



Autonomy and accommodation in India: A case of Jammu and Kashmir

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Abstract

The Indian polity enshrines the principles of federalism that is not based on the principle of equality. The Union is not the result of 'coming together' of the states but the states are the creation of the Constitution of India. This paper broadly discusses the nature of the Indian polity to explore the scope for accommodation of autonomous region of Jammu and Kashmir within the Indian polity. It also demonstrates that the accommodative features of the Indian Polity have their genesis in the anti-colonial struggle. The paper thus highlights that the Article 370 is neither against the principles of federalism nor against the principles of autonomy and tries to analyse the arrangement in the context of asymmetrical model of federalism.

Keywords: federalism, autonomy, constitution, accommodation, asymmetrical arrangement, Indian polity

Introduction

The process by which Indian polity is established involves as in the case of Canada both devolution and aggregation (Saxena, 2006) ^[83]. Thus, in both contexts the constitution itself neatly created Lists carrying items over which powers are distributed between the center and the states. In addition, the basis of the Indian Polity-the Act of 1935 was itself patterned on the Canadian model (Saxena, 2006) ^[83]. The Indian polity is thus influenced by the common law tradition where the scope of judicial review is not as limited as is in the case of civil law tradition (Watt, 2005) ^[108].

The provisions that establish the essence of the Indian Polity is the Seventh Schedule of the Constitution of India that gives plenary powers to the State Legislatures. Schedule Seven contains three lists (the Union List, the State List and the Concurrent List) that enumerate the subjects over which the Union or the states have either exclusive or concurrent powers to make laws. Institutions like Inter-state Council, Planning Commission [recently named as NitiAyog], and National Development Council further embodied the federal political structures in the Indian Constitution.

The most profound features of federalism that emerges from the Seventh Schedule are that the parliament of India cannot make laws over the subjects enumerated in the state list. In cases where the parliament legislates over the items listed in list II i.e. the state list under Article 252 consent of the state/s is required. Kothari (1961) emphasizes that on analyses of the Seventh Schedule of the Constitution of India significant autonomy has been given to the states. Further, the Concurrent List and the overlapping between the Union List and the State List suggests that federalism in India is cooperative and not competitive. The tendency of cooperation between Union and states under the universal impact of the welfare state necessitates cooperation (Laski, 1949).

However, the unitary features of Indian polity have many a times blurred the federal features of the Indian Polity. Kumar (2005) argues that the powers of the center to impose

emergency, appoint governors for the states, appoint Chief Election Commissioner of India, appoint and regulate All India Services, imposition of taxation and the dependence of the states for finances on the Center has prevented the promotion of federalism in a classical sense. Notwithstanding the difficulties in attaining a federal scheme, the Indian constitution embodied various forms and various degrees of autonomy using the principles of federalism (Singh, 2009).

Kothari (1961) argues that the federal system of governance in India has received a treatment that is excessively formalistic. Routine political controversy is understood as the center's overarching control over the functions of the state. This political controversy is often highlighted when directives and instructions from the organs of the Union Government are given to the state governments. The directives have become a normal administrative affair that does not need invoking extraordinary provisions in the Constitution that allow the Center to take over the functioning of the state governments. Similarly, the functioning of the NitiAyog [erstwhile Planning Commission] is often questioned that it creates a "Vertical Federation" where the Union issues regular directives to the state ministries (Santhanam, 1963) ^[82].

In India, the political elite set the mission to consolidate the princely states that involved both finesse and muddle. The muddle hardly involved constitutional niceties nevertheless; it provided the ammunition in the form of "jurisdictional squabble and polemics" about "state's rights" versus "overriding national interests" (Kothari, 1971, p. 1550) ^[57].

This paper is broadly divided into three sections. Section first discusses the nature of the Indian polity to explore the scope for accommodation of autonomous region of Jammu and Kashmir within the Indian polity. Section second demonstrates that the accommodative features of the Indian Polity have their genesis in the anti-colonial struggle. This section highlights how the anti-colonial struggle in India generated debates over the future of Indian polity creating space for accommodation of diversity at the time of the

Constitution-making. Section third highlights that the Article 370 is neither against the principles of federalism nor against the principles of autonomy and tries to analyze the the arrangement in the context of asymmetrical model of federalism.

