

## **18<sup>th</sup> Amendment and the Constitutional Structure of Azad Kashmir**

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### **Abstract**

The state of Azad Jammu and Kashmir (AJK) is not a sovereign state, nor is it a province of Pakistan. According to UNCIP resolution, the status of Azad Jammu and Kashmir is of a local authority and the administration of this area is entrusted to Pakistan until the region exercises right of self-determination under the UN resolutions. The Government of Pakistan has governed Azad Jammu and Kashmir through different enactments promulgated from time to time: Acts of 1960, 1964, 1968 and 1970. The latest enactment, that is in force, is the Azad Jammu and Kashmir Interim Constitution Act of 1974, which was passed by the Legislative Assembly of Azad Jammu and Kashmir and approved by the Government of Pakistan. The Government of Pakistan is vested with all executive and legislative authority in matters of defense, foreign affairs (including foreign trade and foreign aid), currency, and the implementation of UNCIP resolutions. The Azad Jammu and Kashmir Council, however, has exclusive legislative and executive authority over matters included in the 'Council Legislative List' which comprises the subjects that, under the Constitution of Pakistan, belong to the federation. The AJK Legislative Assembly has exclusive power to make laws on matters not listed in the Council Legislative List. The Azad Kashmir Assembly, which is an elected forum, is only responsible for dealing with day-to-day affairs in the given legal setup. In fact, the aim of establishing the Kashmir Council was to build a bridge between AJK and the federation of Pakistan to overcome legal ambiguity and ensure smooth functioning of governance-related matters in the territory of Azad Kashmir. However, since its inception, it has failed to fulfil the purpose it was made for. Rather, it has become a source of contention between the parties. All powers and responsibilities that should lie with an elected government for economic prosperity, transparency, and other inevitable challenges regarding governance are given to the AJK Council, which is by default headed by the prime minister of Pakistan, who is neither elected by the people of Azad Kashmir nor accountable to the any institution or judiciary of AJK. This paper explores the constitutional structure of Azad Kashmir and the impact of 18<sup>th</sup> Amendment on Azad Kashmir, especially with reference to financial autonomy.

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## Introduction

The state of Jammu and Kashmir, having an area of 85,806 square miles was one of the 562 princely states in the Indian subcontinent. According to the Partition principle, all princely states were given the option to accede with either India or Pakistan, while considering the geographical situation and wishes of the people of the state.<sup>1</sup>

As far as the Kashmiri people were concerned, they had natural interest in allying themselves with Pakistan. 'At the time of the transfer of power, Muslims constituted about 78% of the entire population and around 93% in the valley itself. Kashmir had religious and cultural affinities with Pakistan. It has over nine hundred mile border with Pakistan'.<sup>2</sup> Besides this, several other factors linked Kashmir to Pakistan. The Hindu Maharaja of Kashmir was reluctant to accede the state with Pakistan. The Muslims of Kashmir started their freedom struggle with the goal of liberating the state and acceding it with Pakistan. The Maharaja fled to Delhi and appealed to the Indian government for military assistance. Indian Prime Minister Nehru, a Kashmiri Hindu, flew troops to the state to crush the voice of freedom fighters.<sup>3</sup> The freedom fighters liberated an area of 5124 square miles, formally declared independence from Maharaja's government on 24 October 1947, and established a revolutionary government of their own in the liberated territory.

## Emergence of the state of Azad Kashmir

As stated above, the people of the liberated part announced the establishment of Provisional Revolutionary Government, on 24 October 1947, and overthrew the Maharaja's government.<sup>4</sup> The revolutionary government described itself as a War Council. Later on, the prominent leaders of a Kashmiri political party, Muslim Conference (MC), reconstituted the Provisional Revolutionary Government as the 'Azad Kashmir Government' (AJK), run by the Central Committee of Muslim Conference. The sole objective of this government was to liberate the

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<sup>1</sup> Justice (Rtd.) Nasim H. Shah, 'Kashmir and International Law', *Pakistan Horizon*, 15:1 and 2 (Karachi: Area Study Centre for Europe, University of Karachi, 1999), p.1.

<sup>2</sup> Aqil Ahmed Azami, *Kashmir: An Unparalleled Curfew* (Karachi: Zyzzyyva Publishing, 1990), p.38.

<sup>3</sup> Musarat Javed Cheema, 'Pakistan – India Conflict with Special Reference to Kashmir', *A Research Journal of South Asian Studies*, 30:1 (January – June 2015), pp.48-49.

