
The Truth about Article 370

by
Arvind Lavakare



रामभाऊ म्हाळगी प्रबोधिनी

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Publisher's Note

Rambhau Mhalgi Prabodhini is indeed very happy to present this monograph, scholarly written by our friend and noted columnist Shri Arvind Lavakare.

At Prabodhini, our publication activities are mainly aimed at creating awareness about certain crucial issues through analytically written essays and monographs thereby giving impetus to opinion-making.

This particular monograph on Article 370 will help to do away with all-pervading ignorance about the content of this constitutional provision and its long lasting impact. Let us hope, this monograph will help our intellectuals and academicians to grasp the ground realities in J & K in the light of the assessment presented.

We are extremely grateful to Shri Lavakare for having painstakingly written this monograph.

— Vinay Sahasrabuddhe

Preface

There is a belief, even among senior politicians, that with several features of the Constitution of India having been made applicable over the years to Jammu & Kashmir State, Article 370 no longer puts that State on a special pedestal and, therefore, the Article's continuance need no longer be a bone of contention. The truth is otherwise.

For instance, the average educated Indian believes that every law of the Parliament is applicable throughout the country, including the State of Jammu & Kashmir. Nothing is further from the truth. Using the freedom provided by Article 370, the J&K State has not accepted Indian Penal Code, Prevention of Corruption Act, 1988, and several other laws passed by the nation's Parliament.

Another truth is that, because of the leeway provided by Article 370, the Jammu & Kashmir State governments have, down the years, declined the applicability of dozens of other Articles of the Indian Constitution to their State or accepted them in only a modified form. A glaring example of this is that while the Preamble of the Indian Constitution proclaims the Union of India as being 'Secular' (whatever that may mean), the corresponding Preamble of the J&K State Constitution does not avow that the State is 'Secular'.

There is the notion that Article 370 protects Muslim interests and therefore ought not to be abrogated. The truth is that the continuance of Article 370 for Jammu & Kashmir State in no way benefits the Muslims in the rest of the country while simultaneously forcing the Muslim majority of that State to continue living relatively isolated from the rest of the entrepreneurial and innovative Indian people.

There is, lastly, that old perception that it is Article 370 which prohibits anyone from outside Jammu & Kashmir

*State from acquiring immovable property in that State.
The truth is that no such prohibition exists in any clause
of Article 370 itself!*

*The above truths and some others were rediscovered and
fine-tuned in the course of an in-depth study of Article
370 undertaken by me at the suggestion of Vinay
Sahasrabuddhe of Rambhau Mhalgi Prabodhini. These are
now presented before the public so as to enable it to react
to the whole truth of what must be the most complex,
controversial and carcinogenic Article of the Constitution
of India.*

— Arvind Lavakare

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The Truth about Article 370

I Historical Background

Article 370 is arguably the most contentious provision of the Constitution of India. It deals exclusively with Jammu & Kashmir State that came under the administrative control of the Government of India after the country's 15-month war that Pakistan started in 1947 to seize sovereignty over that State¹.

Besieged by controversy right from its draft stage, Article 370 has been the subject of heated debate ever since the Constitution came into full effect from 26th January 1950. While one section of the Indian polity has strongly demanded its abrogation, some others have vehemently opposed this demand; why, in 1999, Farooq Abdullah, the State's then Chief Minister, even threatened a revolt if the Article were revoked.

Strange as it may seem, the origin of Article 370 can be traced to the British Raj in India. This section shows how and why it is so².

Prior to the partition of 1947, the British control over what was then known as India extended to two very different sets of geographical regions. One of these two comprised the various provinces that were administered in all respects by the British Parliament through its nominated representative designated as the Viceroy of India. This group of provinces

¹ Legally and constitutionally the State comprises the territory which, immediately before the commencement of the Constitution of India, constituted what was formerly the princely State of Jammu & Kashmir. However, after the 1947 war, Pakistan came to occupy 1,15,669 sq. kms. of the State out of which it gave China 37,555 sq. kms. through the 1963 Sino-Pakistan Border Agreement. As a result, the control of the Government of India extends to 1,06,567 sq. kms. or 48% out of the State's total area of 2,22,236 sq. kms.

² Unless otherwise stated, historical facts in this section about British India and Indian States are from **The Proudest Day — India's Long Road to Independence** by Anthony Read & David Fisher, Pimlico edition, 1998.

was known as British India and constituted 60% of the land area of the sub-continent.

The rest of the 40%, containing 100 million of the sub-continent's total of 400 million inhabitants, was ruled by the princes — Maharajas, Nawabs, Rajas and so on, each with a medieval territorial monarchy. There were in all 562 such princely states ranging in size from Hyderabad and Jammu & Kashmir, each of which was almost as big as mainland Britain, to mere dots on the map. Of this total, 327 were petty States whose average area was about 20 square miles, average population about 3000, and average annual revenue about Rs. 22,000. All of them were collectively designated simply as 'Indian States' by the British.

All rulers of these States owed allegiance to the British Crown. The States were not directly ruled by the British and were allowed governance in internal matters such as law and order, civil liberties, health, education and economic development. But the British looked after the States for defence, foreign policy and communications in return for which they each acknowledged British 'paramountcy' through individual treaties. Their citizens were not British subjects, like the other Indians, but 'British protected persons'. The British gave an Indian State and its ruler protection against neighbours and usurpers by stationing company troops in its capital under the control of a British Resident. The troops were, of course, very much a two-wedged weapon : while they were protecting the prince, they were also keeping him in line, a privilege for which he was expected to pay !

The case of Jammu & Kashmir was very telling in this context. Although the British transferred the State forever to Maharaja Gulab Singh for Rs. 75 lakhs under Treaty of Amritsar, 1846, and fixed a nominal annual payment to protect his territories from external enemies, they appointed an Officer on Special Duty who, from 1877, was placed directly under the Government of India. In 1884, the British appointed its Resident in the State although a provision to that effect was not a part of the Treaty. They wanted

the Resident to be in complete charge of the State. Because of a court intrigue out of the fact that the Maharaja had no son to succeed him, the British played his brother against him, and pressurised him to accept an arrangement by which he was relieved of all parts of the administration which was placed in the hands of Council of Regency under the control of the Resident. In 1889, the British deposed Maharaja Pratap Singh and restored him his throne in 1905 but subject to the veto of the Resident³.

On 20th February, 1947, His Majesty's Government announced that independence would be given to British India, the plan being to create two independent dominions of India and Pakistan based on the Hindu and Muslim majority areas of the various provinces that constituted British India⁴.

With regard to the Indian States, the policy was the one announced by the British Government's Cabinet Mission on 12th May 1946. Under that policy, political arrangements between the States on the one side and the British Crown and British India on the other were to be brought to an end. The rights surrendered by the States to the Paramount Power would revert to the States when the Dominions of India and Pakistan were created⁵.

Thus, with the withdrawal of paramountcy, the princely States would become 'independent' and the communal basis of division of British India would not affect the States at all⁶.

Neither the Cabinet Mission nor the British Government made any suggestion regarding the future of the princely States except that they would become legally independent.

The prospect of all 562 Indian States exercising their independence was too mind-boggling. Imagine the chaos of fragmentation posed by 562 pockets of sovereign States spread

³ Justice A. S. Anand *The Constitution of Jammu & Kashmir — Its Development & Comments* 1998, third edition pp. 380, 17, 18, 20 and 24.

⁴ *Ibid*, p.66

⁵ *Ibid*, p.65

⁶ *Ibid*, p.66

over the two Dominions of India and Pakistan. Military take-overs and civil wars were on the cards. Who knows, that may very well have been the objective of the British.

It was V. P. Menon who came up with a solution. As Secretary to Sardar Patel's States Department, Menon proposed that the princely rulers should be persuaded to hand over just three functions of their States to the central government: defence, external relations and communications — the same functions which had been always exercised by the British government. His argument was that few, if any, of the States were equipped to conduct their own defence and external affairs was, by definition, tied to defence. Communications, which included postal services, telegraph and broadcasting, railways and road links were the lifeline of the new nations and could not reasonably be left to the whims of individual rulers. It was thus that the Instrument of Accession was born.

1.1 The Instrument of Accession

Its draft was circulated on 25th July 1947 when Lord Mountbatten, Viceroy of India and Crown Representative, addressed the Chamber of Princes, a congregation of the rulers of Indian States. He advised the princes and their representatives that although legally they had become independent, they should accede to one or other of the two dominions before the official transfer of power, keeping in mind the 'geographical contiguity of their States'. Accession, he told them, was to be under the Cabinet Mission memorandum of 16th May, which contemplated surrender to the Central Government of only three subjects: defence, external affairs and communications. He also warned the States, "If you do not link with one or other of the dominions, you may be cut off from any source of supply".⁷

This draft Instrument of Accession provided for the ruler agreeing to accede to either of the two dominions while surrendering to the appropriate Dominion the power over three specified subjects, without any financial liability. It

⁷ Anand *Ibid* p.67

finally came to be made under Section 6 of the Government of India Act, 1935, as adapted by Section 9 of the Indian Independence Act, 1947⁸.

As it transpired, the vast majority of the princely States were in the territory that would become India : only 14 of the 562 were in or adjacent to Pakistan.

1.2 Patel's 'basket of apples'

Sardar Patel had bluntly told Mountbatten that in return for their signed Instrument of Accession, the Viceroy was free to offer the rulers, their titles, palaces, privy purses, their right to British decorations and so on as long as Patel got his "full basket of apples" before the official transfer of power occurred. So persuasive and aggressive was Patel that by 14th August 1947, one day before Independence Day, only three apples were missing from his basket : the small State of Junagadh and the two large ones, Hyderabad and Jammu & Kashmir. How each of these three came into the basket is a small saga by itself.

Briefly, the Nawab of Hindu-majority Junagadh (now in Gujarat) first acceded to Pakistan though his State's distance by sea to Karachi was 300 miles and therefore did not meet the test of 'geographical contiguity' in deciding the accession Dominion. Surrounded by the Kathiawar region of which several small States had acceded to India, the Nawab's rule was soon crippled by the economic blockade masterminded against it by Samaldas Gandhi, a nephew of Mahatma Gandhi. Ultimately, the Nawab fled to Pakistan with his bag, baggage and begums, the State's entire cash balances, the treasury's shares and securities in tow. A fortnight later, his Dewan, Sir Shah Nawaz Bhutto, issued a letter on 8th November 1947 officially handing the reins of Junagadh to the Government of India and flew off to Karachi⁹.