Approaches to Accommodation

The constitutional development in India reflects series of hybrid strategies adopted by the state to accommodate the diversity in relation to linguistic and religious identities. The asymmetrical arrangement as a scheme emerged over a period with different nations experimenting with such an arrangement either out of an ideological commitment or out of a contingency for accommodation. As the nation-state model adopted by India like it was adopted across continents through imperialism and colonization had tools in hand to create an asymmetrical polity (Loughlin, 2013) ^[60]. The Indian state gave concession or changed strategies to realign resources and access to power (Adeney, 2007). The autonomous/semi-autonomous arrangements that emerged in the Indian Constitutions are Article 371 along with the Fifth and the Sixth Schedule that provides for “Temporary, Transitional and Social provisions for the Northeastern states, namely Nagaland, Sikkim, Assam, Manipur and Arunachal Pradesh; Article 370 that accords ‘special status’ to Jammu and Kashmir in the Indian Constitution. As a special protection clause, Article 371 was introduced in the Constitution of India. The Article recognized customary laws, procedures, and land rights of the people of the Northeast. The introduction of Article 371 was based on the recommendations of Bordoloi Committee ^[1] in the Constituent Assembly of India. Under Schedule 6 vide Article 244(2) autonomous districts were also created. These districts were created in Assam, Meghalaya, Tripura, and Mizoram. Under schedule 6, no law made by the state is applicable to the districts without their consent. Elected district councils or the regional councils govern these districts. Such Councils exercise legislative and judicial functions on the matters of marriage, inheritance, the appointment of a headman, the collection of land revenue, regulation of shifting cultivation, social customs, protection of unreserved forests etc. However, the laws made by the parliament require the assent of the governor in case of Assam and that of the president of India in case of other districts and regions (Das, 2013).

Thus, the Indian polity enshrines the principles of federalism that is not based on the principle of equality. The Union is not the result of ‘coming together’ of the states but the states are the creation of the Constitution of India Basu (2008). However, Majeed (2005) ^[62] observes that the Indian federalism is asymmetrical only in a very limited sense. The states have no share in the amending powers except as provided by the Constitution itself. The states have no powers or rights of their own but the union empowers the states and bestows the rights. From the circumstances, that India faced in the backdrop of the Partition of the sub-continent what

emerged was a quasi-federal polity (Wheare, 1963). The measures that provided a certain degree of autonomy were adopted “in deference to the historical specificity of these states as well as to the then historical conjuncture” (Kumar, 2005, p. 96). The Indian federal structure not only had novel features in its own right but also by opting for an asymmetrical model it created anomalies of varied natures. The nature of federalism in India is no longer *resintegra* (Shukla, 2001)

Twentieth-Century Politics and Debates in India: Laying Foundations for Accommodation

In the Indian subcontinent, under the British colonial rule, framework for political organization was initially based on interactions among autonomous provinces. This framework was later changed to bring provinces closer to the central control. Adeney (2007) argues that to the British Imperial interests, this frame work suited more than a democratically structured centre. The British, however, were not consistent but were varied in their federal and convocal arrangements with different provinces depending on divergent interests the British wanted to address (Adeney, 2007). As observed by Rai (2004) the British sometimes even went to the extent of slowing down the democratic processes by withholding the application of rights from the princely states ^[2]. However, one can argue that the Government of India Act, 1919 for the first time envisaged, in terms of a constitutional framework, a democratic federal government. Although in a rudimentary form, this Act played a significant role in the constitutional design that the Indian Polity adopted after Independence. The Act decentralized the Indian polity and codified the division of powers between the Centre and the provinces. Adeney (2007), however, observes that provisions of the Government of India Act, 1919 essentially provided for a mechanism to control the vast geographic expanse of India. In fact, the whole power was concentrated at the Centre, with the centrally appointed governor ruling the provinces.

