, the process of integration of princely States was common for all the acceding States and the State of Jammu and Kashmir was no different. All such native Indian States were classified as Part B States and were allowed to frame their own Constitution. Thus Jammu and Kashmir was not the only State to frame its own constitution, a constitution which was intended to regulate the internal administration of the State, a feature which is common to most of the federal countries in the world. Existence of the State Constitution never meant that it was on a higher pedestal if compared to the COI neither it was at par with Union constitution. Supreme Court contradicting the observation of J&K High Court in 2016 expressed that,

“The State of Jammu & Kashmir has no vestige of sovereignty outside the Constitution of India and its own Constitution, which is subordinate to the Constitution of India,”<sup>1</sup>

## ACCESSION OF JAMMU AND KASHMIR: COMPLETE AND UNCONDITIONAL

There was no condition attached to the accession of the State to India. Maharaja Hari Singh laid no conditions for integrating J&K with union, neither he could for the accession of the State to India. “*The Government of United Kingdom has also never*

*questioned and indeed could not have questioned this act of accession which was made directly under the enactments of the British Parliament. Further the Legal Advisor to the United Nations Commission came to the conclusion that the State’s accession to India was legal and could not be questioned*”.<sup>2</sup> Thus unquestionably, by executing the instrument of accession, State of J&K became legitimately and irreversibly the integral part of India.

While accepting the Instrument of Accession, Lord Mountbatten, the then Viceroy of India, affirmed in a note communicated to the sovereign of the State that as soon as situation comes to normalcy in Jammu and Kashmir and her soil cleared of the invaders, it was his Government’s wish, in conformity with their policy in case of disputed accession, that “*the question of State’s accession should be settled by a reference to the people*”.<sup>3</sup> This unwarranted statement was not a part of the Instrument of Accession therefore it does not and cannot affect the legality of the accession.

## Mehr chand mahajan says

“*The Indian Independence Act did not envisage the conditional accession. It could not envisage such a situation as it would be outside the Parliament’s policy. It wanted to keep no Indian State in a state of suspense. It conferred on the rulers of Indian States absolute power in their discretion to accede to either of the two Dominions. The Dominions Governor General had the power to accept the accession or reject the offer but he had no power to keep the question open or attach conditions to it, as the act of accession made the Dominion Government responsible for defence, communication and external affairs of the acceding State*”.<sup>4</sup>

On the faith of the document of accession, crores of money of the Indian tax payers has been spent on the defense and development of the Jammu and Kashmir. No Indian statesman had any power or right to spend all this money if there was any doubt about the finality of accession.<sup>5</sup>

2 H.S Gururaj Rao, *Legal Aspects of the Kashmir Problem* 84 (Asia Publishing House, Bombay, 1967)

3 S.K Sharma, *The constitution of Jammu and Kashmir* 09 (Universal, Delhi, 2011)

4 Mehr Chand Mahajan, *Looking Back* 279-80 (Har Anand Publications, Delhi, 2018)

5 *Ibid.*, p.279.

1 SBI v. Santosh Gupta (2017) 2 SCC 538

Thus, "Instrument of Accession was accepted in the same way as in the case of other Indian States. It was unconditional, voluntary and absolute. It was not subject to any exceptions. As such, it bound the State of Jammu and Kashmir and India together legally and constitutionally".<sup>6</sup> The accession was thus complete in law and in fact Jammu and Kashmir thenceforth became an integral part of India and consequently India became constitutionally responsible for the defence of the entire State and had to dispatch troops to defend it.

## POLICY OF ACCESSION AND REASONS FOR DELAY

The Government of India under the leadership of Pt. Nehru always blamed Maharaja Hari Singh that he wished to remain independent when all other Princely States were joining either Indian Dominion or Pakistan's Dominion. History suggests contrary to it. It is not a secret that Pt. Nehru was not even ready to talk and discuss with Maharaja on the issue of accession. He was rather more interested in discussing the issue of accession of State of J&K with Sheikh Abdullah only and wanted Maharaja to hand over the rule of J&K to Sheikh.<sup>7</sup>

### Nehru's dawdling policy

Nehru's point of view was that, first of all, the Constituent Assembly of Jammu and Kashmir will be set up, for which, elections will take place. The State's Constituent Assembly will then pass a resolution on the accession of the State with India. Subsequent to it, the State of Jammu and Kashmir will send the offer of accession and only then after, India will accept the accession.

Though for other State too, Constituent Assemblies were being set up but all this had happened after the signing of accession. But for the State of Jammu and Kashmir, Pt. Nehru wished all these things to be settled before the signing up of accession, which was clearly outside the jurisdiction of the then Nehruvian Government.<sup>8</sup> One month before the partition of

India, in the month of July, Prime Minister of J&K, Mehr Chand Mahajan was sent by Maharaja to Delhi to discuss the process and conditional formalities related to accession of J&K, but he was told in Delhi that, without knowing the wishes of people, the offer of accession will not be accepted.<sup>9</sup>

Pakistan became impatient as Maharaja was not signing up the accession with Pakistan. Pakistan started blocking the supplies to the State of Jammu and Kashmir to mount pressure on Maharaja as almost all the routes to J&K for civil supplies, essential commodities and petrol were from Pakistan only. But when Maharaja didn't even succumb to this move, Pakistan ultimately invaded the State under the guise of Tribal Muslims. They were in the uniforms and carried sophisticated weapons.<sup>10</sup>