<sup>4</sup> Muhammad Yusuf Saraf, *Kashmir Fight for Freedom (1947-1978)*, Vol.II (Lahore: Ferozsons, 1979), p.771.

whole of Kashmir.<sup>5</sup> The MC identified the Azad Kashmir Government as the government of both ‘territories of the State of Jammu and Kashmir which have been liberated by the people of that state’.<sup>6</sup> However, there was no constitutional framework or legal setup to function within the state. Thus, the government worked on ad hoc basis until the ceasefire agreement was signed between India and Pakistan on 1<sup>st</sup> January 1949. According to the resolutions of United Nations Commission for India and Pakistan (UNCIP), the Government of Azad Kashmir was declared a local authority and the administration of this area was entrusted to the Government of Pakistan, whilst the area was demarcated through the ceasefire agreement.<sup>7</sup>

### **Constitutional and political development in Azad Kashmir**

After the ceasefire agreement, the Government of Azad Jammu & Kashmir devised a legal framework and formulated the rules of business to run the administration of the state. The supreme head of Azad Kashmir movement promulgated the ‘Rules of Business’ for Azad Kashmir government on 28 December 1950.<sup>8</sup> The real legislative and executive powers were vested in the supreme head of the state. According to these rules, the supreme head had the power to appoint the president and members of the council of ministers. Under these rules, the government was of presidential form.<sup>9</sup> The entire government, including the president, was responsible to the supreme head of Azad Kashmir movement.

The rules of business (1950) were revised in 1952. The Ministry of Kashmir Affairs was constitutionally introduced in the affairs of Azad Kashmir. According to these rules, ‘The President shall hold office during the pleasure of All Jammu and Kashmir Muslim Conference, duly recognized as such by the Government of Pakistan in the Ministry of Kashmir Affairs’. All powers were vested in the ‘Joint Secretary, Ministry of Kashmir Affairs’. Therefore, the appointment of the heads of government departments, judiciary and other important appointments

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<sup>5</sup> *Ibid.*

<sup>6</sup> Sardar M. Ibrahim Khan, *The Kashmir Saga* (Lahore: Ripon Printing Press, 1965), p.71.

<sup>7</sup> Manzoor Gillani, *The Constitutional Development in Azad Kashmir* (Islamabad: National Book Foundation, 2008), p.23.

<sup>8</sup> Sardar M. Ibrahim Khan, *op.cit.*

<sup>9</sup> Christopher Sneddon, *The Untold Story of the People of Azad Kashmir* (Oxford: Oxford University Press, 2012), p.111.

could only be made with prior consultation of Ministry of Kashmir Affairs.<sup>10</sup>

The Rules of Business of 1952 were revised in November 1958. The joint secretary was substituted by the 'chief advisor' through this revision. All the powers were vested with the chief adviser or any other officer nominated by the Ministry of Kashmir Affairs. All functions of the government were exercised in the name of the president.<sup>11</sup> The Government of AJK could not create a post that required a monthly salary of over Rs.150, and was not allowed to spend over one lakh per annum. Up to 1960, the appointment of president was the sole discretion of the MC and a person who enjoyed the confidence of the working committee of MC could become and remain the President of AJK.<sup>12</sup>

### **Presidential Election Act, 1960**

The AJ&K Presidential Election Act of 1960 was enforced on 16 December 1960. Under this act, presidential election by the votes of basic democrats was introduced and Azad Jammu and Kashmir Council was constituted. The council consisted of twenty-four members, the people of Azad Kashmir and Kashmiri refugees were to elect twelve members each.<sup>13</sup>

In 1964, Azad Jammu and Kashmir Government Act 1964 replaced the Presidential Act. Under the provision of this act, the State Council was amended to the extent that eight state councilors were to be elected by the Basic Democrats of AJK.<sup>14</sup> In 1965, under another provision two members were to be nominated by the president from the refugees settled in Pakistan. The chairman of the council was to be nominated by the chief adviser amongst the members who was to act as the President for Azad Jammu and Kashmir. Under this Act, the State Council could not undertake any legislation without prior consent of the

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<sup>10</sup> Manzoor Gillani, *op.cit.*, p.33.

<sup>11</sup> Muhammad Yusuf Saraf, *op.cit.*, p.779.

<sup>12</sup> 'Azad Jammu and Kashmir and Gilgit-Baltistan Proposals for enhanced autonomy and empowerment', *Association for the Rights of the People of Jammu and Kashmir*, June 2012, p.19. Retrieved from <http://www.ajk.org/wp-content/uploads/2012/07/Book.pdf>.

<sup>13</sup> Khalil Ahmed Qureshi, *Azad Jammu and Kashmir Interim Constitution Act 1974 (ACT VIII OF 1974)*, accessed on 11 May 2015 [http://www.ajkassembly.gov.pk/AJK\\_Interim\\_Constitution\\_Act\\_1974.pdf](http://www.ajkassembly.gov.pk/AJK_Interim_Constitution_Act_1974.pdf) p.14.