The colonial methods of divisive politics, like the one of the separate electorates based on religious divisions, and their co-option of princely states proved to be a stumbling block for the unification of the Indian sub-continent. Between 1916 and 1946, the Indian political elite were concerned over granting of separate electorates based on religion and dividing the subcontinent on religious lines into dominions of India and Pakistan (Bhattacharyya, 2010) ^[20]. The debates were taking place between the Indian National Congress and the Indian Muslim League over the choice of the government they wanted to opt for. Conscious of the divisive British politics, the nationalist writings during the 1940s emphasized upon the unity among the diverse communities of the Indian society (Bose & Jalal, 1998). The twentieth-century debates also highlighted that the interests of Muslim majority provinces, the princely states and the provinces ruled by the Congress

¹ Bordoloi Committee was constituted by the Constituent Assembly on 27 February 1947. It recommended a scheme of administration for the tribal and excluded areas, which would help to reconcile the hill peoples’ demand for political autonomy.

² As discussed in the previous chapters for a long time British adopted a policy of non-interference towards the Princely State of Jammu and Kashmir. The British believed that the ‘mistake of religious interference’ was responsible for the rebellion against them. They thus guaranteed “the loyal ‘breakwaters’ in the storm, the princes of India ‘their dignity, rights and, honor’ and their territorial possessions to which the charter of religious freedom would not extend (Rai, 2004, p.82).

government after the election of 1937 were not identical. Thus, there were efforts made to set up a national federal structure that could accommodate the territorially based ethnicity (Kumar, 2005). It was in this context that during 1944-1946 the work towards some sort of a loose federation was taken up. Rajagopalachari Plan ^[3] devised the first federal scheme that was followed by the Sapru Committee ^[4]. Finally, the Cabinet Mission proposed a three-tiered federal system on the pattern of Austro-Hungarian federal arrangement (Kumar, 2005). Under such arrangement, the units could group together to have different levels of federal linkages with the centre. Such units had to devise the modalities of linking with the center where the centre cannot have jurisdiction except over communications, currency, foreign affairs and defense.

One of the two major contenders, the INC was already working within this institutional framework created by British in response to the 1857 mutiny. This federal framework was premised on the need for effective communication of the government decisions in the vast geographical expanse of India (Adeney, 2007). Further, the attitude of Congress towards federalization can be traced back to their acceptance of religious reorganization of Sind in 1928 and post-independence linguistic reorganization in 1956 (Roy, 1965). The INC justified the religious/linguistic re-organization of the Sind in 1928 on the claim that the 'wishes of the people' be respected. At a later stage in the emergence of the Indian polity, the INC justified and validated the territorial autonomy of Jammu and Kashmir, based on a similar claim that of the 'wishes of the people' (constituent Assembly Debates, 1949). Moreover, the INC resolution of 1927 urged the creation of Andhra, Orissa, Karnataka and Sind on a religious/linguistic basis. The report by the Committee of All Party Conference referred in the Nehru Report read "...two most important considerations in rearranging provinces are the linguistic principles and the wishes of the majority of the people" (Char, 1983, p.547; 1928, p. 61). Overall, the Congress Party accepted the need for a federation though there were disagreements within the Congress over the forms of the federation to be adopted. The Congress itself came to be structured into Provincial Congress Committees (PCCs), and after the passing of 1919, Act into linguistically defined PCCs (Hirose, 1994). Until 1937, the Indian Muslim League too imagined its existence within the larger Indian Federal Polity. The League perceived the interests of the Muslims in India to be 'safe' within a united India where power is shared between the religious communities in religiously defined provinces (Adeney, 2007). Jalal (1995) observes that the Muslim majority provinces favored federalism as a means to protect minority interests. The League felt the arrangement to be much more comfortable as they saw it as a mechanism to accommodate minorities and not merely as a power-sharing system for the purposes of efficient governance.

³ This plan devised the first federal formula in pre-independent India. The main objective of the plan was to break the deadlock between the All India Muslim League and Indian National Congress.

⁴ The Sapru Committee published its report in 1945 proposing a constitutional framework for future on the lines of separate judiciary, legislature and executive etc.

