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ARTICLE 370: GENESIS AND WRECKAGE

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The present state of Article 370 of the Indian Constitution mirrors the tragedy of Kashmir

Article 370 of the Constitution of India is a unique provision. The Constituent Assembly of India which adopted this special provision only put the imprimatur of its formal approval on a solemn agreement, a compact. It had been negotiated for five whole months between the State of Jammu & Kashmir, represented by its Prime Minister - as he was then called - Sheikh Muhammad Abdullah and his colleagues, and the Prime Minister of India Jawaharlal Nehru and his colleagues, including the

Deputy Prime Minister Vallabhbhai Patel. It was crafted to give J&K guaranteed autonomy and a special status different from all other States. It was wrecked by Nehru deliberately, calculatedly. "It has been eroded, if I may use the word, we feel that this process of gradual erosion of Article 370 is going on. Some fresh steps are being taken and in the next month or two they will be completed. We should allow it to go on" (Lok Sabha Debates; 27 November 1963; Volume XII, Columns 1231-2; Vide also A.G. Noorani; Article 370: A Constitutional History of Jammu and Kashmir, Oxford University Press, New Delhi and Karachi; pp. 304-5. This compilation covers documents from 1947-2010 and cites references to all the documents).

Nehru hesitated to use the word "eroded" because he knew that while a Constitutional provision can be amended or deleted, it cannot be eroded with time like a natural element; a mere 14 years later. When he spoke of "fresh steps" to be taken shortly, he had in mind the ones he proposed to take in respect of the Constitution of Jammu & Kashmir. The object was to wipe out the State's "special status" and its autonomy in all but name and bring it on a par with the other States.

Simultaneously with this internal process, another was undertaken externally to close another chapter. It was to foreclose any possibility of Kashmir seceding from India by a plebiscite. Internally, Art. 370 was wrecked; externally so were the agreements with Pakistan. Both spelt closer control by the Union of India over the State. In 1952 Sheikh Abdullah began to express his disquiet. In 1953 he sought to devise a formula for plebiscite acceptable to India as well as Pakistan and thus bring peace to the State and, indeed, to the sub-continent. Alarmed, Nehru personally ordered his arrest and imprisonment on 8 August 1953, as the documents published in 1998 establish; including his instructions to his Private Secretary M.O. Mathai on 31 July 1953 (Noorani; p. 236).

Why did the Sheikh, once a staunch advocate of Kashmir's accession to India, rebel at all? Neither admirers nor critics care to answer the question objectively and with full respect to the record. There is no doubt that in 1947 he was emotionally more in sympathy with Nehru's outlook than with that of Pakistan. In 1944 he was snubbed by Quaid-e-Azam Mohammad Ali Jinnah in Srinagar. He was asked to wind up the National Conference and join the Muslim Conference (Muhammad Yusuf Saraf; Kashmir's Fight for Freedom, Ferozsons, Lahore; Vol. 1; pp. 627-632; 1977; Sheikh Muhammad Abdullah's The Blazing Chinar; Gulshan Books; Srinagar; p.279; 2013).

The Muslim League, with an eye on Hyderabad, supported the ruler's right to decide his State's future. The Congress supported the people's right. The faultlines had opened as far back as in 1938. But the Sheikh was every bit the people's tribune sanspareil. He knew that regardless his own opinions; the people sought accession to Pakistan. On his release from prison on 29 September 1947, he sent one emissary after another to Pakistan - Bakshi Ghulam Mohammad and G.M. Sadiq-while Mian Iftikharuddin, M.D. Taseer and Malik Tajuddin visited Srinagar to talk to him.

Two statements reveal his outlook. In the one to the press he said "If the 40 lakhs of people living in Jammu and Kashmir we bypassed and the State

(read; the ruler Hari Singh) declares accession to India or Pakistan, I shall raise the banner of revolt and we face a struggle”.

To Phillip Talbot, later Assistant Secretary of State for New Eastern and South Asian Affairs, he said, around the same time, “that Kashmir would be finished if it had to join one Dominion and thereby incur the hostility of the other. What he sought, he said, was an arrangement by which Kashmir could have normal relations with both countries” (Phillips Talbot; *An American Witness to India’s Partition*; SAGE; p.378).

Neither Indian nor Pakistani scholars care to ask with what mandate did he send the emissaries to Pakistan and how they were received. Saraf provides a well sourced account. Referring to Abdullah’s public statements he writes: “It is obvious that a man of Shekh Abdullah’s experience could not have taken such a line in Delhi as late as 21st October, 1947, if he were already committed to a pro-India and anti-Pakistan line. It not only represented a softening of his attitude but amounted to a discreet public assurance to Pakistan. While he was still in Srinagar, he deputed Khawaja Ghulam Muhammad Sadiq to Lahore to continue the dialogue with the Pakistan leaders. Of course, he was supposed to talk to those in authority in Pakistan. It seems that nothing concrete came out of these talks. The highest official, Mr. Sadiq was honoured to meet, was the Nawab of Mamdot. Obviously, he could not speak with authority.

“Quoted below is a passage from an article written by Mr. Abdul Majid Qarshi of Jammu, one of the earliest political workers in the State, published in the *Weekly Azad Kashmir* dated the 4th November, 1959.

“On the 18th of October, 1947, I received a message from Maulvi Muhammad Saeed Masudi at Amira Kadal Srinagar that Sh. Muhammad Abdullah had ordered me to leave for Lahore immediately in order to take part in the negotiations that were already going on there between Kh. Ghulam Muhammad Sadiq and the Muslim League Government. I was also told that Sh. Muhammad Abdullah wanted me to ensure that the talks were not broken under any circumstances.”” (italics mine throughout)

He reached Sialkot on 20th October to make arrangements for his family. He then proceeded: “I spent the 21st of October in taking stock of the situation and on the 22nd when I was preparing to leave for Lahore, news came that tribesmen were about to enter Muzaffarabad in aid of the Muslims of Kashmir. I reached Lahore on the 22nd October but an hour before my arrival, Kh. Ghulam Muhammad Sadiq and his companions had, on hearing of the tribesmen’s entry, flown to Delhi.”

“Dr. M. D. Taseer recorded: I went to Delhi a third time (before the partition) to see Muhammad AH Jinnah, I talked to him about Kashmir. I was not satisfied with his handling of Kashmir affairs and I thought it was not tactful.

“One thing is now clearly established that Sheikh Abdullah’s representative was still holding negotiations with the Pakistan Government on the Pakistan soil and the idea was to pave the way for his leaders’ visit to Karachi when tribesmen entered the State.” (Saraf; Vol. 2; pp. 801-3).

Had the raiders succeeded, they would have captured him and brought him to Pakistan. He felt betrayed. The accession to India was forced on him by events. It is highly significant that not long after the accession on 26

October 1947, he spoke to the British Commonwealth Secretary Patrick Gordon-Walkar on lines similar to his remarks to Talbot (Noorani; *The Kashmir Dispute 1947-992*; Vol.1, 2012; p. 38, Tulika Books, New Delhi). On their part, Nehru and Patel, had sought to by-pass the people even before the Sheikh's release from prison, by foisting on the ruler Hari Singh an Instrument of Accession or failing that a Standstill Agreement which in its Indian form, bound the State to surrender foreign affairs to the Union (Noorani; Vol. 1, pp. 1,5 and 18).