⁸ *Ibid*

⁹ V. P. Menon, *The Story of The Integration of The Indian States* 1956, pp 138, 142-143

Hyderabad State was much more difficult to pluck. With its own currency, postage stamps, its own army and even its own airline, Deccan Airways, the State's ruler, Nizam Sir Mir Osman Ali Khan, was one of the richest men in the world. Vainglorious about all these assets, the Nizam was obstinate in his refusal to accede to the Indian Dominion; he not only stopped certain exports from his State to the rest of India, but also chose to declare the Indian currency as being no longer legal tender, even as he harassed his Hindu majority population in various ways. He not only refused to sign the accession deed, but also requested the President of the USA to intervene; unbelievably, in August 1948, he sent a delegation from his State to present its case to the UN Security Council. Ultimately, the Indian Army was sent to Hyderabad on 13th September 1948; the State's army surrendered four days later. On 23rd November 1949, the Nizam issued a firman accepting the Constitution of India that was being framed then¹⁰.

Finally, there was Jammu & Kashmir State, the biggest of all with an area of 84, 471 square miles. Ruling over a population of about forty lakhs, the vast majority of whom were Muslims, was a Hindu Maharaja, Hari Singh. He vacillated between acceding to Pakistan, acceding to India, and remaining independent. His procrastination was ended by the invasion of his State by some 5,000 Pathan tribesmen from the northern areas in Pakistan. Pakistani soldiers followed. All were on their way to Srinagar, looting, killing and raping on the way. The Maharaja was in a state of panic, begging for the help of the Indian army to drive out the invaders. To secure that help, he had first to accede to India by signing the prescribed Instrument of Accession. This he did on October 26, 1947. It was accepted the next day by Lord Mountbatten, the Governor General of India. The legality of the accession was sealed by India's acceptance.

A copy of this accession deed signed by the Maharaja of Jammu & Kashmir and accepted by Lord Mountbatten is at Appendix I of this booklet. The Schedule attached to it listing

¹⁰ *Ibid* pp 338, 373, 376 and 387

matters on which the Dominion Legislature could make laws for the acceding State appears as Appendix II.

What has made the Jammu & Kashmir's Instrument of Accession absolutely special and unique is that it is the only one around which the State chose to mould and build the signatory State's legal relations with the emerging Republic of India. Though all other Indian States joining the Dominion of India signed an identical Instrument of Accession, none of them chose to live by it.

A large number of Indian States were represented in the Indian Constituent Assembly and though it was envisaged that the States would have separate Constitutions for their internal administration, the idea of a separate Constitution for each State was forsaken as a "Legacy from the Ruler's polity which could have no place in a democratic set-up." Thus, by November 1949, the Rulers and Raj Pramukhs had issued Proclamations making the Constitution of India operative in their States¹¹.

Jammu & Kashmir chose to act differently. It insisted that, as provided by clause 7 of the Instrument of Accession, it was not committed to accept the future Constitution of India. Instead, it decided to have its own separate State Constitution. This was made clear by the State's four representatives nominated to the Indian Constituent Assembly in June 1949 by the Yuvraj of Jammu & Kashmir on the advice of his Council of Ministers of his State's Interim Government led by Sheikh Abdullah. They told the Indian Constituent Assembly that the Jammu & Kashmir State's association with India would be based 'only' on the terms of the Accession, that the State's government did not accept the Constitution of India as a Constitution for the State, and that, despite accession, the State was still to be governed by its old Constitution Act, 1939¹².

This stand of Jammu & Kashmir raised a major legal hurdle before the new nation. A totally integrated Constitution of

¹¹ Anand *ibid* p. 98

¹² Anand *ibid* pp. 98 and 99

India, merging the erstwhile princely regimes and British India, became impossible to attain. This was because the Government of India had given an undertaking that the people of Jammu & Kashmir could frame their own constitution and because the Government of India could not force the State to accept the Constitution of India, for that would violate the agreed terms of association of the State with India¹³.

Conspicuous in this delicate situation was the apparent reluctance of 'iron man' Sardar Patel to intercede and persuade Sheikh Abdullah to let his State be, like other princely States, an integral part of the proposed Indian Constitution. Perhaps the Sardar was aware that Nehru was unwilling to thwart the latter's ambition to be the Prime Minister of the new, autonomous Jammu & Kashmir. Perhaps, the Sardar saw the impasse as an inevitable outcome of his unstated apprehension of the problems Jammu & Kashmir's accession would bring — remember, he had earlier told Mountbatten that if the Jammu & Kashmir Maharaja chose to accede to Pakistan, India would not take it amiss¹⁴.

It came to pass therefore that while the Constitution of India was to become applicable not only to the former provinces of British India but also to other princely States as full-fledged constituent units of the Union, the Indian Constituent Assembly was compelled to make a special provision to cover the particular and exceptional case of Jammu & Kashmir. Article 370 was sown then.

1.3 Article 306-A The final Article 370 was Article 306-A of the draft Constitution of India

It was a Bill for a special constitutional provision for Jammu & Kashmir and was moved in India's Constituent Assembly by Gopaldaswami Ayyangar, minister without portfolio in Nehru's government¹⁵.

According to Constituent Assembly Debates (India) Vol. X No.10, Ayyangar made the following arguments in seeking

13 *Ibid* p.99

14 *Ibid* p.78

15 *Ibid* p.99

support for his Bill on Article 306-A :

- ✍ “The State (Jammu & Kashmir) is a unit of a federal State namely the Dominion of India. This Dominion is getting transferred into a Republic . . . The Jammu & Kashmir State, therefore, has to become a unit of the new Republic of India.”
- ✍ “Till India became a Republic, the relationship of all the States with the Government of India was based on the Instrument of Accession. In the case of other Indian States, the Instruments of Accession will be a thing of the past in the new Constitution; the States have been integrated with the Federal Republic in such a manner that they do not have to accede or execute a document of accession for becoming units of the Republic. It would not be so in the case of Kashmir since that particular State is not yet ripe for this kind of integration due to special conditions prevailing in Kashmir. In the first place there has been a war going on within the limits of Jammu and Kashmir State — part of the State is still in the hands of the enemies, and in the second place, 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 will be given to the people of the State to decide for themselves the nature of their Constitution.”

Considering that Jammu & Kashmir representatives had insisted in the Constituent Assembly that their State’s relationship with India would be based ‘only’ on the terms of the Instrument of Accession and considering that the debate regarding Jammu & Kashmir had reached a stalemate in the United Nations, it was decided to have an interim arrangement in the Constitution of India regarding Jammu & Kashmir. Sardar Patel, the then Minister of States in India, declared in the Constituent Assembly, “In view of the special problem with which the Jammu and Kashmir Government is faced, we have made special provisions for the continuance of the State with the Union on the existing basis.” [Constituent Assembly Debates (India), Vol. X, No. 5].

Accordingly, Draft Article 306-A was discussed in the Constituent Assembly and thereafter formally added to the Constitution of India as Article 370.

The modern generation, familiar with the frequent heated exchanges over Article 370, may be surprised to learn that the records of the Constituent Assembly Debates do not show any acrimonious discussion on Draft Article 306-A. Thus, Mahavir Tyagi had two amendments but did not choose to move them. In the debate, only one member, Maulana Hasrat Mohani of U.P. spoke. While “not opposed to all the concessions being granted to my friend Sheikh Abdullah,” his objection was, “why make this discrimination about this ruler?” “If you grant all these concessions to the Maharaja of Kashmir, you should give all these and more concessions to the Baroda ruler” he said. He was told that the Kashmir case was different and that was that.

But it is erroneous to believe that Draft Article 306-A was all smooth sailing. The resentment to it, and it was considerable, came during the discussion among Congress members before its introduction in the Constituent Assembly.

The whole tale was narrated in an article by L. K. Advani published in ‘The Indian Express’ of 17th February 1992. As reproduced in the fortnightly magazine ‘BJP Today’ of August 1-15, 2000, the following excerpts from that article tell a unique story :

- ✧ Before leaving the country for a visit abroad, Pandit Nehru finalised the draft provisions relating to Jammu and Kashmir with Sheikh Mohammad Abdullah and entrusted Golpalaswami Ayyangar the task of piloting these provisions through the Constituent Assembly. Ayyangar spelt out his proposals in the Congress Parliamentary Party. His presentation provoked a storm of angry protests from all sides and Ayyangar found himself a lone defender with Maulana Azad an ineffective supporter. In the (Congress) party, there was a strong body of opinion that looked askance at any suggestion of discrimination between Jammu & Kashmir State and

other States as members of the future Indian Union, and it was not prepared to go beyond certain limits in making the special provision of Jammu & Kashmir.

- ✍ Sardar Patel, who heard the proposals only in the above Congress Parliamentary Party meeting, was fully in accord with the above discordant opinion. But he did not indicate his mind because “Gopaldaswami had acted under Panditji’s advice. How could I have let him down in the absence of his Chief?”
- ✍ Dismayed by the rough reception he had to face at the Congress Party meeting, Ayyangar rushed to Sardar Patel later in the evening and appealed to him to come to his rescue. Patel heard him out and then lapsed into silence.
- ✍ Later, Patel asked the Congress Party Chief Whip to convene a Party meeting to discuss the matter. That meeting was stormier than the earlier one. Opposition was forcefully and even militantly expressed. It was left to the Sardar to plead that because of the international complications, a provisional approach alone could be made. The Congress Party reluctantly fell in line. Article 306-A was to be allowed to go through by Patel against his better judgment and because of his belief that the future would depend on the strength and guts of the Indian Government.

Even Dr. B. R. Ambedkar, proclaimed as the architect of the Indian Constitution, was apparently opposed to Article 306-A. This has been revealed by Professor Balraj Madhok who has been intimately associated with Jammu & Kashmir affairs for more than six decades now. In his interview published in the Deepavali Special issue of ‘Organiser’ November 14, 2004, Madhok states as follows :

“Nehru sent Abdullah to Dr. Ambedkar to explain to him the position and draft an appropriate Article for the Constitution. Dr. Ambedkar was a good friend of mine. He himself told me that after hearing Abdullah patiently, he told him “Mr. Abdullah, you want that India should defend Kashmir, India should develop Kashmir and Kashmiris should have equal rights as the citizens of India, but you don’t want

India and any citizen of India to have any rights in Kashmir. I am the Law minister of India. I cannot betray the interest of my country.”

It was then that Nehru asked Ayyangar to draft what was numbered Article 306-A.