The Constituent Assembly Debates and the shaping of the Indian Polity

In the context of India, the institutional legacies of the British Raj influenced constitutional framework adopted by the Constituent Assembly of Independent India. The colonial legacy influenced the adoption of the form of government and the nation's polity. The Indian Constitution makers were influenced by, to borrow from Pierson (2000) the 'learning effects' of the Raj (p.254). Thus, the 'learning effects' of the Raj structured the broader parameters of the Constituent Assembly debates. Adeney (2007) argues that it is difficult to imagine that a former colony would be in a position to avoid the example set by the colonial powers and remain unaffected by the institutional legacies of the colonial state.

The Indian Constituent Assembly debates amply highlight that the makers of the Constitution aimed at a unifying polity for what was essentially a highly diverse and fragmented society. With the creation of the Dominions of India and Pakistan, the withdrawal of the League from the Constituent Assembly brought a tiding of homogeneity in the thinking of the Indian leaders at the helm of affairs and the contestation over the idea of nation and community took a different turn. (Kumar, 2005). Adeney (2007) argues that after the withdrawal of the Muslim League, the Constitution of India took on a more majoritarian character and ignored the existence of religious identities, believing them to be essentially primordial and with the creation of Pakistan, took for granted that the "Muslim Question" is taken care of (Shani, 2010). In the context of Indian National Congress and its choice for the future Indian polity, Jalal argues that Congress's constitutional preferences and design were '*dictated by the religious composition of the state it sought to run*' (Jalal, 1994). Austin (1966) observes that if Muslim League had not been able to design a country of their own, India would have become a loose federation with a minimal centre and vast residuary powers. Thus, Bose and Jalal (1998) argue that political elite of the subcontinent were not necessarily ideologically committed to federalism. However, Jayal (1999) observes that during the Nationalist Movement and inside the Constituent Assembly of India, the debates and discussions around the community and nation reflected that the constitution that was finally framed was well ahead of the times in recognizing diversities through [constitutional and] formal democratic means. At the time of constitution-making the members of the Constituent Assembly had to digress from the main theme that India is a union of states to respond to these challenges and come up with additional constitutional proposals for territorial and non-territorial autonomies, (Adeney, 2007).

Nevertheless, the presence of numerous national/sub-national identities posed its own challenges for territorial organization of India. The ideological beliefs about India's historic unity; Indian society being inclusive towards minorities; and that the religion cannot be the basis for state organization influenced the accommodation of diversity in the Constitution (Talbot, 2000). Yet as Adeney (2007) observes that Congress's socialist beliefs had a bearing on recognizing the ethnic demands. However, while recognizing the linguistic and religious diversity in India, the Constitution makers believed that such diversities would fade away with the onset of modernization. She further argues that the ambition of the

Constitution makers to realize the 'euphemistic idea of India' into a reality and at the same time being true to their socialist beliefs, proved a double bind for the Indian National Congress dominated Constituent Assembly. A loose federation would debunk the idea of 'unity in diversity' and a strong unitary structure would discredit the idea of Indian secularism and accommodation that the Assembly adopted in the scheme of the Constitution making. Thus, ethnicities had to be recognized by the same constitution to give political legitimacy to their accommodation in the larger design of Indian polity (Dikshit, 1975). The heterogeneity of the Indian society has, therefore, found a political expression in the form of federal constitutional scheme, forms of government and territorially defined autonomy (Adeney, 2007).

However, Majeed (2005) ^[62] observes that during the Constitution-making the drafters decided not to use the term "federalism" and whenever the term was being used they did not mean it at all in its traditional sense. Even though the Constituent Assembly of India refrained from calling India a federation, federalism was enshrined in the Constitution of India in the form of dual polity with a single citizenship, a division of legislative and executive powers between the centre and the state, an independent judiciary and supremacy of the Constitution (Majeed, 2005) ^[62]. While debating the nature of the Indian state in the Constituent Assembly, Ambedkar observed:

India was to be a federation; the federation was not the result of an agreement by the states to join in a federation; and the federation not being the result of an agreement and no state had a right to secede from it. (Everett, 1997, p. 77) ^[34]