One wonders why the leaders of India and Pakistan agreed to accept transfer of power to their countries by the British Parliament and thus, impliedly, accepted the legality of rule by the British Crown and Parliament over India. All that was required was mere relinquishment of the British Parliament's sovereignty over British India and the British Crown's suzerainty over the princely rulers whom it had propped up. Section 1(1) of the Indian Independence Act, 1947, enacted by the British Parliament, laid down "As from the fifteenth of August, nineteen hundred and forty-seven two independent Dominions shall be set up in India, to be known respectively as India and Pakistan"; that is "set up" by the British Parliament.

Since the partition of India was based on a tripartite accord, the two governments could have set themselves up, in New Delhi and Karachi, by common consent and recognition accorded duly to their independent existence by executive orders. A simple statute declaring that the British Parliament renounced and relinquished its existing power to legislate on India would have been more dignified.

But this implied an accord between the Indian National Congress and the All-India Muslim League. Their disagreement surfaced soon after the agreed partition plan of 3 June 1947 was announced. Who would decide on the State's accession? Jinnah opined that it was the ruler; Nehru that it was the people. They met on 13 June 1947 under the Chairmanship of the Viceroy Lord Mountbatten, a mere ten days after they had accepted the Partition Plan of 3 June 1947. "Mr. Jinnah said that in his view the States were fully entitled to say that they would join neither Constituent Assembly. Every Indian State was a sovereign State. Pandit Nehru said he differed altogether. He spoke as a lawyer. Mr. Jinnah said that he spoke as a lawyer also" (*The Transfer of Power 1942-47*, Vol. XI: 320-26). It had come to that.

An overall settlement was proposed to Jinnah in writing at Governor's House in Lahore by Mountbatten on 1 November 1947. By then the Indian troops had occupied Junagadh and were beating back the raiders who had entered Kashmir on 22 October. India and Pakistan launched a cold war even while they were in the embryo of history.

Jinnah rejected this formula which Mountbatten offered to him. It read: "The Governments of India Pakistan agree that where the ruler of a State does not belong to the community to which the majority of his subjects belong, and where the State has not acceded to that Dominion whose majority community is the same as the State's, the question of whether the State should finally accede to one or the other of the Dominions should in all cases be decided by an impartial reference to the will of people" (Durga

Das Sardar Patel's Correspondence; 1974: 73).

The formula was to be 'a basis for discussion' at the conference, as envisaged in the "Suggested proposal to Pakistan Government to form the basis of discussion'. It covered the entire process from the ceasefire, withdrawal of the raiders and next of the Indian troops, followed by a UN-supervised plebiscite. India was "prepared to agree that a joint India-Pakistan force should hold the ring while the plebiscite is being held." The formula, including its basis, the religious factor, was offered by Nehru to Liaquat Ali Khan, the Prime Minister in a telegram on 8 November (White Paper on Jammu and Kashmir 1948: p.62, paragraphs 14 and 15). Omitted however, was the offer of a joint India-Pakistan force. Pakistan's negotiating strength was evaporating by the day. India's offer was made to a militarily weak Pakistan after its troops had occupied Junagadh and were beating back the raiders in Kashmir. Jinnah's objection to the inclusion of Hyderabad wrecked the best opportunity for peace. He could well have asked for some safeguards for Hyderabad as a part of the deal. (Vide writer's article Bilateral Negotiations on Kashmir: A record 1947-2006; Criterion, 10 January 2006).

Jinnah had already declared his stand in two public statements on 17 June and 30 July 1947. The Congress declared its stand in its general body, the AICC's resolution of 15 June 1947. Accordingly Junagadh acceded to Pakistan shortly after independence. The tribesmen's entry into Kashmir forced its vacillating ruler Hari Singh to accede to India on 26 October 1947 by signing the standard Instrument of Accession. The Indian Independence Act, 1947 empowered the Governor General of India (Section 8(2)) to adapt the Government of India Act, 1935 as the interim constitution till the enactment of a Constitution by the Constituent Assembly of India. The Act, as adapted, served as India's Constitution from 15 August 1947 to 25 January 1950.

Section 6(1) of the Act enabled an Indian State, a formerly princely state, to accede to India by its ruler executing an Instrument of Accession. It is important to note that no specific form was prescribed by the Act itself. All it required was that the Instrument declare the act of accession and specify its terms. As a matter of convenience the Government of India used the Draft Instrument which was drawn up after the Act of 1935 became law. The federation it envisaged did not come into being. In the case of Jammu and Kashmir, the Instrument of Accession which the Ruler executed on 26 October 1947 was accompanied, uniquely, by a letter of the same date signed simultaneously with the Instrument. In law, such a document is a collateral document and the two form an integral whole. The letter has the same legal effect as does, indeed, the Governor General's letter of acceptance dated 27 October 1947. Acceptance is a legal prerequisite under Section 6(1) of the Act. The Governor General's letter stipulated that "as soon as law and order have been restored in Kashmir and her soil cleared of the invaders; the question of the State's accession would be settled by a reference to the people." Accordingly, the White Paper on Jammu & Kashmir published by the Government of India early in 1948 recorded: "In accepting the accession, the Government of India made it clear that they would regard it as purely provisional until such time as the

will of the people of the State could be ascertained.” It was, in law, a conditional accession.

Clause 7 of the Instrument of Accession said, “Nothing in this instrument shall be deemed to commit me in any way to acceptance of any future Constitution of India or to fetter my discretion to enter into arrangements with the Government of India under any such future Constitution.” Except Jammu and Kashmir, every state accepted Part B of the Constitution of India which provided uniformly for the governance of the former princely states. Jammu and Kashmir was the only state to declare its intention to have its own Constitution drafted by its own Constituent Assembly. That was as far back as 5 March 1948, by the Maharaja’s Proclamation. It negotiated the terms of Article 370 to protect those rights; the only State to do so.

The State acceded to India in 1947 in respect only of defence, foreign affairs, and communications. Negotiations began on 15 and 16 May 1949. On 16 June 1949, Sheikh Abdullah, Mirza Mammad Afzal Baig, Maulana Mohammed Saeed Masoodi, and Moti Ram Bagda joined the Constituent Assembly of India. Negotiations had begun in earnest on Article 370 (Article 306A in the draft). A text, agreed on 16 October, was moved in the Constituent Assembly the next day, by Ayyangar.

The clumsily drafted Article 370 reads as follows:

“Temporary Provisions with Respect to the State of Jammu & Kashmir.

370. (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 on the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for the 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 recognised 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 relations 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:

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 (1) or in the second proviso to subclause (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.”

Thus, Article 370 embodies six special provisions for Jammu and Kashmir. First, it exempted the State from the provisions of the Constitution providing for the governance of all the States. Jammu and Kashmir was allowed to have its own Constitution.



Second, Parliament's legislative power over the State was restricted to three subjects - defence, foreign affairs, and communications. The President could extend to the State other provisions of the Constitution so as to provide a federal constitutional framework if they related to the matters specified in the Instrument of Accession. For this, only consultation with the State government was required since the State had already accepted them by the Instrument. But, thirdly, if other constitutional provisions or other Union powers were to be extended to Kashmir, the prior concurrence of the State government was required.