With due respect to Dr. Ambedkar and the Congress worthies, Ayyangar’s draft, finalised in consultation with Nehru, was the Hobson’s choice in the then prevalent circumstances.

Firstly, the Instrument of Accession compelled the acceding princely State to surrender only the subjects of defence, external affairs and communications to the Dominion to which that State had acceded. Nothing else, absolutely nothing else, was left to the care and control of the Dominion. The accession deed did not even provide a clause to fix a price for the services that the Dominion would provide on those three subjects. Nor did it provide for any sort of obligation of the acceding State in return for these three services. The solitary item that the acceding State was yielding was its name to be included as a part of the Dominion. Clearly, the Instrument of Accession was infirm and loaded heavily in favour of the acceding State and against the Dominion. But then again, the particular sop was essential if 562 princely States were to give up their sovereign independence.

Secondly, Sheikh Abdullah’s Interim Government was determined that it would adhere to the Instrument of Accession’s clause 7 whereby the acceding State would not be committed to the Constitution of India.

Thirdly, Nehru’s government was pledged to let Jammu & Kashmir have its own State Constitution. Abdullah’s National Conference Party had, after a meeting held in June 1938, sustained its demand for a government by an elected legislature based on a democratically established constitution.

Finally, even as the Indian Constituent Assembly was

concluding its task towards the end of 1949, the Jammu & Kashmir question was hanging delicately in the UN Security Council. Any attempt by India to coerce the State into a merger with the Constitution of India would have raised hackles internationally — a situation which the Indian government under Nehru's leadership was temperamentally not attuned to.

Taking recourse to a separate treaty with Jammu & Kashmir for resorting to the old British mode of governing Indian States through a Resident was also not the option for the new Republic of India, fired as it was with noble ideals of democracy, equality, fraternity etc. That option of the British model would have meant India forsaking the forty lakh citizens of Jammu & Kashmir who were reeling under Maharaja Hari Singh's oppressive rule where everything and everybody was taxed, be they carpenters, boatmen, butchers, bakers and prostitutes.¹⁶ Nehru and other Indian leaders of those times would never have permitted that rule to be perpetuated by executing a fresh treaty of paramountcy with the State's Maharaja.

For long, the Bharatiya Janata Party (BJP) and its precursors have regarded Article 370 as the big wall that has prevented the emotional integration between Jammu & Kashmir State and the rest of India. The Congress and other parties disagree with this view. However, considering the earlier described overall situation prevalent at that bygone point of history over half a century ago, getting Sheikh Abdullah and the other three nominees of Jammu & Kashmir in the Constituent Assembly to agree to Article 370 was a major step forward at that time. The Article at least paved the way for the Republic of India to make several laws and provisions of the Constitution of India applicable to Jammu & Kashmir State beyond the strait jacket of the Instrument of Accession. Besides, Article 370 was conceived as a temporary arrangement, with hopes of a full integration in time to come.

¹⁶ Anand *ibid* p.32

It is essential to conclude the preceding historical background of Article 370 by noting just a few points about the Jammu & Kashmir State Constitution which was mentioned earlier and with which Article 370 is inextricably linked.

On 20th June 1949, Maharaja Hari Singh of Jammu & Kashmir State abdicated his throne in favour of his son, Yuvraj Karan Singh.¹⁷ On 1st May 1951, the Yuvraj issued a Proclamation calling for the establishment of a State Constituent Assembly, consisting of representatives of the people, elected on the basis of adult franchise to frame a Constitution for the entire State. These elections to the Assembly were completed by August of the same year. The first meeting of the Assembly's 75 members was held in Srinagar on 31st October 1951. The opening speech was made by Sheikh Abdullah, the supreme leader of the National Conference Party which had swept the elections. He declared that the objects and functions of the Assembly included, not only the framing of a State Constitution, but also to declare its reasoned conclusions regarding the accession and the future of the State. With regard to the latter, he mentioned three alternatives: accession to India or accession to Pakistan or complete independence.¹⁸

On 15th February 1954, its Drafting Committee's report was adopted by the Constituent Assembly. The report embodied the ratification of the State's accession to India.¹⁹ The State Constitution was formally established on 17th November 1956 and came into full force on 26th January 1957.²⁰ It consisted of 158 Sections, of which Section 3 says, "The State of Jammu and Kashmir is and shall be an integral part of the Union of India." What is more, that Section is not amenable to any change under the Constitution's own Section 147 dealing with Constitutional amendments. In view of a judicial decision making it abundantly clear that the effect of the Instrument of Accession was not to make any State a part of the Dominion, [(1952)1 All England Reports 326, 328-329]²¹ this Constitutional assertion by Jammu & Kashmir State is of the utmost significance. Unfortunately, it is

¹⁷ Anand, *ibid*, p.100 ¹⁸ *Ibid* p.119 ¹⁹ *Ibid* p.126 ²⁰ *Ibid* p.200

just not invoked by India in world forums to prove its claim on Jammu & Kashmir. Instead, our leaders depend on Article 1 of our Constitution that lists Jammu & Kashmir as being Indian territory or use the Parliamentary resolution of February 1994 to stress the status of Jammu & Kashmir as an integral part of India. Incidentally, a legal view is that a Parliamentary resolution is time-bound and lapses when the particular Lok Sabha which passed it is dissolved.

II Text of Article 370

Labeled as ‘**Temporary provisions with respect to the State of Jammu and Kashmir**’ right from the time it came into effect, the text of Article 370 as it is in vogue today is reproduced in bold type below.

- (1) Notwithstanding anything in this Constitution —**
- (a) the provisions of Article 238 shall not apply in relation to the State of Jammu and Kashmir;**
 - (b) the power of Parliament to make laws for the said State shall be limited to —**
 - (i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and**
 - (ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.**

²²*Explanation* : For the purposes of this article, the Government of the State means the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the Governor²³ of the

²¹ *Ibid* p.95

²² As amended from 17-11-1952 on the recommendation of the Constituent Assembly of Jammu & Kashmir State

State, acting on the advice of the Council of Ministers for the time being in office.

- (c) the provisions of article 1 and of this article shall apply in relation to that State;
- (d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order specify :

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State :

Provided further that no such order which relates to matters other than those referred in the last preceding proviso shall be issued except with the concurrence of that Government.

- (2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

- (3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

It is important to note that none of the above provisions of

²³ Substituted for 'Sadar-i-Riyasat' by Jammu & Kashmir (Sixth Amendment) Act, 1965.

Article 370 by itself prevents anyone outside Jammu & Kashmir State from purchasing immovable property in that State — perhaps the most resented aspect associated with that Article. Such and other disconcerting restrictions flow only from the authority that Article 370 gives to the issuance of executive orders exempting or modifying provisions of Parliament's laws or of the Indian Constitution in respect of Jammu & Kashmir State. Article 370 is thus only the enabling provision that permits differences between the legal/constitutional situation in Jammu & Kashmir and the rest of India. These will be discussed later.

Meanwhile, the text of Article 370 is dissected below clause by clause.

III Content Analysis

Status :

Originally, Article 370 fell under the Constitution of India's Part XXI called 'Temporary And Transitional Provisions' and Article 370 itself was dubbed as 'Temporary provisions with respect to the State of Jammu and Kashmir.' From 1st December 1963, under the Constitution (Thirteenth Amendment) Act, 1962, the title of Part XXI of the Constitution was changed to 'Temporary, Transitional And Special Provisions', the word 'Special' being the significant addition to the previous title.

Subsequent constitutional amendments were enacted as 'Special Provisions' of one kind or the other for various States. However, Article 370 has continued under the 'Temporary' status.

This facet of Article 370 being 'Temporary' from its inception in 1950 till date needs to be highlighted because there is an impression that the constitutional provisions which Article 370 incorporates for Jammu & Kashmir State are 'special provisions' and therefore 'permanent'. A lamentable inclusion in this category of people is Adarsh Sein Anand, a former Chief Justice of India.

Anand's dissertation on the Jammu & Kashmir State Constitution had earned him a Ph.D. from the Faculty of Laws, London University, in April 1963. That thesis was, with slight modifications and alterations, later converted into the full-fledged book titled 'The Constitution of Jammu & Kashmir — Its Development & Comments' cited earlier.

In that book's third edition, 1998, on page 104, Anand refers to Sardar Patel's statement in the Constituent Assembly regarding 'special provisions for the continuance of the State with the Union' and goes on to write that 'the special provisions were embodied in Article 370 of the Constitution of India which reads as Temporary and Transitional and Special Provisions.' This label given to Article 370 by Anand is blatantly wrong. It misleads readers into believing that the status of Article 370 is of a 'special provision'. That is just not so; Article 370 is very definitely even now designated as 'temporary' in our Constitution. It is Article 371 and Articles 371A to 371I which are designated as 'Special Provisions'.

According to the speech made by Dr. Shyama Prasad Mookerjee at Kanpur on 29th December 1952,²⁴ Gopalaswami Ayyangar had made a statement in the Constituent Assembly that in order to keep the door open for the day when Jammu & Kashmir State would merge with India and fully accept the Constitution of India, he had labelled Article 370 as a 'Temporary' provision. And on 27th November 1963, Pandit Nehru confirmed on the floor of the Parliament that he had earlier made the statement: "Samvidhan ki dhara 370 ghiste ghiste ghis jaayegi." ("Article 370 of the Constitution would disappear by being eroded progressively."). That hope of Nehru hasn't been fulfilled till date. Instead, Article 370 has become permanently 'Temporary'.

The Prelude :

Beginning with the words 'Notwithstanding anything in this Constitution' before the hard text, the prelude indicates that Article 370 applies without having to depend on any other

²⁴ *Kashmir Sentinel*, August 2000.

provision of the Constitution of India for its enforceability. This prelude has been extremely rarely used in the rest of the Indian Constitution.

Article 238 :

The reference in clause (1)(a) of Article 370 to the non-application of Article 238 to Jammu & Kashmir State is superfluous today. All the princely States that had acceded to the Indian Dominion were labelled as Part 'B' States in the Constitution of India. Jammu & Kashmir State was thus also a Part 'B' State. However, while all the princely States had accepted the Constitution of India, Jammu & Kashmir had reserved the right to frame its own Constitution. Since Article 238 was meant to govern the constitutional relationship between the Union and the princely States, it could not be applied to Jammu & Kashmir State. Furthermore, Article 238 was deleted by the Constitution (Seventh Amendment) Act, 1956, when the scheme of reorganisation of all States on the basis of language involved not only changes in boundaries of several of the existing States but also the abolition of the classification of the Part 'B' States. Thus, there is no Article 238 in the Constitution of India publication. Why then does clause (1)(a) of Article 370 at all mention Article 238 today ?