The Constituent Assembly that acquired homogeneity after the approval of the Dominion status for Pakistan ignored the calls of justice from communities for whom non-territorial autonomies were being considered. The calls for 'righting the past wrongs' by Jaipal Singh Munda, the representative of *Adivasis* in the Constituent Assembly of India, were not heeded. The Constitution of India reconfigured the status of the now-called minorities to the more legalistic connotations. For example, in the Constituent Assembly debates, over the representation and constitution-making by the adivasi people, Jaipal Singh Munda asserted that adivasis cannot be categorized as minorities. They enjoy the prescriptive rights within the Indian nation and are named as Adivasis in the Constitution and the term Adivasi cannot cause any misconception as was argued ^[5]. Ambedkar explained that a more legalistic term must be used as Adivasi was a generic term with no legal connotation. India was wary to recognize any fragment of sovereignty of any of the communities in India. Although the communities were entitled to "protection and help" under the carefully crafted provisions of the Constitution any demand by their leaders for example in case of adivais to recognize them as original inhabitants [First Nations] was seen as mischief ^[6]. The manner of accommodation of groups by India already paved way to govern the groups in a particular framework, scuttling possibilities of any real autonomy.

For the Scheduled tribes, Tribal Advisory Committees (TAC)

were formulated. During the debates amidst reservation expressed by the tribal leaders, the committees were to be put in the hands of the governors of the respective states ^[7]. Concerns were raised that such a move will limit the efficacy of the Tribal Committees to the whims of the executive authority ^[8]. The running thread in the arguments of many members of the Constituent Assembly was that the Fifth Schedule of the Constitution is aimed at assimilation of the Tribes in the Indian Nation ^[9]. The assertions of members like Jaipal Singh Munda over many issues like TACs be not handed over to the executive authority were seen by some members of the Assembly as separatist, and an expression of "disloyal and extra-territorial sympathies" ^[10].

The frontier of the Northeast in the late eighteenth century was terra incognita for the British colonial powers. The terra incognita was reshaped through mainstream Indian nationalist discourse as the Northeast India. For integration of the Northeast, some parts of which were anticipating their independence as separate units from the Indian Nation state a constitutional technology was required. However, the constitutional technology has not been able to instill Indian nationalism among the people of the Northeast. As Sarmah (2016) argues that while the Northeast is considered as the "other" vis-à-vis the Indian Nation state, there also lies a "dichotomy between the plains and the valley people that was reinforced by the colonial logic" (p. 15).

The Special Status of Jammu & Kashmir Within The Indian Constitution

Article 370 of the Constitution of India provides a special status to the State of Jammu & Kashmir ^[11] for special

⁷ Constituent Assembly Debates, Vol IX (5 September 1949) at 976

⁸ Constituent Assembly Debates, Vol IX (5 September 1949) at 977

⁹ Constituent Assembly Debates, Vol IX (5 September 1949) at 987,989

¹⁰ Constituent Assembly Debates, Vol IX (5 September 1949) at 996

¹¹ Article 370: Temporary provisions with respect to the State of Jammu and Kashmir.-

(1) Notwithstanding anything in this Constitution,-

(a) The provisions 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-

(i) 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

(ii) Such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation.- 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;

(c) The provisions of Article 1 and of this article shall apply in relation to that State;

(d) 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:

⁵ Constituent Assembly Debates, Vol IX (5 September 1949) at 993

⁶ Constituent Assembly Debates, Vol IX (5 September 1949) at 993

circumstances as mentioned in Appendix I. By virtue of Article 370, the relationship between the State of India and the State of Jammu & Kashmir got established in this manner:¹²