The fourth feature is that the State Government's concurrence was strictly provisional. It had to be ratified by the State's Constituent Assembly. Article 370(2) says clearly: “If the concurrence of the Government of the State... 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.”

The fifth feature is that the State Government's authority to give the concurrence lasts only till the State's Constituent Assembly is convened. It is an interim power. Once the Constituent Assembly met, the State government could not give its own concurrence; still less, after the Assembly met and dispersed. Moreover, the President cannot exercise his power to extend the Indian Constitution to Jammu and Kashmir indefinitely. The power has to stop at the point the State's constituent Assembly drafted its Constitution and decided finally what additional subjects to confer on the Union, and what other provisions of the Constitution of India it should get extended to the State, rather than having their counterparts embodied in the State Constitution itself. Once the

State's Constituent Assembly had finalised the scheme and dispersed, the President's extending powers ended completely.

The sixth special feature, the last step in the process, is that Article 370(3) empowers the President to make an order abrogating or amending it. But for this also the recommendation of the State's Constituent Assembly shall be necessary before the President issues such a notification.

Article 370 cannot be abrogated or amended by recourse to the amending provisions of the Constitution of India which apply to all the other states; namely, Article 368. For, in relation to Jammu and Kashmir, Article 368 has a proviso which says that no constitutional amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under Article 370. That requires the concurrence of the State's government and ratification by its Constituent Assembly.



Jammu and Kashmir is mentioned among the States of the Union in the First Schedule as Article 1(2) requires. But Article 370(1) (c) says: "The provisions of Article 1 and of this Article shall apply in relation to the State." Article 1 is thus applied to the State through Article 370.

The Cabinet Minister N. Gopalaswamy Ayyangar's exposition of Article 370 in the Constituent Assembly of India on 17 October 1949 is authoritative: "We have also agreed that the will of the people, through the instrument of a Constituent Assembly, will determine the Constitution of the State as well as the sphere of Union jurisdiction over the State... You will remember that several of these clauses provide for the concurrence of the Government of Jammu and Kashmir State. Now, these relate particularly to matters which are not mentioned in the Instrument of Accession, and it is one of our commitments to the people and Government of Kashmir that no such additions should be made except with the consent of the Constituent Assembly which may be called in the State for the purpose of framing its Constitution."

Ayyangar explained: "the provision is made that when the Constituent Assembly of the State has met and taken its decision both on the Constitution for the State and on the range of federal jurisdiction over the State, the President may, on the recommendation of that Constituent Assembly, issue an Order that this Article 306A (370 in the draft) shall either cease to be operative, or shall be operative only subject to such exception and modifications as may be specified by him. But before he issued any order of that kind, the recommendations of the Constituent Assembly will be a condition precedent."

In plain words, Article 370 cannot be invoked after the State's Constituent Assembly has taken its decision on the Constitution and on the range of federal jurisdiction over the State.

The unique process of a Presidential Order altering constitutional provisions by a mere executive order ends with the final decision of the State's Constituent Assembly. Ayyangar repeatedly said that the State government's concurrence alone will not do. That concurrence should be placed before the Constituent Assembly when it meets and the Constituent Assembly may take whatever decision it takes on those matters. It was, as he put it, only an interim arrangement.

In 1949, no one knew when Kashmir's Constituent Assembly would be elected. Arrangar therefore said: "The idea is that even before the Constituent Assembly meets, it may be necessary ... that, certain items which are not included in the Instrument of Accession would be appropriately added to that list in the instrument ... and as this may happen before the Constituent Assembly meets the only authority from whom we can get consent for the addition is the Government of State". This was explicitly only for that interim period.

Article 370(1) (b) is clear. The power of India's Parliament to make laws for Kashmir shall be limited to (i) matters in the Union and Concurrent Lists corresponding the broad heads specified in the Instrument of Accession 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. Similar concurrence was required when extending provisions regarding Union institutions beyond the agreed ones. But Article 370(2) stipulated clearly that "if that concurrence is given before the Constituent Assembly ... is convened, it shall be placed before such Assembly for such decision as it may take thereon."

Once Kashmir's Constituent Assembly was convened on 31 October 1951, the State Government lost all authority to accord any concurrence to the Union. With the Assembly's dispersal on 17 November 1956, after adopting the Constitution of Jammu and Kashmir, vanished the only authority which alone could cede: (i) more powers to the Union and (ii) accept Union institutions other than those specified in the Instrument of Accession. All additions to Union powers since then are unconstitutional. This understanding informed decisions right until 1957. It was abandoned thereafter.

The Constituent Assembly of India adopted the Constitution of India on 26 November 1949. A day earlier, the ruler of Kashmir made a Proclamation declaring that "it shall in so far as it is applicable to the State of Jammu and Kashmir, govern the constitutional relationships between this State and the contemplated Union of India." On 26 January 1950, the President made his first order under Article 370, extending specified provisions of the new Constitution to the State.

Remove Art. 370 and Kashmir's link with India is severed. It is not a "temporary" provision pending the State's full integration with India. It is "temporary" pending a decision on its future. In 1949 when it was adopted by the Constituent Assembly a plebiscite in Kashmir was very much India's oft declared commitment.

The exposition of the mover of the provision in the Constituent Assembly quoted earlier in brief was Sir N. Gopaldaswamy Ayyangar, a former Dewan of Kashmir, who was hostile to the Sheikh. What he said in the Assembly on 17 October 1949 is quoted here in extenso: "I shall briefly indicate what the special conditions are. In the first place, there has been a war going on within the limits of Jammu and Kashmir State.

"There was a cease-fire agreed to at the beginning of this year and that cease-fire it still on. But the conditions in the State are still unusual and abnormal. They have not settled down. It is therefore necessary that the

administration of the State should be geared to these unusual conditions until normal life is restored as in the case of the other States. Part of the State is still in the hands of rebels and enemies.

“We are entangled with the United Nations in regard to Jammu and Kashmir and it is not possible to say now when we shall be free from this entanglement. That can take place only when the Kashmir problem is satisfactorily settled.

“Again, the Government of India have committed themselves to the people of Kashmir in certain respects. They have committed themselves to the position that an opportunity would be given to the people of the State to decide for themselves whether they will remain with the Republic or will go out of it. We are also committed to ascertaining this will of the people by means of a plebiscite provided that peaceful and normal conditions are restored and the impartiality of the plebiscite could be guaranteed. We have also agreed that the will of the people, through the instrument of a Constituent Assembly, will determine the constitution of the State as well as the sphere of Union jurisdiction over the State.

“Till a Constituent Assembly comes into being, only an interim arrangement is possible and not an arrangement which could at once be brought into line with the arrangement that exists in the case of the other States.

“Now, if you remember the viewpoints that I have mentioned, it is an inevitable conclusion that, at the present moment, we could establish only an interim system. Article 306A is an attempt to establish such a system.

“Clause (b) (ii) refers to possible additions to the List in the Instrument of Accession, and those additions could be made according to the provisions of this article with the concurrence of the Government of the State. The idea is that even before the Constituent Assembly meets, it may be necessary in the interests of both the Centre and the State that certain items which are not included in the Instrument of Accession would be approximately added to the List in the Instrument so that administration, legislation and executive action might be furthered, and as this may happen before the Constituent Assembly meets, the only authority from whom we can get consent for the addition is the Government of the State. That is provided for.