Parliamentary laws :

The essence of clauses (1)(b)(i) and (1)(b)(ii) combined is that laws of Parliament on matters in the Union List and the Concurrent List can be made for Jammu & Kashmir State only after 'consultation' with the State government or after 'concurrence' of the State government depending on the subject matter of the law.

Under (1)(b)(i), Parliamentary laws on the subjects mentioned in the two said Lists conforming to Defence, External Affairs and Communications — the matters conceded to India by the Instrument of Accession — need 'consultation' with the State Government; under (1)(b)(ii), Parliament's laws on all other subjects will require the State's "concurrence" before they are applied to the State.

A word about these two said Lists. Article 246 of the Indian Constitution governs the law making powers of Parliament and a State Legislature. Items on which Parliament alone can make laws are enumerated in what is called List I -Union List, while matters on which both, Parliament and a State Legislature, can make laws is named as List III — Concurrent List, subject to the Parliament law prevailing over a provision of the State law. There is also List II — State List, which enumerates matters on which a State Legislature can make laws applicable to that State alone. All these three Lists are included in the Seventh Schedule related to Article 246. However, there is no State List for Jammu & Kashmir today because it was omitted by the order of the President issued under Article 370 in September 1963. As on date, the Union List comprises 99 items and the Concurrent List consists of 52 items.²⁵

Now, a plain reading of the above clause (1)(b)(ii) of Article 370 would suggest that excluding those items conforming to Defence, External Affairs and Communications, Parliamentary laws on the subjects remaining out of the sum of 151 items on the two said Lists can be made applicable to Jammu & Kashmir provided concurrence of that State's Government is secured.

But this is not the ground reality. In practice, six entries, including the omnibus 97, stand excluded from the prevalent Union List and 21 entries stand excluded from the prevalent Concurrent List. Additionally, five items in the Concurrent List are not applicable to the State. All these exclusions are the result of orders issued over the years under Article 370. In short, Parliament today cannot extend laws to Jammu & Kashmir in respect of 32 entries (of which one is omnibus) in the two existing Lists together; neither 'consultation' nor 'concurrence' enters the picture. Moreover, seven entries in Concurrent List stand substituted for Jammu & Kashmir, thereby further diluting the force of the two Lists put together.

²⁵ *The Constitution of India*, P. M. Bakshi, 2002

Hence, to remove any misunderstanding, addition of the words 'as applicable to the State from time to time' should have been used to qualify 'Union List' and 'Concurrent List' mentioned in the existing text of clause (1)(b)(i) of Article 370.

As it is, clauses (1)(b)(i) and (1)(b)(ii) prevent the possibility of a law of Parliament being extended to Jammu & Kashmir either because the consultation with the State Government was not productive or because the State Government denied concurrence to that law.

Relevant here is a question of semantics. While the meaning of 'concurrence' is crystal clear, what is the meaning of 'consultation'? In the matter of appointing the Governor of a State, for example, it was long held as a convention, that the Centre must 'consult' a State Government on the person to be so appointed and that he/she must be approved by the State Government. In effect, therefore, the State government's 'concurrence' to the person's appointment was necessary. In November 2004, however, the UPA government in New Delhi did so 'consult' the Tamil Nadu government on the appointment of the State's Governor and though the person to be appointed was apparently not acceptable to the State Government, Delhi went ahead with appointing that very person as Tamil Nadu's Governor. It later transpired that the UPA government had interpreted 'consult' to mean just that and not 'concurrence'.

The question therefore emerges: Can the Indian Parliament extend a law to Jammu & Kashmir State when, after consultation with the State Government, it does not get its approval? Going by the aforesaid interpretation of the UPA government, it would appear that such a consultation is a mere formality that cannot restrain the Union Government from going ahead with its intention.

That, however, does not seem to have happened in extending Parliamentary legislations to Jammu & Kashmir. The ruling National Conference Party of that State admitted as

much in its State Autonomy Committee Report, page 63, that Jammu & Kashmir has been brought within the ambit of over 260 Central laws with, and not without, the 'concurrence of the State Government'.²⁶

It would appear, therefore, that 'consultation' in clause (1)(b)(i) only means 'concurrence' of clause (1)(b)(ii). Ergo, any legislation of the Indian Parliament can, in practice, be applied to Jammu & Kashmir State only if it gets the stamp of approval from that State's government.

Clause (1)(c) :

The assertion in Article 370 that 'provisions of Article 1 and of this Article shall apply in relation to that State' seems superfluous. However, a legal view gives weight to the words 'Notwithstanding anything in this Constitution' that precede the entire text. This view holds that the prelude indicates that (i) Article 370 does not depend on any other Article of the Constitution for its enforceability and (ii) it is Article 370 alone which makes Article 1 (enunciating the territorial components of India) applicable to Jammu & Kashmir State. This view therefore has us believe that were Article 370 to go, Article 1 would also not apply to that State and would exclude Jammu & Kashmir State as part of Indian territory!

Clause (1)(d) :

Clause (1)(d) regarding applicability of provisions of the Indian Constitution to Jammu & Kashmir is based on the same principle of clauses (1)(b)(i) and (1)(b)(ii) pertaining to application of Parliamentary laws to that State. Application to Jammu & Kashmir State of the Indian Constitution's provision pertaining to Defence, External Affairs and Communications require 'consultation' with the State government and all other provisions require that Government's 'concurrence'.

²⁶ Cited by Hari Om "Delink Jammu & Ladakh from Kashmir Valley", The Tribune, 27-8-2000.

Clause (2) :

While the Jammu & Kashmir Constituent Assembly was on the anvil, there was only an Interim Government functioning in the State. Hence it was a justified stipulation of this clause that concurrence given by the State (Interim) Government was required to be placed before that Assembly for decision after that Assembly had been convened. Once the Constituent Assembly had been dissolved after the first State Assembly elections were held in March 1957 under the laws enacted by the State Constitution of November 1956 (fully in force from 26th January 1957), the Constituent Assembly became moribund and any mention of it as an ongoing constitutional authority became superfluous.

Clause (3) :

Its first para permits a mere executive notification to cease the operation of an Article of the Constitution or to restrict its operation in the country. It should be remembered in this context that the President of India is, unlike in the USA, not elected directly by the people of India and is morally bound to always act on the advice of his Council of Ministers. The rule in a constitutional democracy is that the removal of any constitutional provision or limiting its operation in a modified form requires an elaborate process of getting approval from the representatives of the people elected to a supreme body called the parliament or its equivalent such as the Congress in the USA. Clause (3) of Article 370 is thus a revolutionary provision in a parliamentary democracy.

What seems worse is that the second paragraph of clause (3) permits the above executive action on the recommendation of an organisation that is today moribund viz the Constituent Assembly of Jammu & Kashmir State. As indicated earlier, that Assembly was dissolved in March 1957. Thus, the Constituent Assembly could well have made its recommendation on the cessation or otherwise of Article 370 only prior to March 1957. The continued mention of the Constituent Assembly in Article 370 thereafter as a recommending authority seems verily like investing a ghost with powers to do this or that.

However, a very strange decision has been given in this regard by the Supreme Court in *Sampat Prakash v. State of Jammu and Kashmir* (AIR 1970, SC 1118). The five-judge bench ruled that (i) the wording of Article 370 makes no mention of the completion of the work of the Constituent Assembly or its dissolution and (ii) the Constituent Assembly recommended that Article 370 should continue with one modification. The modification that the Court alluded to was the 'Explanation' of 15th November 1952 reproduced earlier in Section II ('Text of Article 370') and assigned footnote 22.

The apex court's verdict implied that just because the Jammu & Kashmir Constituent Assembly had so recommended, way back in November 1952, Article 370 should go on and on and on. Perpetuating the wish of a political authority long after it was dissolved and leaving no other mechanism for change is an impossible proposition to accept for any Constitution in any democracy anywhere in the world.

In the light of the above Supreme Court verdict, putting the onus of recommending cessation of Article 370 on the Jammu & Kashmir Constituent Assembly rather than on the State Legislature may well be the blunder in Ayyanger's proposal contained in the second paragraph of clause (3) of the Article. Correcting that mistake should be the first step towards stopping the eternal continuance of Article 370.

Summing up :

The various contents of Article 370 may have merits or demerits as per one's perspective but there's no doubt that its text as published by the Government of India needs a spring cleaning so as to update it to the actual contemporary status. However, no one but the BJP is prepared to even attempt the most minimum about Article 370. Such is the sway and awe generated by the 'special position' that Article 370 occupies in the country's psyche.

IV Article's Effects

It has been seen that the contents of Article 370 restrict the

applicability of Indian Parliamentary legislation to Jammu & Kashmir State, depending either on the result of consultation with the State Government or obtaining its concurrence. The same principle is true with regard to the application of the provisions of the Constitution of India in full or in modified form to Jammu and Kashmir State. The effects on the ground of these constraints are now elaborated.

IV.1. Legislative Exceptions

One does not recall any Law Minister of India ever being asked the following questions in Parliament :

- (a) "What is the total member of Parliamentary Acts in force today?"
- (b) "How many of this total number are applicable to Jammu & Kashmir State?"
- (c) "How many of those extended to Jammu & Kashmir are applicable in their entirety and how many are applicable only in modified form?"
- (d) "How many of the Parliament Acts are not extended in their entirety to Jammu & Kashmir State because the 'consultation' with the State Government stipulated under Article 370 (1) (b) (i) did not result in their full applicability?"
- (e) "How many Parliament Acts are not extended to Jammu & Kashmir State because the 'concurrence' from the State Government under Article 370 (1) (b) (ii) was denied?"
- (f) "How many Parliament Acts have not been extended to Jammu & Kashmir because of reasons other than those in (d) and (e) above?"

The answers to the above Parliament questions would have been a revelation regarding the degree of integration of Jammu & Kashmir with the rest of India. Part of the answer was given in Jammu & Kashmir's State Autonomy Committee Report mentioned earlier. However, the basic question remains only half-answered at best, especially since it is not readily known as to exactly how many Acts of Parliament are not applicable to Jammu & Kashmir State and

which are the really important among those. One hopes that the next edition of Dr. Anand's book on the subject will do that.

What is definitely known is that the following crucial Parliament laws are not at all applicable to Jammu and Kashmir :

Indian Penal Code 1860. This is among the oldest Indian statutes and the most comprehensive criminal law in the country.

The Prevention of Corruption Act, 1988. Politicians and Government employees are being increasingly charged under this law.