<sup>14</sup> Ershad Mahmud, 'Status of AJK in Political Milieu', *Policy Perspectives*, 3:2 (July-December 2006). [www.isp.org.pk/education/115-status-of-ajk-in-political-mileu.html](http://www.isp.org.pk/education/115-status-of-ajk-in-political-mileu.html).

chief adviser and no law could take effect unless the chief adviser directed so by a notification.

In 1968, the Azad Jammu and Kashmir Government Act 1968 was enforced and eight councilors were elected, while four members were to be nominated by the chief adviser from the refugees. The chief adviser still occupied the pivotal role and there was hardly any mechanism in the region to elect leader democratically. Not to mention, the entire process was carried out by the Government of Pakistan.

The significant and far-reaching constitutional changes came in 1970 through the Azad Jammu and Kashmir Government Act of 1970. The system of adult franchise was adopted and a democratic setup was introduced under this act. For the first time, the members of Legislative Assembly as well as President of Azad Jammu and Kashmir were elected on the basis of adult franchise by the people of AJK and the refugees of Jammu and Kashmir settled in Pakistan. The assembly consisted of 24 elected members and one co-opted female member. The Act of 1970 provided a democratic form of government through presidential system. President was the chief executive and all legislative powers were vested in the assembly. Except defense, security, currently and responsibilities of the Government of Pakistan under UNCIP resolutions, the AJK Assembly had the power to make laws for all subjects in the territory including the diaspora whose ancestors belonged to the area.<sup>15</sup> The president had the power to appoint the chief justice and judges of the High Court. The arbitrary authority of the chief adviser or joint secretary was also abolished.

This system continued for four years. When a parliamentary form of government was introduced in Pakistan through the constitution of Pakistan in 1973, a wave of change also gripped the people in Azad Kashmir, who raised voice for a parliamentary form of government in the state. As a result, Act of 1970 was repealed and re-enacted with certain modifications through Interim Constitution Act, 1974.<sup>16</sup>

### **The Azad Jammu and Kashmir Interim Constitution Act, 1974**

The draft constitution was introduced in the assembly on 24<sup>th</sup> of August 1974. It was passed by the Assembly of Azad Kashmir and was approved by the Government of Pakistan. Presently AJK is governed under this act under which a parliamentary system of government was introduced with prime minister as chief executive of the state, Azad Jammu and Kashmir

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<sup>15</sup> Azad Jammu and Kashmir and Gilgit-Baltistan Proposals for enhanced autonomy and empowerment', *op.cit.*, p.21.

<sup>16</sup> Ershad Mahmud, *op.cit.*

Council was created and the institution of 'Joint Sitting' was created as a Constituent Assembly.<sup>17</sup> The AJK Interim Constitution Act has undergone about eleven amendments so far. The Azad Jammu and Kashmir Legislative Assembly consists of forty-nine members, twenty-nine members are elected from the territory of Azad Kashmir and 12 members are elected by the refugees settled in Pakistan on the basis of adult franchise. Five seats are reserved for women, one for *ulema*, one for technocrats and one for overseas Kashmiris. The prime minister of Pakistan heads the Azad Jammu and Kashmir Council as chairman. Six members are elected by Azad Kashmir Assembly, three ex-officio members including president AJK (vice-chairman of the council), prime minister of AJK or his nominee, federal minister for Kashmir Affairs, and five members are nominated by the prime minister of Pakistan from amongst the federal ministers and members of the parliament.<sup>18</sup>

Azad Jammu and Kashmir Council is vested with the legislative and executive powers over fifty-two subjects as well as some other power including the appointments of high and supreme courts judges. The Interim Constitution Act provides two executive forums, the Government of Azad Kashmir in Muzaffarabad and the Azad Kashmir Council in Islamabad.

### **Constitutional structure of Azad Kashmir**

Constitutionally, Azad Jammu and Kashmir is not a part of Pakistan, nor is it a province or agency of Pakistan but has a government of its own. According to the resolutions of UNCIP, the Government of Azad Kashmir is a local authority and the administration of this area is entrusted to the Government of Pakistan. The power-sharing mechanism between Azad Kashmir and Government of Pakistan is based on Interim Constitution Act, 1974.<sup>19</sup>

The AJK Interim Constitution Act 1974 formally visualizes a three-tier constitutional structure. The first one is the Government of Pakistan, which is vested with all executive and legislative powers in matters of defense, foreign affairs (including foreign trade and foreign aid), currency, and the implementation of UNCIP resolutions.<sup>20</sup> The

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<sup>17</sup> Manzoor Gillani, *op.cit.*, p.17.