“Then we come to clause (2). You will remember that several of these clauses provide for the concurrence of the Government of Jammu and Kashmir State. Now, these relate particularly to matters which are not mentioned in the Instrument of Accession, and it is one of our commitments to the people and Government of Kashmir that no such additions should be made except with the consent of the Constituent Assembly which may be called in the State for the purpose of framing its Constitution. In other words, what we are committed to is that these additions are matters for the determination of the Constituent Assembly of the State.

“Now, you will recall that in some of the clauses of this article we have provided for the concurrence of the Government of the State. The Government of the State feel that in view of the commitments already entered into between the State and the Centre, they cannot be regarded as

final authorities for the giving of this concurrence, though they are prepared to give it in the interim periods but if they do give this concurrence, this clause provides that that concurrence should be placed before the Constituent Assembly when it meets and the Constituent Assembly may take whatever decisions it likes on those matters.” (Constituent Assembly Debates; Volume X; pp. 422-7).

In plain words the provisions of the Constitution of India could be extended to the State of Jammu & Kashmir only by an Order made by the President under Article 370 of and not by the Indian Parliament. The extension was to be in respect of topics on which Parliament could legislate for Kashmir and the federal framework which would bind it to the Union - membership in Parliament, jurisdiction of the Supreme Court and other Central institutions. If the President’s Order was confined to matters already conceded to the Centre under the Instrument of Accession - defence, foreign affairs and communications - the only prerequisite was mere “Consultation” with the Government of the State since the State had already acceded to the Union on those very subjects. But if the President’s Order under Article 370 went beyond those subjects, “the concurrence of that Government” was acquired. But this was also subject to an overriding condition. If the State Government’s concurrence was “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”. As Ayyangar said the State Government’s Concurrence could be given only “in the interim period”. Once Kashmir’s Constituent Assembly was “convened” the State Government ceased to have any authority or power to accord its “concurrence”.

On 20 April 1951, the ruler made a Proclamation for convening the State’s Constituent Assembly. It first met on 31 October 1951. Nehru was eager to secure Kashmir’s closer integration with India; the Sheikh was as eager to preserve its autonomy. The Delhi Agreement that followed was announced at a press conference in Delhi on 24 July 1952 by both. This Union-State accord had no legal force by itself. Only an Order under Article 370 could confer that after the State’s Constituent Assembly gave its concurrence, as it alone could; the State government having lost the power on 31 October 1951 when the Assembly was convened.

President Rajendra Prasad questioned “the competence of the President to have repeated recourse to the extraordinary powers conferred on him” by Article 370. He added: “Any provision authorising the executive government to make amendments in the Constitution” was an incongruity and endorsed Ayyangar’s views on the finality of a single order under Article 370. “I have little doubt myself that the intention is that the power is to be exercised only once, for then alone would it be possible to determine with precision which particular provisions should be excepted and which modified.”

The President concluded: “The conclusion: therefore, seemed to me to be irresistible that Clause (3) of Article 370 was not intended to be used from time to time as occasion required. Nor was it intended to be used without any limit as to time. The correct view appears to be that recourse is to be had to this clause only when the Constituent Assembly (sic.) of the State

has been fully framed.”

The Constituent Assembly of India adopted the Constitution of India on 26 November 1949 and resolved to adjourn till such date before the 26th of January 1950 as the President may fix (Constituent Assembly Debates, Volume 12, p. 996). It met again on 24 January 1950 when Dr. Rajendra Prasad was elected the first President of India and members signed three copies of the Constitution. The President of the Constituent Assembly, Dr. Rajendra Prasad, declared: “The House will stand adjourned now sine die.” The proceedings record: “The Constituent Assembly is adjourned, sine die.”

The contrast with the end of the deliberations of the Constituent Assembly of Jammu and Kashmir could not have been more glaring. It formally, solemnly resolved to dissolve itself by considered, deliberate moves. On 17 November 1956 it adopted Mir Qasim’s resolution that “This Assembly resolves that it should stand dissolved on the 26th day of January 1957, which is the date of the commencement of Constitution.” Thus on this date the sole and indispensable ratificatory body, which alone could ratify and endorse any increase in the Centre’s power (beyond defence, foreign affairs, and communications) - disappeared into thin air.

Nonetheless even after this date and event, successive State Governments continued to accord their concurrence to the increase in Central power.

The President of India made as many as 47 Orders under Article 370, mostly after 1956. The net result was that Article 370 was reduced to an empty shell. Of the 395 Articles of India’s Constitution, as many as 260 were extended to Kashmir unconstitutionally. Of the 97 entries in the Union List of topics for legislation by the Indian Parliament, as many as 94 were extended to Kashmir - far beyond defence, foreign affairs and communications. Of the 47 entries in the Concurrent List, 26 were applied with equal unconstitutionality. In all cases the “concurrence” was given even after the State’s Constituent Assembly had formally dissolved itself on 17 November 1956. By then the Prime Minister of Kashmir Sheikh Abdullah, who had consented to the accession, was in prison. He was removed from office and arrested on 8 August 1953.

No executive can usurp the powers of a legislature, still less those of a Constituent Assembly. All the more so if the executive had come to power through one rigged poll after another. “From 1953 to 1975, Chief Ministers of that State had been nominees of Delhi. Their appointment to that post was legitimised by the holding of farcical and totally rigged elections in which the Congress party led by Delhi’s nominee was elected by huge majorities.” This authoritative description of a blot on the record was written by B.K. Nehru, who was Governor of Jammu and Kashmir from 1981 to 1984, in his memoirs published in 1997 (Nice Guys Finish Second, Viking Books, 1997, New Delhi, pp. 614-15).

In 1949 Pakistan protested against India’s decision to admit Kashmir’s four representatives to its Constituent Assembly. The Secretary General of the Ministry of External Affairs Sir Girija Shankar Bajpai, replied on 21 November 1949: “While the Constitution of India which inter alia provided for the relation of acceding States to the Government of India was under consideration it would have been unfair to the Government and

the people of the State of Jammu and Kashmir to deny them the opportunity of participating in the discussion of that Constitution. Such participation was not intended to, and does not, in fact, alter the Government of India's determination to abide, in the matter of accession, by the freely declared will of the people of Jammu and Kashmir. Should that will be against the State continuing to be part of India, if and when it comes to be expressed in a constitutional way under conditions of peace and impartiality, the representation of the State in Indian Parliament would automatically cease and the provisions of the Constitution of India that govern the relations of the State of Jammu and Kashmir with the Union of India will also cease to operate." Presumably by an order by the President under Clause (3) of Article 370.

But all this was a charade. The truth comes out in odd places. Only recently I happened to find a letter by that very sanctimonious hypocrite, N. Gopalaswamy Ayyangar, to Sir Tej Bahadur Sapru, on 8 May 1948: "We cannot afford to let Kashmir secede from India. There are one thousand and one reasons against it, and I sincerely hope with you that Kashmir will be saved for us" (Rima Hooja (Ed.). *Crusader for Self-Rule: Tej Bahadur Sapru and Indian National Movement*; Rawat Publications, Jaipur and New Delhi; p. 497).