The Religious Institutions (Prevention of Misuse) Act, 1988. This law prohibits religious institutions from allowing their premises for the promotion of political activity and for storing of arms and ammunition.

The Delhi Special Police Establishment Act, 1946. The legal powers of investigation of Central Bureau of Investigation (CBI) are derived from this Act. The CBI is today the country's foremost criminal investigation agency. CBI is entry number 8 in the Union List but this entry is, by a Constitution order under Article 370, excluded from Parliament's purview in respect of Jammu & Kashmir. Hence the DSPE Act is not extended to that State — an exclusion which Justice Anand in his cited book (p. 140) says, "may possibly have serious consequences for India and Kashmir."

Below are some Parliament Acts that are applicable to Jammu & Kashmir only partly.

The Commissions of Inquiry Act, 1952 does not apply to Jammu & Kashmir in respect of 61 subjects in List II — State List shown in Seventh Schedule of the Indian Constitution. Some of those 61 subjects are : prisons, sale of intoxicating liquors, hospitals and water supplies. Thus, if there is any

incident in Jammu & Kashmir of definite public importance in relation to liquor sale, the Central Government cannot set up an inquiry commission into that incident.

The Protection of Human Rights Act, 1993, is another Act which does not extend to Jammu & Kashmir in respect of subjects under List II of Seventh Schedule.

The Unlawful Activities (Prevention) Act, 1967, empowers the Central Government to ban any combination or body of individuals that act in a manner intended to bring about cession or secession of Indian territory or to disrupt the sovereignty and territorial integrity of India. Any activity under section 153-A or Section 153-B of the Indian Penal Code is also defined as unlawful activity under this law. Section 153-A refers to 'Promoting enmity between different groups on grounds of religion, race, place of birth, residence, language, etc. and doing acts prejudicial to maintenance of harmony' while section 153-B refers to 'Imputations, assertions prejudicial to national integration.' However, activities in Jammu & Kashmir falling under these two Sections are excluded from purview of this Act because the Indian Penal Code is not applicable to that State!

The Representation of the People Act, 1950, provides for the allocation of seats and the delimitation of constituencies for the purpose of election to the Lok Sabha and the State Assemblies. It lays down the qualification of voters at such elections, the preparation of electoral rolls, etc. Its Section 13D on the preparation of electoral rolls for parliamentary rolls is not applicable to Jammu and Kashmir State.²⁷

The Representation of the People Act, 1951, provides for the conduct of elections of the houses of Parliament or of the State Assemblies; it lays down qualifications and disqualifications of electoral candidates and lists offences such as corrupt practices in such elections. In its Section on 'Interpretation' the meaning of the word 'election' is not applicable

²⁷ Jammu & Kashmir State has its own "People's Representation Act, 1957" and "Representation of People (Conduct of Elections and Election Petitions) Rules, 1957; Anand, *ibid*, p.369

to Jammu & Kashmir State.²⁸

In conclusion, this phenomenon of certain laws of the Indian Parliament (which is the Central or Federal authority) not being applicable at all or applicable only in part to Jammu & Kashmir State (a constituent of the Federation) is extraordinary. In the USA in contrast, each of the 50 constituent States has its own Constitution, but every Federal law is applicable to all the 50 States by virtue of Article VI of Part IV of the USA Constitution. Clause 2 of that Article, titled 'Legal Status of the Constitution of the USA', says "This Constitution, and the Laws of the United States which shall be made in Pursuance thereof; and all Treaties made, or which shall be made, under the Authority of the United States, shall be the supreme Law of the Land; and the Judges in every State shall be bound thereby, notwithstanding any Thing in the Constitution or Laws of any State to the contrary."

IV.2. Constitutional Connections

It is clause (1)(d) of Article 370 that authorises the President of India to issue orders exempting Jammu & Kashmir State from certain provisions of the Constitution of India or applying them to that State in a modified form. Each such order is designated as 'Constitution (Application to Jammu and Kashmir) Amendment Order' followed by the year in which it was issued. A specimen of one such order (issued on 17th February 1969) is at Appendix III.

The first such Constitution Order was issued on 26th January 1950 — the day on which Article 370 and the rest of the Indian Constitution came into full affect. This Order was to govern the constitutional relationship between Jammu & Kashmir State and the Union of India. Its essence was that it extended the powers of the Union Parliament with regard to that State beyond the terms of the Instrument of Accession.

The sections of the Indian Constitution which that Order of

²⁸ *Ibid*

1950 extended with some modifications to Jammu & Kashmir were Part V (dealing with the Union Executive), Part XI (dealing with Legislative Relations between the Union and the States), Part XII (dealing with Finance), Part XV (dealing with Elections), Part XVI (dealing with Reservations), Part XVIII (dealing with Official Language), Part XIX (dealing with Miscellaneous provisions), Part XX (dealing with Amendment of the Indian Constitution) and Part XXI (dealing with what were then Temporary and Transitional provisions). The provisions of Part XXII dealing with 'short title', the commencement of Constitution, repeal of the Indian Independence Act and the Government of India Act, 1935, were made applicable to the Act.²⁹

The above Order of 1950 was superseded by the Order of 14th May 1954 — three months after the Jammu & Kashmir Constituent Assembly ratified the State's accession to India. This Order included terms related to the 'Delhi Agreement 1952' set out in Appendix IV.

The conspicuous issues conceded by the Government of India in the Delhi Agreement were : (i) the residuary powers of legislation vested in Jammu & Kashmir State rather than in the Centre as was the case in respect of other States of the Union (ii) the State Legislature was given power to confer special rights on persons who had domicile in Jammu & Kashmir (iii) the State could have its own flag in addition to the Union flag, and (iv) the Centre's power to proclaim a general emergency in the State was restricted to the event of war or external aggression but not to internal disturbance.

The Delhi Agreement was a landmark one. "In arriving at this arrangement", declared Sheikh Abdullah, the then Prime Minister of Jammu & Kashmir, "the main consideration before our (Interim) Government was to secure a position for the State which would be consistent with the requirements of maximum autonomy for the local organs of the State power which are the ultimate source of authority in the State while discharging obligations as a Unit of the federation." The

²⁹ Anand *ibid* pp.110-115

Indian Parliament accepted this agreement on 7th August 1952. The Jammu & Kashmir Constituent Assembly approved it on 21st August 1952.³⁰

The Constitution Order 1954 issued by the President of India under clause (2) of Article 370 put the seal on the special position of the State of Jammu & Kashmir in the Union of India. As it now stands, this Constitution Order summarises the portions of the Constitution of India that are applicable to Jammu & Kashmir State, and elaborates those provisions that are not extended to that State as well as those that are applicable to it with modifications.

The Constitution Order of 1954 was amended 42 times till 1994 under Article 370 clause (1). All these amendments were, like the earlier Order of 1954, issued “with the concurrence of the Government of the State of Jammu & Kashmir.” The ‘concurrence’ factor suggests that the Jammu & Kashmir State had agreed to increasingly fall in line with the provisions of the Constitution of India. However, this is not entirely true because, as will be shortly seen, the Order of 1954 and all its subsequent amendments granted several concessions that increased the elitist autonomy of Jammu & Kashmir State. Thus, the ‘concurrence’ may well have been from the Government of India !

Government of India’s publication titled *The Constitution of India (as on 1st January 2000)* carries the Order of 1954 as Appendix I and, “For facility of reference”, a restatement of practically significant modifications and exceptions to Jammu & Kashmir of the Indian Constitution is listed as Appendix II but without indicating which Constitution Order after 1954 brought about which particular modification and exception.

A major objection to the above Government of India publication is the inclusion of the above Appendix I and Appendix II under the title ‘The Constitution of India’. As seen earlier, every such Constitution Order is issued only as an executive order of the President of India under Article 370;

³⁰Anand, *ibid* p.123

each such Constitution order does **not** undergo the rigorous Parliamentary procedure set out in Article 368 relating to amendment of the Constitution of India; the Indian Parliament does not approve each such Order. Hence, the so-called Appendix I and Appendix II are not legally and constitutionally additions to the Constitution of India. While the information provided by those two Appendices is welcome, the Government of India would do well to publish them separately under an appropriate title so as to remove the conception that the two Appendices are part of the Constitution of India.

Let us now move to the prevalent exemptions and modifications in the Constitution of India in relation to Jammu & Kashmir State.

IV.2.1. Constitutional Exemptions

According to the above Appendix II, the following Articles of the Constitution of India are exempted from being applicable to Jammu & Kashmir State :

Article 31C

Prohibits challenge on certain grounds to laws giving effect to Directive Principles of State Policy set out in Part IV of the Constitution of India.

Articles 36 to 51

These contain directive principles which need to be applied in making laws. One such directive is to secure a uniform civil code throughout the territory of India.

Article 51A

Lays down 10 fundamental duties of every citizen of India.

Article 134A

Empowers the High Courts to give certificate for appeal to the Supreme Court.

Article 135

Lays down power of the former Federal Court.

Article 139

Empowers Parliament to make laws conferring powers on the Supreme Court for issuing certain writs.

Article 139A

Empowers the Supreme Court trying a case to transfer to itself a similar case pending in High Court/s.

Articles 153 to 217

These constitute Chapters II, III and IV of Part VI titled 'The States'. The provisions lay down procedures, rules, authority etc. relating to the Governor, the Council of Ministers, the State Advocate General, High Courts, and all aspects of State Legislature.

Article 219

This stipulates the text of the oath or affirmation by High Court judges before assuming office.

Articles 221, 223 and 224

These lay down provisions for various aspects of High Court judges, including appointment of acting Chief Justice and additional judges.

Article 225

This pertains to jurisdiction of existing High Courts.

Articles 227 to 231

These relate to powers of High Courts including appointment of a common High Court for two or more States.

Article 233

Relates to appointment of district judges by the Governor.

Article 233A

Prohibits invalidation of certain appointments of district judges and decree or sentence or order issued by them.

Articles 234 to 237

These relate to recruitment to judicial service, control over subordinate courts, certain interpretations and application of provisions to magistrates.

Articles 239 to 241

These lay down provisions regarding administration of Union Territories.

Articles 244 and 244A

These relate to Scheduled Tribal Areas.

Article 255

Requires stipulated recommendation or previous sanction of an Act of Parliament or a State Legislature as matters of procedures only.

Articles 323A

Empowers Parliament to make laws for adjudication or trial by administrative tribunals for employees of the Union or of any State.