1. Although under Article 238 (which now stands deleted) the State of Jammu & Kashmir was incorporated as one of the States of India, provisions that were to be applied to other States, under the same Article, were not applied to the State of J&K.
2. Only Article 1 and Article 370 was applied to the State of Jammu & Kashmir, while the rest of the Articles could only be made applicable by virtue of Presidential orders, in 'consultation' with the government of Jammu & Kashmir, in matters related to the Instrument of Accession.
3. Under Article 370 (1) (b) (ii), the President was given powers to pass Presidential orders over the matters not specified in the Instrument of Accession. However the passing of such orders was made subject to the concurrence of the State government.
4. Under Article 370(1)(d), the power of the State government to accord concurrence to the orders passed by the President in matters other than the items mentioned in the Instrument of Accession would end, once the State's Constituent Assembly was convened. Additionally, it states that the power of the Constituent Assembly to rectify such orders would end the day the Constituent Assembly was dissolved.
5. Article 370(3) empowers the President to make an order to abrogate or amend Article 370. However, the recommendation of the State's Constituent Assembly was made mandatory in this regard.
6. Article 370 would not be abrogated or amended since no constitutional amendment can have effect in relation to the State of Jammu & Kashmir unless applied by order of the President under Article 370 ^[13]. This is because amendment to Article 370 requires recommendation of the Constituent Assembly which was dissolved in 1956 after it completed drafting of the State's Constitution.

The aforementioned analysis of Article 370 highlights the extent of autonomy that was guaranteed to the State of Jammu & Kashmir, so much so that it was allowed to have amongst

others, its own Constitution, Judiciary, Legislature and the Executive. Its autonomy was further underscored by the fact that residuary powers under Schedule VII of the Constitution of India vested with the State government and not with the Parliament.

The powers of the Parliament to make laws for the State of Jammu & Kashmir were also restricted. Under Article 246 of the Indian Constitution the Union list would apply to the State of Jammu & Kashmir, but with exceptions, thus giving the State of Jammu and Kashmir more powers to determine their own laws.¹⁴ The Parliament also needed the concurrence of the State government in case a law was made relating to the subjects not specified in the Instrument of Accession. However, in case of the subjects of accession mentioned in the Instrument, Parliament only required consultation of the State government ^[15].

Indian federalism as such is a result of centripetal forces where the Indian state relinquished some powers in favor of its units for "holding-together ^[16]". The states are the creation of the Constitution; and the states have no existence of their own. Scholars who classify Article 370 of the Constitution of India as a case of asymmetrical federalism observe that federal polity imports constitutional division of powers between federal government and the federating unit (Basu, 2008). Stepan, linz & Yadav (2011) categorize Jammu and Kashmir's *special status* under the Constitution of India as a federal accommodation. He argues that the asymmetrical federal accommodation is achieved when an independent state relinquishes a set of powers like defense, communication; foreign affairs in favor of the federal state for the purpose of national unity. However, as is evident from the conditional and provisional nature of the *accession*, Jammu and Kashmir did not join the Indian Dominion for the national unity of India ^[17]. Further, the negotiations that resulted in the power-sharing arrangement between India and Jammu and Kashmir amply highlight the contestations between the leaders of the two states. On the one hand, the Indian leaders were keen to integrate Jammu and Kashmir as an integral part of the "civilizational history" that India invoked ^[18]. On the other hand, the leaders from Jammu and Kashmir invoking their own nationalism based largely on historic injustices were

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.

(2) 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.

(3) 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.

¹² Noorani A.G., A Cruel Hoax, *FRONTLINE*, Vol. 27, Issue 03, (Jan. 30-Feb. 12, 2010)

¹³ Proviso to Article 368 reads thus: "For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this Article Part XXI TEMPORARY, TRANSITIONAL AND SPECIAL PROVISIONS"

¹⁴ ANAND A.S., THE CONSTITUTION OF JAMMU & KASHMIR, 6th Edn., Universal Law Publishing, New Delhi, 2010, p. 137-139

¹⁵ ANAND A.S., THE CONSTITUTION OF JAMMU & KASHMIR, 6th Edn., Universal Law Publishing, New Delhi, 2010, p. 137-139 (*Only 'Consultation' and not 'concurrence' from the State government was required since the State had already accepted those subjects through the Instrument of Accession*)

¹⁶ When the old states that have historically been governed as unitary states and have been originally conceived as future nation-states confront rising peripheral nationalisms they turn to federalism to "hold-together" the people in the common state. Such federations that "hold-together" federal sub-units are characterized by asymmetrical structures in which some cultural privileges are Constitutionally guaranteed to the federal sub-units with salient territorial identity.