By then Jawaharlal Nehru had also decided against holding a plebiscite. His daughter Indira Gandhi informed him, in a letter from Srinagar on 14 May 1948, "They say that only Sheikh Saheb is confident of winning the plebiscite." (Sonia Gandhi, ed. 2005: 517).

Before long the Sheikh also lost hope. President Rajendra Prasad repeated to Nehru, in a letter on 14 July 1953, that Vice-President Radhakrishnan, on his return from a visit to Kashmir, "came and told me that even Sheikh Saheb thought that we would lose in a plebiscite." The message could not have come as a surprise to the Prime Minister and would only have hardened him in his resolve to do away with the inconvenient messenger, Sheikh Abdullah. Nehru himself was none too confident of success either. He frankly told the British High Commissioner, Sir Archibald Nye, on 6 September 1949: "The result of a free and impartial plebiscite, if one could be held, would be for the Poonch area to go to Pakistan and for the Jammu area to go to India, whilst it was doubtful which way the valley would vote" (SWJN, Vol. 13:225).

The agitation by the Jan Sangh's ally, the Praja Parishad, in Jammu confirmed Abdullah's fears and Nehru's as well. Nehru bared his thoughts to his close friend B.C. Roy, Chief Minister of West Bengal, on 29 June 1953: "They (the people in the Valley) have become frightened of the communal elements in Jammu and in India and their previous wish to be attached to India has weakened. Indeed, at the moment, all the hostile forces against us are dominant in Kashmir... The position now is that if there was a plebiscite, a great majority of Muslims in Kashmir would go against us. In fact there has been some petty violence also. So, this movement of the Praja Parishad, which aims at a closer integration of Kashmir State with India, has had the opposite effect. It is true that so far as Jammu Province is concerned, it has demonstrated that a majority of Hindus there want closer integration. Nobody ever doubted that and,

whatever happens, Jammu cannot leave India. There need be no apprehension about that. The whole difficulty has been about the Valley of Kashmir and we are on the point of losing it because of the Prajas Parishad movement. Psychologically we have lost it and it will be difficult to get back to the older position. ...

“In the ultimate analysis, we gain Kashmir if we gain the goodwill of the people there. We cannot keep it at the point of the bayonet if it is clear that the people do not want us. For the first time public cries are raised in Kashmir that the Indian Army should get out.” (SWJN; Vol. 22, pp. 204-5).

If Nehru accepted the two resolutions of the UN Commission for India and Pakistan, dated 13 August 1948 and 5 January 1949, it was not to implement them and hold a plebiscite which they envisaged. It was to obtain a cease-fire since the entire Valley had come under India's control. Indeed, on 12 January 1949, a week after the UNCIP's plebiscite resolution of 5 January 1949, he wrote to Sheikh Abdullah “You know well that this business of plebiscite is still far away and there is a possibility of the plebiscite not taking place at all. (I would suggest that this should not be said in public, as our bona fides will then be challenged)” (SWJN; Vol. 9; p. 198).

Neither had a particularly high opinion of the bona fides of the other. Given his views in September 1947, before the tribal raid, the Sheikh seems to have developed second thoughts on the accession to India.

That Nehru had to reckon with his domestic constituency is understandable. But he himself sought to close the chapter by integrating Kashmir even more closely with the Union, on the one hand, and, on the other, foreclosing the dispute with Pakistan. This was done in stages - first, came the demand for Pakistan's prior withdrawal of its troops from Kashmir without a corresponding commitment of withdrawing the “bulk” of India's forces as the UNCIP's resolution of 13 August 1948 required. Next, he ruled out mediation. Lastly he denied that any dispute on Kashmir existed.

The Delhi Agreement between Nehru and Abdullah of July 1952 covered extension of the federal relationship in respect of (a) Residuary Powers, (b) Citizenship, (c) Fundamental Rights, (d) Supreme Court of India, (e) National Flag, (f) The President of India, (g) The Headship of the State, (h) Financial Integration, (i) Emergency Provisions, and (j) Conduct of Elections to Houses of Parliament. The terms were set out by Nehru on 24 July 1952 and Abdullah on 11 August 1952 (For texts vide Noorani; Art. 370; pp. 138-172). Kashmir must have its own flag. There would be an elected head of State in place of the monarchy, the Sadar-e-Riyasat. Residuary powers would reside in the State. In 1986 this was wiped out when the State was ruled by the Governor. A Central appointee, gave his “concurrence” as the State Government (ibid.; p.419). Sheikh's delays in implementing the Delhi Agreement riled Nehru. Abdullah publicly warned the Centre that any unilateral change would “invite serious consequences for a harmonious association of the State with India” - that is, if Nehru allowed him to remain in power if he did not toe the line. Sheikh Abdullah did not.

Two crucial documents hold the key to what followed and, indeed, to what persists even in 2016. While camping at Sonamarg in Kashmir, Nehru wrote a Confidential Note for Abdullah dated 25 August 1952. It is as significant in the modern history of Kashmir as the document prepared by Paul Nitze NSC-68 is in the history of the Cold War. It is quoted in extenso. "Being clear in my mind as to what should be done, it did not matter much to me what Pakistan did or what the United Nations might do. I was, however, sometimes a little surprised, and somewhat worried, to find that the leaders of Kashmir were not so clear in their minds about the present or the future and were, therefore, worrying a great deal. To give an instance, the present talks with Dr. Graham in Geneva do not appear to me to have any great importance. They do not alter my appraisal of the situation, or what we should do about it. I find, however, that much greater importance is attached to these Graham talks in Geneva, here in Kashmir, and there is some apprehension also about their result.

"After some experience of the UN, I came to the conclusion that nothing substantial could be expected from it. It was clear that we would not give in on any basic point, whatever the UN might say. It seemed also clear that Pakistan would not simply walk out and revert to the status quo ante-war. Thus, towards the end of 1948 it seemed to me that there were only two possibilities open to us: (1) continuation of the war in a limited way; (2) some kind of a settlement on the basis of the then existing military situation.

"I have not mentioned the plebiscite; because it became clear to me then that we would never get the conditions which were necessary for a plebiscite. Neither side would give in on this vital issue, and so I ruled out the plebiscite for all practical purposes. ...

"Even that war, apart from foreign intervention, would not be a very easy or quick one. We had definite superiority from the military and industrial points of view, but that superiority was not so great as to overwhelm the enemy. And then, there was always the question of what foreign powers might do either in interfering or in aiding Pakistan in other ways. "The result of all this thought, and my own powerful inclination to avoid war on a big scale which brought disaster in its train, whatever the result, led me to certain definite conclusions towards the end of 1948. These conclusions were that the only possible way of putting an end to this conflict was by accepting, more or less, the status quo then existing. We were not prepared to give up any territory we possessed to Pakistan. But we might, for the sake of peace and a settlement, agree to their holding what they then had. I was doubtful if Pakistan would accept this. If not, then we continued where we were.

"When I met Attlee and Bevin and Liaquat Ali Khan in London in the last quarter of 1948, I mentioned this briefly to them saying that it was entirely a personal suggestion because of my desire to end this conflict. I was not at all sure how far my own Government, or the Kashmir Government, would agree to it, because they felt strongly on this question of Pakistan aggression. Liaquat Ali Khan refused to consider this matter on this basis and there it ended.