Article 323B

Empowers the appropriate Legislature to make laws providing for the adjudication or trial by tribunals of matters other than those included in Article 323A.

Article 328

Lays down that provided Parliament has not already done so, a State Legislature may make laws regarding all election matters subject to the provisions of the Constitution of India.

Article 331

Provides for nomination of the Anglo-Indian community to

the Lok Sabha.

Article 332

Deals with reservation of Scheduled Castes/Scheduled Tribes seats in the State Legislatures.

Article 333

Provides for representation of Anglo-Indian community in a State Legislature.

Article 336

Makes provision for Anglo-Indians in certain services.

Article 337

Contains provision for educational grants to Anglo-Indian community.

Article 360

Empowers the President of India to make a Proclamation of Financial Emergency if, in his opinion, the financial stability or credit of India or any part thereof is threatened.

Article 361A

Protects publication of proceedings of Parliament and State Legislature unless the publication is proved to have been made with malice.

Article 365

Failure of any State to comply with directions given by the Centre makes it lawful for the President of India to hold that a situation has arisen in which that State cannot be carried out in accordance with the Constitution of India.

Article 369

This gave temporary power to Parliament to make laws on certain matters in Concurrent List within five years of the commencement of the Constitution.

Articles 371, 371A to 371I

These deal with special provisions for States other than Jammu & Kashmir.

Article 372A

Empowers the President to update any law in India in accordance with Constitutional amendment.

Article 373

Empowers the President to make order in respect of persons under preventive detention in certain cases.

Articles 376 to 378A

All these relate to continuation of certain judicial and public service posts held prior to the commencement of the present Constitution.

Articles 392, 394 and 395

These were transitory provisions and are now obsolete for all the States in India.

Seventh Schedule

Entries 2A, 8, 9, 34 and 79 in Union List are omitted and existing entry 3 substituted for the State.

In the Concurrent List, existing entries 1 and 2 substituted for the State, and existing entries 3, 5 to 10, (both inclusive) 14, 15, 17, 20, 24, 27, 28, 29, 31, 32, 37, 38, 41 and 44 stand omitted. Further, entries 11A, 17A, 17B, 20A and 33A in the Concurrent List are not applicable to Jammu & Kashmir State. Description of each of these 35 entries in all is given in Appendix V.

Constitutional Amendment of 2003

This put a ceiling on the strength of the Council of Ministers in the States to 15% of the strength of its Legislative Assembly. It came into effect from July 2004 but has not, till the time of writing, come into effect in Jammu & Kashmir State.

While several of the above exemptions to Jammu & Kashmir from the Constitution of India are insignificant or merely cosmetic, other exclusions are such as have given a fair amount of leeway in the governance of that State. The conspicuous ones are briefly analysed below.

1. Any law of Parliament on a Uniform Civil Code or any other Directive Principles of State Policy could be deemed invalid only in Jammu & Kashmir because Article 31C is not applicable to that State.
2. A law by Parliament on 'Population control and family planning' would not be applicable to Jammu & Kashmir as long as that item stands excluded from Concurrent List for the State. (See Appendix V).
3. While Article 172 lays down five years as the normal duration of a State Legislature, that stipulation is six years in Jammu & Kashmir as laid down in Section 52 of its State Constitution.
4. Excluding Jammu & Kashmir from the application of Article 360 means the Union Government cannot give directions to that State to observe canons of financial propriety and such other measures deemed necessary when a Proclamation of financial emergency is issued under that Article.
5. Refusal or failure to comply with any direction given by the Union Government under any provision of the Constitution of India applicable to Jammu & Kashmir will not be held as a misdemeanour by that State because the relevant Article 365 has not been extended to that State.
6. By being exempted from the Constitutional amendment limiting the number of the Council of Ministers to 15% of the strength of a State Assembly, Jammu & Kashmir government continues to have the luxury of 37 Ministers when, in fact, it should have had only 13 ((15% of its Assembly's strength of 87) if the amendment were extended to it. Thus, while India was rid of over 100 ministers in August 2004, thereby reducing the burden on the States across the country by an estimated Rs.250 crores by way of salaries and perks, Jammu & Kashmir

State will continue to pay for the two furnished bungalows, cars, security etc. of 24 superfluous Ministers.

7. Deliberately kept to the last is that exemption regarding oath or affirmation taken before assuming office. As per the Third Schedule mentioned in Article 188 of the Indian Constitution, the oath sworn by every member of the State Legislature before assuming office requires the member to "bear true faith and allegiance to the Constitution of India." This is true of the affirmation by every High Court and Supreme Court judge as well. In Jammu & Kashmir State, however, every legislator and every judge, including the Chief Minister and the Chief Justice, is required to swear only by 'the Constitution of the State' as mandated in the Fifth Schedule referred to in Sections 64 and 97 of the Jammu & Kashmir State Constitution.

Contrast the above dichotomy in India created by Jammu & Kashmir with the stipulation in Article VI of Part IV of the USA Constitution. Titled as 'Legal Status of the USA Constitution', its Clause 3 says, "The Senators and Representatives before mentioned, and the Members of the several State Legislatures, and all executive and judicial Officers, both of the United States and of the several States, shall be bound by Oath or Affirmation, to support this Constitution; but no religious Test shall ever be required as a Qualification to any Office or public Trust under the United States."

IV.2.2. Constitutional Modifications

The exact count of the total number of modifications of the Indian Constitutional provisions in their application to Jammu & Kashmir State is not readily available. Only those that have 'practical significance' are listed in the earlier referred Appendix II of the Government of India's publication titled The Constitution of India (As on 1st January 2000). Those alone add up to 100-odd. With that ready reference of Appendix II available to a serious student of the subject, this present exposition deems it essential to highlight only such of those modifications that appear striking and unique.

The Preamble is the place to begin. Though the word ‘secular’ was added to the earlier Preamble of the Indian Constitution by the 42nd Constitutional amendment in 1976, it is meant to be omitted in respect of Jammu & Kashmir State. The latter’s Constitution of November 1956 therefore does not proclaim itself to be ‘secular’. What has been ruled by the Supreme Court as part of the ‘basic structure’ of the country’s constitutional framework³¹ is thus not true of Jammu & Kashmir State. Ironically, the State’s top political leadership has criticised as violative of the country’s secular credentials the RSS’s idea of trifurcating the composite State into its three major political entities of a Hindu-majority Jammu, a Buddhist-majority Ladakh and a Muslim-majority Kashmir Valley.

Article 3 of the Indian Constitution provides that Parliament by law may increase or diminish the area of any State or give it a different name. A Bill for the purpose can be introduced in Parliament only on the recommendation of the President who, unless the change concerns a Union Territory, is first required to refer it to the State Legislature concerned for expression of its views. But Parliament is in no way bound by these views. However, in its application to Jammu & Kashmir State, the following has been added to the said Article :

“Provided further that no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of the State.”

The above modification means that, if and when, the Indian Government and Pakistan enter into an agreement on some kind of give-and-take of Jammu & Kashmir territory, that agreement would not be enforceable unless and until the Jammu & Kashmir Legislature first approves it. In which other country in the world would the nation’s supreme-law-

³¹ *Keshavananda Bharati v. State of Kerala*, AIR 1973 SC 1461 and *S. R. Bommai v. Union of India*, (1994) 3 SCC 1 cited in **The Constitution of India**, P. M. Bakshi, 2002.

making body be so cribbed, cabined and confined by a constituent unit for disposing the latter's territory or for altering its contours or even for changing its name ?

Article 172 of the Indian Constitution stipulates that every Legislative Assembly of every State shall, unless sooner dissolved, continue for five years from the date appointed for its first meeting. In Jammu & Kashmir, however, the State Legislature's duration is fixed at six years as per the State's own Constitution. Remember, all Articles of the Constitution of India pertaining to the States (Articles 153 to 217) are *not* applicable to Jammu & Kashmir State.

Article 326 of the Indian Constitution lays down that like in the case of the House of the People (Lok Sabha), every person who is a citizen of India and who is not less than eighteen years old shall be entitled to be registered as a voter unless he is otherwise disqualified on the ground of non-residence, unsoundness of mind, crime or corrupt or illegal practice. When applied to Jammu & Kashmir State, however, this Article on universal adult suffrage is not enough for an Indian citizen to get voting rights for a Jammu & Kashmir Legislative Assembly election. In Jammu & Kashmir, Section 140 of the State Constitution lays down that voting rights for the State Legislature are given on the basis of adult suffrage *only* to those who are recognised as 'Permanent Residents' under Part III of that Constitution. This classification is based on a combination of number of years of residence in the State, ownership of immovable property in the State and recognition given under an old princely rule.

This most peculiar discrimination in the right to vote has resulted in the most unusual phenomenon that Indian citizens in Jammu & Kashmir are eligible to vote for the Lok Sabha elections but not for the State Assembly polls ! And this for no other reason than that they are not 'Permanent Residents' under the State Constitution and State laws.

Article 327 requires Parliament to make provisions with respect to elections to Legislatures. In the case of Jammu &

Kashmir State, however, it is the State Legislature that is entrusted to make, by law, provisions with respect to all matters relating to elections to either House of the Legislature, including the preparation of electoral rolls, the delimitation of constituencies and all other matters necessary for securing the due constitution of the two Houses. This has been laid down in Section 141 of the Jammu & Kashmir State Constitution.

Some other interesting 'election specials' of Jammu & Kashmir are :

- (i) The State has its own People's Representation Act, 1957
- (ii) The superintendence, direction and control of election to its State Legislature have been vested with the Election Commissioner of India only since 1959.³² However, while the Chief Election Commissioner of India himself is appointed by the President of India under Article 324 of the Indian Constitution, his appointment for the Jammu & Kashmir State must be made under Section 138 of the State Constitution as amended in 1959.³³
- (iii) Irrespective of the number of representatives directly elected to the House of the People as determined under Article 81 of the Indian Constitution, a modification thereto lays down that there shall be six seats allotted to the State in that House and that five Lok Sabha members from the State must be associated with the work in Jammu & Kashmir of the Delimitation Commission under the Indian Parliament's Delimitation Act, 1972.

Article 352 of the Indian Constitution empowers the President to make a Proclamation of Emergency when the nation's security or any part of its territory is threatened, whether by war or external aggression or armed rebellion. Several stipulations accompany such a Proclamation. However, the modified version of this Article in its application to Jammu & Kashmir State is radical. It lays down that such

³² Anand *ibid* p.363 ³³ *Ibid* p.365

a Proclamation of Emergency will have effect in Jammu & Kashmir State if “it is made at the request or with the concurrence of the Government of the State.”