Nobody in Delhi had the time to give attention to Jammu and Kashmir. Ministry of States was already under huge work load of bringing all the States into a democratic constitutional regime. Secretary V.P Menon said,

"We had left the Kashmir in one sense. We didn't asked the Maharaja to accede with India, though India was connected to the State of J&K via roadways as Radcliffe report had come till that point of time. State had its own issues related to the religious composition of population, we were already engaged in so much matters. Truth is that we actually didn't had this time to think on Jammu and Kashmir".<sup>11</sup>

By the end of August 1947, Maharaja Hari Singh had finalized his stand to become a part of India's constitutional administrative structure, but now the accession was getting delayed solely on dogmatic attitude of Pt. Nehru whose prime concern in this whole issue was that accession of Jammu and Kashmir with India was possible only when Maharaja handed over the reins of State to Sheikh Abdullah.<sup>12</sup> Nehru was an advocate of democracy in India but for the State of J&K, he ignored the vital democratic

9 Christopher Thomas, *Faultline Kashmir*, 111 (New Millennium, 2000)

10 V.K Krishna Menon's Speech in the Security Council 23-24 Jan, 1957 part II (File no. 36/15, Sita Ram Papers, National Archives of India)

11 V.P Menon, *Integration of the Indian States* (Orient Blackswan, 2014)

12 Narendra Singh Sarila, *The shadow of Great Game: The untold story of India's Partition* 349 ( Harper Collins India, 2005)

6 A.S. Anand, *Constitution of Jammu & Kashmir - Its Development & Comments* 66 ( Universal Publishing, 8th edn., 2016)

7 Supra note 3

8 Ibid.



ideals in his wish of Maharaja to hand over the reins of State to his friend Sheikh, who was only the leader of Kashmiri speaking Muslims of the smallest region of the State. Also Nehru was adamant on the point that he will not talk with Maharaja until his beloved friend Sheikh Abdullah is not released from jail.<sup>13</sup>

### Mehr chand mahajan says

*“On 29 August, I met with Pt. Nehru before accepting the offer of becoming Prime Minister of Jammu and Kashmir and told him the conditions on which Maharaja was ready to accede. Maharaja wished to accede with constitutional arrangement of India. He was also ready to bring change in administrative structure of State, but he wished to take up this issue of administrative reforms in State only after the accession of Princely State with India. But Nehru wanted the immediate change in administrative control of State. When I informed Pt. Nehru about Maharaja’s views he got angry and told me that now you see Sheikh will be released with immediate effect”.*<sup>14</sup>

It makes very clear that Maharaja was trying hard since August, 1947 to come under India’s new constitutional set up. But Delhi had its own reservations of getting the structure of J&K’s administration changed. On 29th September, 1947 Maharaja Hari Singh released Sheikh on receiving a written apology from him and again sent a proposal to Nehru on accession. But Nehru again refused the offer of Maharaja.<sup>15</sup>

On the one hand, where Sardar Patel was putting his sweat and blood to bring the whole nation together by persuading rulers of Princely States, Delhi’s main worry was how Sheikh would come to power in Jammu and Kashmir. At the same period of time, Nehru too was trying to dethrone the Maharaja by insulting him, so that his friend Sheikh gets the ruling power of Princely State of Jammu and Kashmir.<sup>16</sup> Korbel says,

13 Supra note 3

14 Mahajan, *op. cit.*, Pg. 126

15 Christopher Thomas, *op. cit.*, Pg. 144

16 Supra note 3

*“when the whole subcontinent was going through a tumultuous phase, thousands were being killed, Nehru’s wish was that firstly Maharaja hand over the rule of J&K to his enemy Sheikh”.*<sup>17</sup>

## CONCLUSION

After the accession, J&K became a part of India, but a large part of the territory went under the illegal occupation of Pakistan due to territorial invasion. The Indian government went to the United Nation Security Council against the Pakistani advance on J&K. From 1947 to 1949, five resolutions were passed on Jammu and Kashmir and in addition there was some correspondence, according to which Pakistan was considered an aggressor on Jammu and Kashmir. After independence, the process of constitution making was going on in India. Representatives of the princely states also took part in this process. After this, in November 1948, the Regent of Jammu and Kashmir, Karan Singh, like the kings of other princely states, announced the implementation of the Indian Constitution in Jammu and Kashmir. The result of his declaration was that Article 1 of the Indian Constitution came into force in Jammu and Kashmir, according to which Jammu and Kashmir came to be known as a unit of India. On 5<sup>th</sup> Aug, 2019, President of India in a landmark move, brought a Presidential order and enforced the whole COI in JK. Few months later, that is, on 31<sup>st</sup> Oct, 2019 erstwhile State of J&K was bifurcated into Union Territory of J&K and Union Territory of Ladakh under the J&K Reorganisation Act, 2019. People across J&K i.e. Leh, Jammu, Kathua, Udhampur, Rajouri celebrated this move of amending Art. 370 which they hope that, will soon end the hegemony of Kashmir over newly created UTs and bring equity in symmetry over whole region of Jammu, Kashmir and Ladakh.<sup>18</sup>

17 Andrew Bingham Kennedy, *The International Ambitions of Mao and Nehru: National efficacy beliefs and the making of foreign policy* 174 (CUP, Cambridge, 2012)

18 PTI, “Jammu celebrates scrapping of Article 370 despite restrictions”, *The Hindu* Aug 5<sup>th</sup>, 2019.