"We are superior to Pakistan in military and industrial power. But that

superiority is not so great as to produce results quickly either in war or by fear of war. Therefore, our national interest demands that we should adopt a peaceful policy towards Pakistan and, at the same time, add to our strength. Strength ultimately comes not from the defence forces, but the industrial and economic background behind them. As we grow in strength, and we are likely to do so, Pakistan will feel less inclined to threaten or harass us, and a time will come when, through sheer force of circumstances, it will be in a mood to accept a settlement which we consider fair, whether in Kashmir or elsewhere. The only danger is that the Government of Pakistan, or some military clique there, might, in sheer desperation, launch on an adventure. That danger has to be faced and prepared for. Otherwise, our national interest demands that we should adopt a firm but non-provocative attitude towards Pakistan, and build up our economic strength, keeping our defence forces in good condition for any possibility. The world situation also demands that we should follow this policy....

“Thus, purely from the point of view of India’s national interest, we cannot agree, unless circumstances force us, to see this part of Kashmir State go to Pakistan. There are no circumstances visible that can force us to do this. Pakistan cannot. The United Nations cannot override our wishes in this matter.

“This is an objective statement from the point of view of India’s national interest. There is another aspect which we have stressed, and which is important. This is the wishes of the people of Kashmir. If the people of Kashmir clearly and definitely wish to part company from India, there the matter ends, however we may dislike it or however disadvantageous it may be to India. But, as I have stated above, I see no chance or whatever of any proper plebiscite determining this question, because the plebiscite itself raises highly controversial issues in regard to the conditions governing it and all that. So, ruling out the plebiscite we have to accept the present leadership of Kashmir and the Constituent Assembly there as representing the will of the people of Kashmir. If the Constituent Assembly told India to get out of Kashmir, we would get out, because under no circumstances can we remain here against the expressed will of the people. As far as I know, the Constituent Assembly will not do such a thing and therefore, the question does not arise for me --

“In fact, Jammu and Kashmir have to hold together. If Jammu is separated, Kashmir goes. If Kashmir goes, Jammu’s position becomes precarious and the conflict does not end. Statesmanship therefore requires that Jammu and Kashmir should hold together. The people of Jammu, therefore, should be made to feel the advantages of this union and the dangers of breaking. They should be won over and not irritated, because the safety and freedom of Kashmir is linked up with the retention of Jammu...

“It must be remembered that the people of the Kashmir valley and roundabout, though highly gifted in many ways - in intelligence, in artisanship, etc. - are not what are called a virile people. They are soft and addicted to easy living. They are surrounded by hardy tribes in the north-west of Pakistan and even in the northern areas of the State. It will be difficult, and indeed hardly possible, for the people of Kashmir to survive

by themselves, if left to their own resources. It was all very well when there was a strong suzerain power like that of England which could prevent harassment and raids. But if a strong suzerain power is absent, then Kashmir is likely to fall an easy prey to these depredations.

“Most important of all is that we should have no doubts in our minds about these matters. Doubts in the minds of leaders percolate to their followers and to the people generally. The weakness of the situation in Kashmir is the constant discussion which go on between people holding different views. I do not know how many such groups there are but obviously some people talk about a close association with India, others talk about a loose association with India, yet others think, if not talk, of an association with Pakistan, and yet others talk about independence. All this confusion in ideas and constant debate weakens the basic position. What is required is a firm and clear outlook, and no debate about basic issues. If we have that outlook, it just does not matter what the United Nations thinks or what Pakistan does.

“Personally, I have that clear outlook and have had it for these years and it has surprised me that there should be so much discussion about obvious matters. ...

“Our general outlook should be such as to make people think that the association of Kashmir State with India is an accomplished and final fact, and nothing is going to undo it... I would repeat that I have held these views concisely and precisely for the last four years, and nothing has happened during this period which has made me change them in the slightest. It is for this reason that meetings with Dr. Graham or anyone else, or any developments in Pakistan, do not worry me in the least, in so far as Kashmir is concerned. What has sometimes worried me is what happens in Kashmir, because I have found doubt and hesitation here, and not clarity of vision or firmness of outlook.” Kashmiri nationalism disturbed the Indian nationalist. (Noorani; pp. 197-205).

On his part Sheikh Abdullah, disturbed by the rise of Hindu Communal forces in India as well as by Nehru’s attitude, decided to forge a settlement with Pakistan. Oppressed by the sense of uncertainty, which had singled out the State in the entire sub-continent, Sheikh Abdullah took his colleagues into confidence and placed the matter before the Working Committee of the Kashmir National Conference which met in May 1953 under his Presidentship. After prolonged discussions it came to the conclusion that it was impossible to have internal stability so long as its future was uncertain. It accordingly appointed a Committee consisting of the following eight members to explore avenues of a settlement: Sheikh Abdullah, Maulana Masoodi, Mirza Afzal Beg, Bakshi Ghulam Mohammed, G. M. Sadiq, Sardar Budh Singh, Pandit Girdharilal Dogra and Pandit Shamlal Saraf.

Nehru who had come to Kashmir when the Working Committee was in session, was informed about its deliberations. Here is an extract from the minutes of the Committee’s final session held on 9 June 1953:

“As a result of the discussions held in the course of various meetings, the following proposals only emerge as possible alternatives for an honourable and peaceful solution of Kashmir dispute between India and Pakistan: (a)

Overall plebiscite with conditions as detailed in the minutes of the meeting dated 4,h June 1953 (this apparently was a reference to Maulana Masoodi's suggestion that the choice of independence be offered in the plebiscite), (b) Independence of the whole State, (c) Independence of the whole State with joint control of foreign affairs, (d) Dixon Plan with independence for the plebiscite area.

“Bakshi Saheb was emphatically of the opinion that the proposal (d) above should be put up as first and the only practicable, advantageous and honourable solution of the dispute. Maulana Saeed, however, opined that the order of preference as given above should be adhered to.”

What G.M. Sadiq then said is worth recalling: “If an agency consisting of India, Pakistan, Afghanistan, Soviet Russia and China could be created to supervise and conduct the plebiscite, I would suggest that we should immediately ask for an overall plebiscite. Failing this, we may ask for a Supervision Commission representing all the members of the Security Council for ensuring free and fair plebiscite in the State.”

In June 1953 Maulana Abul Kalam Azad, Union Minister for Education, visited Kashmir and was apprised of these developments. Early in July 1958, Nehru was informed about the decision. Early in August 1953 Sheikh Abdullah called a meeting of the Working Committee of the General Council in the 3rd and 4th weeks of August in order to review the whole situation. On 8 August 1953, just two days before the scheduled Cabinet meeting, Sheikh Abdullah was arrested at the dead of night, and so were a number of his colleagues. (Quoted by Sheikh Abdullah in his letter from Jail to Mr. G.M. Sadiq dated 26 September 1956 published in Sheikh-Sadiq Correspondence (August to October 1956), p. 18. The pamphlet was published by Miss Mridula Sarabhai, New Delhi.)