Article 368 pertains to the amendment of the Indian Constitution and stipulates a detailed procedure that involves both the Houses of Parliament as well as, in certain cases, Legislatures of all the States. But when applied to Jammu & Kashmir State, this Article has been modified to contain yet another condition. The main modification says as follows :

“Provided further that no such amendment shall have effect in relation to the State of Jammu and Kashmir unless applied by order of the President under clause (1) of Article 370.”

The above modification creates another radical situation. Any amendment of the Indian Constitution will not apply to Jammu & Kashmir unless it is brought through ‘consultation with’ or ‘concurrence of’ its State Government and issued under Article 370. In other words, the Indian Parliament is rendered impotent to amend, by itself, any provision of the nation’s Constitution that impacts Jammu & Kashmir State. The question needs to be asked once again : In which other country would the supreme law-making body be similarly incompetent to effect a Constitutional amendment in one part of its national territory ?

Seventh Schedule In the Union List original entries numbered 3 and 97 (an omnibus entry) now stand substituted while modifications today exist in entries 72 and 81. In the Concurrent List, substitutions exist for seven entries (1, 2, 12, 13, 25, 30, 42) and a cosmetic modification is made for one entry (45).

Article 35A is not a modification as such of an existing Article of the Indian Constitution but an addition. And it is a malevolent ‘modification’ insofar as it creates a schism between Indian citizens of the same State of India, drives a wedge between one class of citizens and another. See what it says below :

“Saving of laws with respect to permanent residents and their rights. Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu & Kashmir, and no law hereafter enacted by the Legislature of the State —

- (a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu & Kashmir; or
- (b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects —
 - (i) employment under the State Government,
 - (ii) acquisition of immovable property in the State;
 - (iii) settlement in the State; or
 - (iv) right to scholarships and such other forms of aid as the State Government may provide

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provisions of this part.”

With the above licence (given in 1954) by the Government of India to the Jammu & Kashmir State, the latter has, in fact, created several laws in several spheres that are blatantly against those who are citizens of India but, though living in that State, have not been recognised by the State Legislature as ‘Permanent Residents’. Thus, persons who are not ‘Permanent Residents’ are

- (i) not entitled to purchase immovable property
- (ii) denied employment with the State Government
- (iii) disqualified from being a member of a Village Panchayat and
- (iv) not eligible to vote in the State’s Legislative Assembly elections, as mentioned earlier.

V. ‘Temporary’ vs. ‘Special’

Those who oppose Article 370 but are not adequately familiar

with the Constitution of India are flummoxed when told that there are some other States besides Jammu & Kashmir which too have exclusive Constitutional provisions, and that, therefore, criticism of Article 370 is unwarranted.

Now it is true that Part XXI of the Constitution of India makes Special Provisions for Maharashtra, Gujarat, Nagaland, Assam, Manipur, Sikkim, Mizoram, Arunachal Pradesh and Goa. Each of them has a separate Article for the purpose while Andhra Pradesh has two such Articles. But the Special Provisions for these 10 States³⁴ are nowhere near the breadth and scope of the Temporary Provisions meant for Jammu & Kashmir State. This section briefly explains that position.

Article 371 relates to Maharashtra and Gujarat States, formed in 1960 on reorganisation of the old Bombay State. It authorises the President to provide by order that the Governor of each of those two States would have special responsibility for separate regional development boards. Guidelines for fund allocation and educational training are provided in the Article.

Article 371A deals with Nagaland. It stipulates that no Act of Parliament on (i) religious or special practices of the Nagas (ii) Naga customary law and procedure, including administration of justice under it and (iii) ownership and transfer of land and its resources would apply to the State unless the State Legislative Assembly so decides. The Article also confers special responsibility and discretion on the State's Governor besides establishing a regional Council for the State's Tuensang district.

Article 371B in respect of Assam provides for a separate committee from Tribal Areas members of the State's Legislative Assembly to consider Bills in the Assembly from the viewpoint of the people in those areas.

³⁴ In addition, Special Provisions in the form of Article 239AA were introduced for National Capital Territory of Delhi by the Constitution (69th Amendment) Act, 1991. That Article is under Part VIII of the Indian Constitution dealing with Union Territories.

Under Article 371C for Manipur, the President may provide for the creation of a committee of the State's Legislative Assembly, elected from the Hill areas, for the administration of which the Governor has been made responsible.

Articles 371D and 371E make some special provisions for Andhra Pradesh. According to the former, the President may by order provide for equitable opportunities for people belonging to different parts of the State in the matter of public employment and education. Provision for an Administrative Tribunal has also been made for redressing grievances in matters connected with civil posts, with only the Supreme Court having jurisdiction in any of its matters. Article 371E empowers Parliament to establish a Central University in the State. The genesis of these two Articles is to meet some of the aspirations of those clamouring for a separate Telangana State.

Under Article 371F, the number of seats in the Sikkim Legislative Assembly has been laid down as a minimum of 30. Several other provisions are included to facilitate governance of the State, with the President being given diverse powers towards that end.

Article 371G is for Mizoram and, apart from stipulating the strength of the State Assembly of not less than 40 members, puts the same conditions as in Nagaland on Parliament enacting laws on certain subjects unless the Legislative Assembly so decides by a resolution.

Article 371H for Arunachal Pradesh lays down that the strength of the State Assembly shall consist of not less than 30 members and confers special responsibility and discretion on the Governor in respect of law and order.

Article 371I lays down that the Legislative Assembly of Goa shall have a minimum strength of 30 members.

How do the Special Provisions for the above 10 States compare with the Temporary Provisions for Jammu & Kashmir State ?

The overriding contrast between the two sets is that eight of the 10 States are governed by the entire Constitution of India without exceptions and modifications. Unlike in the case of Jammu & Kashmir State, neither the Constitution of India nor the Indian Parliament is dependent on the will of the State Government. The two exceptions are Nagaland and Mizoram where laws on three categories of subjects are to be first decided by the State Assembly concerned before they are enacted by Parliament; these subjects have been chosen only because they are linked to tribal customs and to protection of tribal economic interests, and not because of any reason of conferring autonomy on the States. Furthermore, the Special Provisions for these 10 States do not drive any wedge between one class of citizens and another as in the case of Jammu & Kashmir State. Lastly, all these nine Special Provisions for 10 States are compassionate in character, not cocky, as is Article 370.

VI. Most Autonomous State

Though Jammu & Kashmir is a constituent State of the Union of India as per Schedule 1 of the Constitution of India, the restrictions of Article 370 on Parliamentary legislation being extended to Jammu & Kashmir State and of the numerous concessions in the nation's Constitution as applicable to the State have created a unique relationship between the Central Government and the State. It has been best summed up by M. P. Jain, a constitutional authority. He writes, "The two characteristic features of this special relationship are : (1) the State has much greater measure of autonomy and power than enjoyed by the other States and (2) Centre's jurisdiction within the State is more limited than what it has with respect to other States."³⁵ In other words, Jammu & Kashmir is the most autonomous State in India. It even has its own State Flag, allowed by Nehru in the Delhi Agreement of 1952. This flag is hoisted on the State's Council Hall and on the Ministerial vehicles along with the Indian National flag. Why, according to a local publication, 'The Daily Excelsior' of June 24, 2002, the State also has its

³⁵ M. P. Jain **Indian Constitutional Law** Fourth Edition Reprint, 2002, p.435

own anthem called *Qaumi Tarana*, which takes six minutes of singing time and during which senior police officials are required to keep standing.³⁶

However, political leaders in that State and elsewhere frequently raise the need for even greater autonomy to that State. Narasimha Rao's Congress Government spoke of an autonomy short of *azadi*. The United Front Government promised 'maximum degree of autonomy' in its announcement of 1996. Its second Prime Minister, I. K. Gujral, made the same pitch while in power and again as a speaker at a conference in July 2004.³⁷ The National Conference party of the Sheikh Abdullah dynasty cries hoarse about autonomy from time to time. Why, in June 2000, the Jammu & Kashmir Assembly's resolution accepted the State Autonomy Committee Report only to have it rejected by the NDA Government a month later. The demand based on that Report has again been raised in January 2005.

One reason touted for this demand for greater autonomy is to preserve the State's so-called 'Kashmiriat' culture — as though the States of Goa, Maharashtra, Orissa, Tamil Nadu etc. don't have distinctive cultural ethos of their own. Another reason, bandied about in recent years, is that the people of the State are 'alienated' and must therefore be given more autonomy so that a stop is put to the ongoing insurgency there for over 15 years now. Both these arguments have never been subjected to a serious probe. For instance, protagonists don't even note that the so-called 'Kashmiriat' of the Kashmir Valley is not at all prevalent in the Jammu and Ladakh regions of the State.

There really seems much more to this demand for greater autonomy than meets the eye. There's the State's Autonomy Committee Report demanding the autonomy of pre-1953. This was clearly in line with Sheikh Abdullah's anxiety expressed to Prime Minister Indira Gandhi in February 1975 that the Constitutional relationship between the Jammu &

³⁶ **Re-organisation of J&K State**, Bharatiya Vichar Saadhana, Mumbai, 2002.

³⁷ Free Press Journal, Mumbai 1-8-2004.

Kashmir State and the Centre should be as it was in 1953 when he was in power.³⁸ And he was in power that year till 8th August.

Why that particular cut-off date? Its crux is that on 9th August 1953, Sheikh Abdullah, then Prime Minister of the State's Interim Government, and 25 others were arrested and put under detention on the charge of conspiracy to 'overawe by force and show of force the duly constituted Government of the State of Jammu and Kashmir, with the object of overthrowing it and facilitating annexation of the State's territory by Pakistan.'³⁹ In the context of the State's autonomy under Article 370, it is significant that in the Lok Sabha debate on 10th August 1953, Prime Minister Nehru stated "This (Abdullah's arrest) was an internal matter and we did not wish to interfere."⁴⁰ (Abdullah was released in January 1958 but was rearrested in April 1958 for making allegedly inflammatory speeches.)⁴¹

The demand for greater autonomy to Jammu & Kashmir State has been endorsed by some political writers as well. One such who has probably been the most vehement is A. G. Noorani.⁴²

In his cited article, Noorani contends that —

1. While President's Rule in Punjab required the amendment of the Indian Constitution four times, the same result in Jammu & Kashmir, from 1990 to 1996, was attained by a mere executive order under Article 370.
2. Article 249 — empowering Parliament to legislate even on a matter on the State List on the strength of a Rajya Sabha resolution — was so modified in its application to Jammu & Kashmir State as in effect to apply to Article 248 — 'Residual powers of legislation'. This enabled the Union to acquire power to legislate on 'any matter specified in the resolution, being a matter which is not enumerated in the Union List or the Concurrent List'

³⁸ Anand *ibid* p.89 ³⁹ *Ibid*, pp 85-86. ⁴⁰ *Ibid*, p.126 ⁴¹ *Ibid*, p. 86

⁴² 'Article 370 : Law and Politics' **Frontline** magazine, September 16-29, 2000

including the State List.