¹⁷ As discussed in detail in Chapter II that Maharaja of Jammu and Kashmir acceded to India on the conditions of retaining his sovereignty and his privileges.

¹⁸ Two trends were visible in the nationalist invocation of India's past civilization. First approach sometimes celebrated India's vainglorious "Hindu civilization" and second approach claimed Indian unity in civilization terms almost as a substitute for national unity ((Bhattacharya, 2011)).

pushing for more and more scope for self-rule. Thus, , Stepan, linz & Yadav's understanding of Jammu and Kashmir's relationship with Indian Union as case of asymmetrical federal accommodation is insufficient.

The crisis that has erupted in 1980's in Punjab, the insurgencies in the Northeastern states and Jammu and Kashmir, the Dravidian Movement of 1950 , the demand for restoration of autonomy of Jammu and Kashmir are seen failures of accommodation that result from overemphasis and anxiety over territoriality (Samaddar, 2005). However, what needs to be recognized in the context of countries, which are as diverse as India, that there exists a de facto asymmetry for political, historical, cultural, ethnic or linguistic reasons. In cases like Northeastern states and Jammu and Kashmir, Requejo (2013) ^[79] observes that this recognition needs to be voiced through constitutional rule-making that might spill over the boundaries of Indian federalism.

Jammu and Kashmir as an Asymmetrical Federal Unit

In India, there are regions and populations that claim to be *minority nations*. Such *nations* and express their desire to be recognized as different collectives and be allowed a measure of self-rule. These collectives claim that they bear peculiar features like a different and distinct history, a different language, a distinct culture or they were independent powers in the past (Requejo, 2013) ^[79]. The *minority nations* are culturally rooted and have been socialized in specific cultural, linguistic and historical contexts (Samaddar, 2005).

To manage the complexities of their demands, models of accommodation like federalism are preferred (Watts, 1966). Requejo (2013) ^[79] however, observes that the normative and institutional analyses of federalism have been greatly influenced by the historical example of the United States of America, which is not an empirical case of national pluralism but a uninational model. This model tries to address the paradox of democracy: what is "the people", and who decides what "the people" refers to (Requejo, 2013) ^[79]

The traditional liberalism approach would address the paradox based on "equality of citizenship and individual rights" alone. The presumed uniformity at the 'entrance requirements' creates problems for achieving robust political accommodation. However, the non-traditional liberalism will take account of "equality of the peoples", their collective and individual rights and incorporate them in the constitutional rules of the polity. The traditional liberal approach wherever it has been adopted has been used to resolve the tension of plurinationalism question in terms of 'national' and distribution of welfare usually in the favour of federal governments (Requejo, 2013) ^[79].

Federalism achieves a normative stance as it supports a multi-level government combined with self-rule at territorial level aiming merely at a better organization of human relations (McGarry & O'Leary, 2007). The traditional liberalism approach would address the paradox based on "equality of citizenship and individual rights" alone. The presumed uniformity at the 'entrance requirements' creates problems for achieving robust political accommodation. However, the non-traditional liberalism will take account of equality of the peoples, their collective and individual rights and incorporate them in the constitutional rules of the polity. The traditional

liberal approach wherever it has been adopted has been used to resolve the tension of plurinationalism question in terms of "national": and distribution of welfare usually in the favour of federal governments (Requejo, 2013) ^[79].

One can borrow from Requejo (2013) ^[79] who observes that unless federalism is refurbished according to the new turn that is non-traditional, it can never be synonymous with national pluralism. The challenge addressed by the non-traditional liberal approach in 1980's was a response against the notions of individualism, 'stateism' and nationalism for being normatively biased in favour of majority national groups. Such debates have led to a theoretical and empirical turn in favour of a new normative of plurinationalism. The empirical turn highlighted the importance of cultural and national collectives to self-realize themselves.

Nevertheless, federalism, devolution and federacies have incorporated an important element of self-rule (Swenden, 2013) ^[87]. In cases where the element of self-rule is incorporated, such arrangements too can contain or address the demands of the *minority nations* to some extent. As a result, such a minority nation achieves considerable self-rule to the extent of acquiring the shape and character of a federacy. Watts (2005) ^[108] includes Jammu and Kashmir as an example of a federacy. He argues that as Greenland and Faroe Island is to Denmark, Isle of Man is to the UK, Jammu and Kashmir is to India.