Unbeknown to the Sheikh, his close friend Nehru had set in train arrangements for his imprisonment. In a Note of 31 July 1953 to his Private Secretary, the sordid M.O. Mathai, Nehru set out in detail the procedure for the Sheikh's dismissal from office including the use of the army and his imprisonment. (SWJH. Vol. 23; pp. 303-5).

In public Nehru falsely denied his role in the matter. He did so to his daughter Indira, to the President and to Parliament and the nation. Nehru made two fateful errors - with time the people of Kashmir would acquiesce and so would Pakistan. Neither did. Before his arrest, Abdullah had prepared this speech for delivery on 11 August 1953. “After having waited for over five years for a solution of the Kashmir dispute, the people of the State now feel that the present state of uncertainty and inaction is affecting not only their minds, but also all aspects of the administration. ...

“Though the accession of Kashmir to India is complete in all aspects, it is conditional and temporary in the sense that the people of the State have to ratify it. Therefore, it is not final.

“Kashmir is so situated geographically that its prosperity depends on trade with both countries. In the State there are such cultural and racial groups who are different and distinct from each other and who have close relations with their neighbours in West Punjab, the NWFP and East Punjab.

“Furthermore, the rivers and roads of Kashmir lead to Pakistan. At present, there is only one highway linking Kashmir with India, which is snowbound

for about three months every year.

“Kashmir has been importing necessities of life from West Punjab and the nearest railway station to it is Rawalpindi. Kashmir traders use Karachi as their port. ...

“The Muslims and not non-Muslims of the State have to take a decision in regard to the accession of the State to India, because non-Muslims could not even think of any alternative. I do not have to assure Hindus and Sikhs that their future will be safe in India, because to say that is unnecessary. In this respect I have been misunderstood. Whenever I have tried to secure their just right for the Muslims or voiced their views about their future in India, my friends labelled me as a communalist. But unfortunately the Praja Parishad agitation, on the one hand, has created doubt in the minds of Muslims and, on the other hand, the Muslim middle class is finding out that whereas accession to India has opened for Hindus and Sikhs various doors of progress, Muslims have become a frog in the well.” (K. Sarwar Hasan and Zubeida Hasan; *The Kashmir Question*; Pakistan Institute international Affairs, Karachi; 1966; pp. 417-8).

That was not to be. Nehru installed the first of New Delhi's stooges who ran the State Government from 8 August 1953 to this day in 2016; elected by rigged polls and controlled by the agencies. On 14 May 1954 came the first and major Presidential Order under Article 370 comprehensively extending the provisions of the Indian Constitution to the State. In all 47 such Orders followed till 1994.

Interestingly, as applied to Kashmir Article 253, on implementing international agreements, had this proviso: “Provided that after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, no decision affecting the disposition of the State of Jammu and Kashmir shall be made by the Government of India without the consent of the Government of that State.”

A Nehru who refused the Abdullah-dominated Constituent Assembly the right to decide the State's future - opt for independence, for example - could hardly have intended to give the State Government a veto. He knew that New Delhi could control the Assembly and he could cite this proviso to others to argue that his hands were tied. (Vide Avtar Singh Bhasin (Ed.), *India-Pakistan Relations 1947-2007: A Documentary Study*; Geetika Publishers, New Delhi; Vol. 5; p. 819.) Nehru did just that in his talks with Ayub Khan at Murree on 21 September 1960. This set of 10 Volumes includes many hitherto unpublished documents and is indispensable to any serious student.

On 3 October 1963, Bakshi Ghulam Mohammed, who had ousted the Sheikh revealed that “a directive had been issued (by the Government of India) to bring Kashmir closer to the rest of India” and that, “as a first step”, it had been decided to change the designation of “Sadar-i-Riyasat” to “Governor” and “Prime Minister” of the State to “Chief Minister”, to bring the State in line with the “other States of India”. Bakhshi Ghulam Mohammad added that the necessary “constitutional” formalities to give effect to this change would be carried out by the State Assembly when it met in March 1964.

On 10 April 1965 the Sixth Amendment to the Constitution of Jammu &

Kashmir substituted the nomenclatures of “Sadar-e-Riyasat” and “Prime Minister” with “Governor” and “Chief Minister”, respectively. The Governor was to be a Central appointee.

Nehru’s acknowledgment of the “erosion” of Art. 370 on 27 November 1963 foreshadowed the changes. “It (Art. 370) has been eroded, if I may use the word, and many things have been done in the last few years which have made the relationship of Kashmir with the Union of India very close. There is no doubt that Kashmir is fully integrated. ... We feel that this process of gradual erosion of article 370 is going on. Some fresh steps are being taken and in the next month or two they will be completed. We should allow it to go on.”

Union Home Minister, G.L. Nanda said in Lok Sabha on 4 December 1964: “the only avenue of taking the Constitution (of India) into Jammu and Kashmir is through the application of the provisions of Article 370. That is the only way of bringing back the Constitution to J and K. It is Article 370 which provides for the progressive application of the provisions of the Constitution to Jammu and Kashmir. ... Article 370 is neither a wall nor a mountain, but that it is a tunnel. It is through this tunnel that a good deal of traffic has already passed and more will - “ abuse Art. 370 unconstitutionally to destroy it.

If the raiders robbed Sheikh Abdullah of his options in 1947, the wars between India and Pakistan in 1965 and 1971 and the Shimla Agreement of 3 July 1972 congealed the status-quo to rob him of any cards to play. Still his pact with Prime Minister Indira Gandhi; on 12 February 1975, need not have taken the form it did. He achieved little - except return to office; now as Chief Minister. Worse, he made a damaging concession.

The Agreed Conclusion of 13 November 1974, on which the Indira Gandhi-Sheikh Abdullah Accord of 12 February 1975 was based, provided in Para 5: “As an arrangement reciprocal to what has been provided under article 368, a suitable modification of that Article as applied to the State should be made by Presidential order to the effect that no law made by the legislature of the State of Jammu and Kashmir, seeking to make any change in or in the effect of any provision of the Constitution of the State of Jammu and Kashmir relating to any of the under mentioned matters shall take effect unless the Bill, having been reserved for the consideration of the President receives his assent.

“The matters are: (a) the appointment, powers, functions, duties, privileges and immunities of the Governor; (b) The following matters relating to elections, namely, the superintendence direction and control of elections by Election Commission of India, eligibility for inclusion in the electoral rolls without discrimination, adult suffrage, and composition of the Legislative Council, being matters specified in Sections 138, 139, 140 and 150 of the Constitution of the State of Jammu and Kashmir.”

The reference to reciprocity is farcical. Shortly after Sheikh Abdullah assumed office, now as Chief Minister of Jammu and Kashmir, the President made an Order under Article 370(1), on 23 July 1975 the infamous Constitution Order 101 avowedly with the concurrence of the State Government. It overrode the State’s Constitution and laid down “After Clause (3) of Article 368, the following shall be added, namely:

No law made by the legislature of the State of Jammu and Kashmir seeking to make any change in or in the effect of any provision of the Constitution of Jammu and Kashmir relating to:

(a) appointment, powers, functions, duties, privileges and immunities of the Governor; or

(b) superintendence direction and control of elections by Election Commission of India, eligibility for inclusion in the electoral rolls without discrimination, adult suffrage, and composition of the Legislative Council, being matters specified in Sections 138, 139, 140 and 150 of the Constitution of the State of Jammu and Kashmir shall have any effect unless such law has, after having been reserved for the consideration of the President, received his assent.”