<sup>18</sup> 'AJK Interim Constitution Act, 1974', *The Azad Jammu and Kashmir Legislative Assembly*, [http://www.ajkassembly.gok.pk/AJK\\_Interim\\_Constitution\\_Act\\_1974.pdf](http://www.ajkassembly.gok.pk/AJK_Interim_Constitution_Act_1974.pdf), accessed on 11 May 2015.

<sup>19</sup> Christopher Sneddon, *op.cit.*, p.113.

<sup>20</sup> 'Azad Jammu and Kashmir and Gilgit-Baltistan Proposals for enhanced autonomy and empowerment', *op.cit.*

Azad Jammu and Kashmir Council is the second tier. It has exclusive legislative and executive authority over the matters included in the 'Council Legislative List'. The subjects falling under the Kashmir Council's remit include electricity and hydro power generation, tourism, population planning, banking, insurance, stock exchange and future markets, trading corporations, telecommunication, planning for economic coordination, highways, miners, oil and gas, development of industries, newspapers, etc. The major sources of income of the Azad Kashmir Government, such as income tax and some other taxes were transferred to the AJK Council, thus giving it greater control over AJK's finances. In addition, the powers to appoint judges of the Supreme and High Court, the chief election commissioner, and the auditor general also vest in the chairman of AJK Council. The Kashmir Council holds exclusive powers over the AJK government and AJK Assembly. The third tier is the Legislative Assembly and Government of Azad Jammu and Kashmir. The Legislative Assembly has exclusive power to make laws on matters not listed in the Council Legislative List. The Azad Kashmir Assembly, which is an elected forum, is only responsible for dealing with day-to-day affairs in a given legal setup.<sup>21</sup> Under the Azad Jammu and Kashmir Government Interim Constitution Act 1974, the Government of Azad Jammu and Kashmir is left with little autonomy or status.

### **Impact of 18<sup>th</sup> Amendment on Azad Kashmir**

The Eighteenth Amendment to the Constitution of Pakistan has empowered the provincial governments by giving greater autonomy and abolishing the Concurrent List, but it was not extended to Azad Jammu and Kashmir. The Kashmir Council still holds all legislative and executive powers over 52 subjects. Furthermore, Azad Jammu and Kashmir has no representation in the institutions established by the constitution for consultation and coordination between the federation and its component units. Similarly, Azad Jammu and Kashmir is not represented on the Indus River System Authority (IRSA). Under the amendment, the proprietorship of natural resources including minerals and water has been delegated to the provinces. Yet unlike the provinces,

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<sup>21</sup> 'An Appraisal of Constitutional, Financial and Administrative Arrangements between the Governments of Pakistan and Azad Jammu and Kashmir', *Centre for Peace Development and Reforms*, June 2011, [http://www.cpd.org.pk/wp-content/uploads/2012/01/2011\\_CPDR\\_Kashmir\\_Report.pdf](http://www.cpd.org.pk/wp-content/uploads/2012/01/2011_CPDR_Kashmir_Report.pdf)

Azad Kashmir is not getting any share of the profits earned from the hydro electric power stations located in the territory of Azad Kashmir.<sup>22</sup>

### **Conclusion**

The Interim Constitution Act 1974 has not provided autonomy to the government of Azad Jammu and Kashmir. Kashmir Council is vested with the powers to legislate, levy taxes, and perform executive functions. The Government of Azad Jammu and Kashmir is left with little autonomy or status. The political rights of the people stand denied. The Kashmir Council control over subjects has marginalized the AJK government's powers over the state's affairs. There is a need to revisit the Council Legislative List and executive authority.

All executive and legislative powers should be reverted to the Government of Azad Jammu and Kashmir and the AJK Assembly. This can only be done with the approval of the Government of Pakistan. Nonetheless, the Government of Pakistan must agree to this in the interests of the political rights of the people of Azad Jammu and Kashmir. The 18<sup>th</sup> Amendment provides provincial and financial autonomy. Azad Kashmir is not a province of Pakistan neither a defined territory of Pakistan in the Constitution of Pakistan. The impact of this amendment on Azad Kashmir cannot be seen unless the status of Azad Kashmir is defined in the Constitution of Pakistan.

### **Recommendations**

- For the autonomy of Azad Jammu & Kashmir government, the recommendations of AJK Legislative Assembly to amend the Interim Constitution Act 1974 should be amended.
- Act 1970 should be reinforced in its original position.
- The Government of AJK should be given the representation in the institutions established by the constitution of Pakistan for consultation and coordination between the federation and its component units.

The role of AJK Council should be minimized and Council Concurrent List should be abolished.

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<sup>22</sup> *Ibid.*