Watts (2005) ^[108] defines Federacy as a political unit with constitutionally embedded legislative powers; where the arrangement cannot be changed without the consent of both the units; and the inhabitants have full citizenship rights as in the mainland. Stepan, Linz & Yadav (2011) observe that federacies are more secure, more stable as they enjoy constitutional guarantee with external actors playing a role in monitoring of such arrangements. A federacy like structure is created in cases where the *minority nations* are tiny with respect to the overall population of the state and the arrangement is not meant at having a federal structure but recognizing the separate identity in the context of a unitary state. (Swenden, 2013) ^[87]. In the context of Jammu and Kashmir as a case of federacy, the legal and constitutional arrangement was based on the provisional and conditional nature of *accession*. Apart from the nature of *accession*, the size of the territory, small population and external factors like geopolitics of cold war, the UN intervention in the first India-Pakistan war played an important role in conceding the demands for maximum autonomy. This arrangement initially gave the region a character of federacy and ensured it some level of self-rule with a substantial autonomy that could not be unilaterally dissolved or altered. However, the Jammu and Kashmir neither proved to be a stable autonomy neither did any international organization monitor the arrangement ^[19].

However, Jammu and Kashmir resembled a federacy until 1953. After the ouster of the Prime Minister of Jammu and Kashmir along with other leaders from the Government and the Constituent Assembly of Jammu and Kashmir in 1953, a good portion of the Constitution of India was extended through executive orders. This process of unilaterally

¹⁹ The role of the UN is limited to the monitoring of the ceasefire on Line of Control between India and Pakistan.

extending the Constitution of India to Jammu and Kashmir has been earlier referred to as "the erosion of the autonomy" (Teng, 1990). As discussed in Chapter two, this curtailment has resulted in the inferior position of Jammu and Kashmir as compared to other units of the Indian Federation. Thus, after the erosion of autonomy, Jammu and Kashmir has lost the features that had some resemblance with a federacy as described by (Watts, 2005; Swenden, 2013) ^[108, 87]. While on the one hand, the power-sharing arrangement that was defined in the supreme constitution was/is altered unilaterally (Bose, 2003). On the other hand, the umpire that intervenes in case of any "competence struggle" in case of a federacy, (in case of India the Supreme Court) has expressed its reluctance to adjudicate on the erosion of autonomy of Jammu and Kashmir carried through executive orders ^[20].

Conclusion

(Samaddar, 2005) argues that in the context of Jammu and Kashmir, in absence of a third party monitoring over the "federacy", the Indian state has acted, as an agent of nationalism in the larger project of nation-building. Over the years, through executive orders, the autonomous region of Jammu and Kashmir has been brought more and more under the jurisdiction of the Indian state. The demands for the restoration of this unilaterally altered autonomy have been treated as "particularistic deviations" or "alienation" (Samaddar, 2005). By treating restoration of constitutionally safeguarded autonomy as a deviant demand, the approach of the Indian State poses a threat not only to the notions of citizenship but also to the concept of popular sovereignty. Nevertheless, the accommodation of Jammu and Kashmir (through asymmetrical federalism) in the Indian polity pre-1953 reflects Indian polity's accommodative approach in terms of recognition of the collective as well as individual rights of the people and their distinct history and culture in terms of non-traditional liberalism approach to accommodation. However, the Indian State's unilateral dilution of the autonomy post-1953 reflects reverting to a traditional-liberal approach towards federalism. This approach aims to achieve a uninational polity and distribution of welfare among the different units only based on equal and individual rights to citizenship. Elazar (1987) argues that some elements of self-rule are still visible however, in the assertion of self-rule; the Indian state has not allowed it beyond a sub-state autonomy.

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²⁰ For further discussion See (Maqbool Damnoo v. State of Jammu & Kashmir, 1972; Sampat Prakash v. State of Jammu & Kashmir & Anr, 1970; Prem Nath Koul v. State of J&K, 1959).

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