However, Article 147 of the Constitution of Jammu and Kashmir does not require the President’s assent for any amendment to the Constitution; only the assent of the Governor. It says: “an amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in the Legislative Assembly, and when the Bill is passed in each House by a majority of not less than two-thirds of the total membership of that House, it shall be presented to the Governor for his assent and, upon such assent being given to the Bill, the Constitution shall stand amended in accordance with the terms of Bill. ...”

The Order of 23 July 1975 is manifestly unconstitutional for two reasons. First the State Government lacked the legal competence to accord any such “concurrence” after the Constituent Assembly was convened on 31 October 1951. Once that sole consenting body, the Assembly, was dissolved on 17 November 1956, the President could make no Order under Article 370. Secondly and fundamentally, Article 370 envisages extension of the Constitution of India to the State. It cannot be invoked to amend the State’s Constitution. Such an order is an abuse of Article 370 and, therefore, void.

The Sheikh’s son and successor Farooq Abdullah set up a Committee on Kashmir’s Autonomy. The Report of the State Autonomy Committee (1999) is an extremely able and comprehensive document. It sought no more than a return to the Delhi Agreement of 1952, which hardly reflected popular sentiment. It was adopted by the State Assembly on 26 June 2000. The BJP walked out. The BJP Government at the Centre headed by Atal Behari Vajpayee lost no time in rejecting it brusquely on 4 July 2000. (For the text vide *The Hindu*, 5 July 2000). Farooq Abdullah’s son Omar Abdullah who was a Minister of State in that Government did not resign.

There was no movement on the issue of Article 370 till 2015. The People’s Democratic Party headed by Mufti Mohammed Sayeed as Patron and his daughter, Mehbooba, as President, made this solemn pledge in its election manifesto for the 2014 elections to the State Assembly: “Use Article 370 itself to restore the original special status of the State”. This is perfectly possible in law. One order can be amended or even repealed by another. In 2011 this writer drafted a final order under Article 370, precisely to this effect and also to end the President’s power to make any further Orders under Article 370. (For the full text of the draft Order vide the writer’s book *Article 370*; pp. 472-474).

At the time Mufti endorsed his manifesto, drafted by an aide Haseeb A. Draba, known to be too clever by half, he was already in touch with the BJP to forge a coalition. He deputed that aide to sew it up in Mumbai, of all places. The talks were prolonged. The PDP was for autonomy. The BJP was ever for the abrogation of Article 371. The Agenda of Alliance (March 2015) also drafted by that aide recorded “the different positions” held by both parties. They were not reconciled. The document registered the Mufti’s abject surrender in the opaque phraseology which comes readily to that slick aide. Read this: “the present positions will be maintained on all the Constitutional provisions pertaining to J&K, including the special status in the Constitution of India”. This is nothing but a fraud on the people. “The special status in the Constitution of India” is meant to pull the wool on the people’s eyes. The draftsman knew it had been eroded. He knew also what his endorsement of “the present positions” meant. It meant endorsement of the 47 Orders made by the President under Article 370 which reduced the autonomy of the State of Jammu & Kashmir to a husk; unconstitutionally and immorally.

The PDP-BJP coalition assumed office on 1 March 2015. Omar Abdullah had sought the BJP’s support for a coalition and failed. There is little to choose between the two power hungry Unionists Mufti Mohammed Sayeed and Omar Abdullah or his father Farooq Abdullah. Of all the Chief Ministers whom New Delhi installed in office, since the coup against Sheikh Abdullah on 8 August 1953, Mufti was by far the worst in his second tenure. In the first (2002-2005) he held out some promise of a “healing touch”. Now he has installed an RSS man as Speaker of the Assembly; one who throws all the conventions to the wind to participate in a RSS rally in Jammu - Mufti has made a retreat on every issue; notably on display of the State ply.

He reminds one of K. Shamsuddin who replaced Bakshi Ghulam Mohammed in 1964. One of his first acts under orders from New Delhi was to install in office a Cabinet in which as many as seven out of twelve Ministers and Deputy Ministers were Hindus. He proceeded to dismiss over 100 officers of the State Governed who, in his own words, were to be replaced by “persons with a more secular and nationalistic outlook”. The Administration of the State was purged of Muslim officers who were in some small measure conscious of the special status of the State and its right to self-determination. Both, the change in the composition of the Cabinet and this purge, was carried out at the behest of the Government of India.

Mufti said in a press interview: “I meet Ajit Doval regularly” (Neerja Chaudhury; Indian Express; 8 October 2007). There was a time when none but Nehru could talk to him. Kashmiris remember the Sheikh’s famous retort to N. Gopalaswamy Ayyangar at the New Delhi airport where he had gone to receive Kashmir’s P.M. “Sheikh Saheb you did not consult us before arresting the Praja Parishad leaders in Jammu”. The retort was swift. “Did you consult me before arresting the Akali leaders in Punjab?”

The separatists are hopelessly divided. Syed Ali Shah Geelani got himself appointed as “lifetime Chairman” of his ramshackle Hurriyat (G) on 26 November 2015. He has a three-point agenda - recognise him as “the sole

spokesman” of Kashmir; the State’s accession to Pakistan; and Pakistan’s full commitment as an Islamic State. He has fought with two Presidents of Pakistan - with F. A. Leghari on the sleeveless kameez worn by women TV anchors in Pakistan and with Pervez Musharraf on Balochistan and North Waziristan. He acts as a drag on others with his inflexible hardline position. The Mirwaiz Umar Farooq, far more sensible, has constantly to look over his shoulder.

Kashmir’s great tragedy has been lack of character in most of its leaders; especially the ones who were CMs from 1953 to 2016. Very many among the separatists share this defect. Meanwhile, the oppressed people yearn for guidance for a way out. Violations of human right continue. The International People’s Tribunal on Human Rights and Justice in Kashmir and the Association of Parents of Disappeared Persons have done an excellent job in compiling a 804- page Report entitled Structures of Violence: The Indian State in Jammu & Kashmir (Khurram Pervez; The Bund, Amira Kadal, Srinagar, Kashmir; 190 001).

There is no hope at all for a roll back of Art. 370 to its original position before 1953. The Unionists lack the guts to confront the Centre which throws at them small morsels of power from the table from time to time. The separatists lack any alternative strategy. Mirwaiz Umar Farooq plans to hold a Conference of activists and writers to help craft an alternative strategy.

The only hope for Kashmir lies in a settlement between India and Pakistan on the Four-Point Formula. Its vital element of “self-rule” will require a rollback of Article 370 and repeal of unconstitutional Orders since 1954. The Kashmiris are much too divided to demand that. Till the settlement of the Kashmir dispute a wrecked Article 370 will give company to controlled politics. As Sheikh Abdullah noted in 1968, “Only that person who enjoys the confidence of the Government of India can be the Chief Minister of Kashmir”. It will not countenance who fights for the rights of Kashmir.

The present state of Article 370 of the Indian Constitution mirrors the tragedy of Kashmir. Weep for the hapless people, the victims of the tragedy. It all goes beyond Article 370. “He pities the plumage but forgets the dying bird,” Thomas Paine wrote of Edmund Burke.

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