3. The State government's authority to give 'concurrence' lasted only till the State's Constituent Assembly existed. Once this Assembly had finalised the State Constitution and dissolved itself, the President's power to extend provisions of the Indian Constitution to the State ended completely. Hence, all additions to Union powers since the adoption of the State Constitution on 17th November 1956 are unconstitutional. Article 370 has been reduced to a husk through political fraud accompanied by Constitutional abuse. Presumably to support this view, Noorani approvingly quotes from Nice Guys Finish Second by B. K. Nehru, Governor of Jammu & Kashmir from 1981 to 1984. The sentences quoted are, "From 1953 to 1975, Chief Ministers of that State (Jammu & Kashmir) 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 margins."

Noorani's above thrusts seem so much passion and rhetoric rather than reason and reality.

Below is a contrary view, point by point.

1. If a mere executive order facilitated an extension of President's Rule in Jammu & Kashmir, each of several such orders under Article 370 also gave the State a special treatment that was very unlikely to have met the stiff stipulations of an amendment of the Indian Constitution under Article 368. Take, foremost, the addition in 1954 of Article 35A that has enabled Jammu & Kashmir State to confer on one category of its residents certain legally unchallengeable rights and privileges denied to its other residents not so privileged. Then there's the modification of Article 3 that prevents any change in the borders of the State without obtaining the consent of the State Legislature. Take the word 'secular' not being applicable to Jammu & Kashmir. Take, finally, the modification of Article 368 that prevents any Constitutional amendment related to Jammu & Kashmir

from taking effect unless it is issued as an executive order under Article 370. All these were hammer blows delivered by a mere executive order under Article 370. Aren't all these also 'Constitutional abuse' ?

2. Likening the Union's power to legislate for Jammu & Kashmir under Article 249 with its power to do so under Article 248 is like equating an orange with an apple. Article 249 is specifically related to 'a matter in the national interest' and is, moreover, contingent on a resolution in the Rajya Sabha supported by not less than two thirds of its members present and voting. Article 248 — 'Residuary powers of legislation' — is not an open-ended scheme; presently, it enables Parliament to make laws applicable to Jammu & Kashmir only on three categories : (i) terrorist acts (ii) activities questioning or disputing the territorial sovereignty of India and (iii) taxes on foreign travel by sea or air, inland travel and all postal articles. Should, under the autonomy guise, any State be allowed to make separate laws on any of these three matters ?
3. By Noorani's own admission, the judiciary has held in *Mohammed Maqbool Damnoo vs. the State of J&K* (1972 JCLR 319) that 'the essential feature' of Article 370 is 'the necessity of the concurrence of the State Government', not of the Constituent Assembly. Again, in *S. Mubarak Shah Naqashbandi vs. ITO*, (AIR 1970 J&K 85) it was ruled that the provisions of Article 370 continued to remain in force even after the Constituent Assembly of the State enacted the State's Constitution.⁴³ Hence, to assail executive orders under Article 370 issued after the Jammu & Kashmir Constituent Assembly was wound up is to be irreverent to rulings of the country's judiciary.
4. Regarding B. K. Nehru's quoted sentences, the reality is that (i) there simply were no State Assembly elections in Jammu & Kashmir in 1953; (ii) the first such elections were in 1957 which were won, not by the Congress, but by the breakaway faction of the National Conference Party led by Bakshi Ghulam Mohammed who was not the nominee of Delhi but one who, as Sheikh Abdullah's

⁴³ Anand, *ibid*, p.109

Deputy, was asked by the then Head of the State, Yuvraj Karan Singh, to lead the Interim Government after Sheikh Abdullah was incarcerated in August 1953; (iii) the Congress Party could not have nominated puppets of its party as the State's Chief Ministers from 1953 onwards until it first entered the electoral fray in Jammu & Kashmir — that was in 1967, and (iv) if elections of 1957 were rigged, the blame cannot be put on New Delhi because the jurisdiction of the Election Commission of India and the Supreme Court was extended to Jammu & Kashmir State only in 1960.

VII. Most Pampered State

Apart from the familiar political sobbing that Article 370 has been exploited to considerably erode the degree of autonomy granted by the Instrument of Accession, some intellectuals, Indian and foreign, have hopped onto this bandwagon of greater autonomy.

Fuller autonomy is suggested as a measure to revive in the State the peace that was destroyed ever since the ethnic cleansing of the Kashmiri Pandit community in 1990 and the emergence of sustained terrorist acts from the Pakistan side, aided and abetted by 'separatists' and 'pro-independence' groups bearing assorted nomenclatures. Some of these intellectuals would ideally like to go back to the times when the constitutional links of Jammu & Kashmir State with the rest of India would strictly be in matters of defence, external affairs and communications — like it was in the British times, presumably.

It is amazing how all those who are so utterly protective of Jammu & Kashmir State's political autonomy totally overlook the economic picture. They forget that the British protected the old Princely State against external aggression, subjected it to their own foreign policy and controlled its communications, but hardly poured pounds sterling or Imperial rupees into the State. The State in Maharaja Hari Singh's time was poor despite being widely and heavily taxed before he acceded it to India. Years later, Bakshi

Gulam Mohammed, as Prime Minister of the State candidly admitted, "Kashmir cannot remain independent. Geographically the situation does not warrant it at all . . . Moreover, Kashmir is a poor State and cannot stand on its own feet."⁴⁴

Surprisingly, but possibly out of ego, Entry 76 of Union List, "Audit of the accounts of the Union and of the States", came under Parliament's legislative purview only with the Constitution Order, 1958, under Article 370. Hence, it was only after May 1957 that the State entered into financial arrangements with the Union Government; that brought it at par with other States in respect of financial matters including proportionate allocation of funds.⁴⁵

As has transpired, without massive financial assistance from the Union Government in Delhi, Jammu & Kashmir State would have had its feet cut off years ago.

It was Arun Shourie who first startled the common man when he said in an interview that 'the per capita Central assistance to Kashmir is 14 times that to Bihar, it is 11 times that to Tamil Nadu, it is 6 times that to even a beleaguered State like Assam.'⁴⁶ However, it was journalist V. Shankar Aiyar who bluntly wrote "For all that talk of autonomy or *azadi* the fact is that Jammu & Kashmir cannot sustain itself without the Centre's support."⁴⁷ He pointed out that Jammu & Kashmir had, among all the States of India, the lowest proportion of population living below the poverty line (3.48%) compared to 26.10% across India, and it is almost entirely because of the munificent financial assistance from the Central Government. Making that assessment a good two years before the UPA Government in Delhi announced a package of Rs.24,000 crores for Jammu & Kashmir State towards the end of 2004, Aiyar's article produced the following stunning facts :

∞ The State's salary bill for 2001-02 was Rs.2,829 crore while its own revenue was barely Rs.1,095 crore. Thus, the

⁴⁴ Anand *ibid* p.88 footnote, citing The Tribune, Ambala, 17-9-1962.

⁴⁵ Anand *ibid* p.179. ⁴⁶ The Times of India, Mumbai, Edit page, 8-7-2000.

⁴⁷ 'The Great Sop Story', **India Today**, 14-10-2002.

State could not have paid even the wages of its employees without the Centre's help.

- ✍ In 2001-02, the State spent Rs.7,516.6 crore of which Rs.4,577 crore or 60 paise of every rupee spent, came from the Centre.
- ✍ Since the beginning of militancy in 1990, the State has managed to get the lion's share of Central resources — over Rs. 35,571.3 crore in grants and assistance. In 2001-02, for instance, the State got Rs. 4,577 crore from the Centre or over 10% of the assistance to all States. It has got more than any other State every year since 1995.
- ✍ While other States get Central assistance in the ratio of 70% loan to 30% grant, Jammu & Kashmir, as a special category State, gets 90% aid as grant and only 10% as loan. Though the Comptroller and Auditor General has indicted the State for misuse of Plan funds, even the 10% repayment criterion has been waived.
- ✍ A Kashmiri gets eight times more money from the Centre than citizens from other States. While per capita Central assistance to other States moved from Rs.576.24 in 1992-93 to Rs.1,137 in 2000-01, that of the Kashmiri spiralled from Rs.3,197 to Rs.8,092. To get a perspective, if this cash, managed by the State government, were to be dispatched by money order, each Kashmiri family (with five members on an average) would get Rs.40,460 every year.
- ✍ Even the security related expenditure by the State is reimbursed by the Centre. The Centre also pays for financial assistance to Kashmiri migrants, the ex-gratia paid to people killed in terrorist acts and public works related to security.
- ✍ The Centre has been funding the entire Plan expenditure of Jammu & Kashmir or Rs. 11,400 crore in five years.
- ✍ For all of the above bounty from Delhi, what did the J&K State give back to the Indian nation? The State's contribution to the country's GDP was less than 1% in 2000-01. Clearly, export of handicrafts, fruits and flowers and its tourism industry is unable to sustain the State

on its own steam.

To the above statistics, add the fact that while all other States have to deal with Reserve Bank of India, the Jammu & Kashmir State banks with the Jammu & Kashmir Bank.

With ample justification, therefore, Aiyar dubbed Jammu & Kashmir as '**the most pampered State in India.**'⁴⁸ And to think that someone like A. G. Noorani has, in his article cited earlier, alleged that Jammu & Kashmir "was put in a status inferior to that of other States" and that it has been politically "subjected to debasement and humiliation."

VIII. The Monster

Among all the Constitutional exemptions and modifications given to Jammu & Kashmir, the most radical has been the introduction of Article 35A exclusively for that State. Several of the other modifications, such as of Article 3, do not have evil effects on a day-to-day basis. However, something that has been converted into a daily nightmare is the body of laws enacted by the State's Legislature through the enabling provision of Article 35A. That provision has, over the years, become the monster in Jammu & Kashmir.

To comprehend this assessment, Article 35A needs a re-statement here.

Issued under Constitution (Application to Jammu & Kashmir) Order of May 1954, Article 35A went as follows :

"35A. *Saving of laws with respect to permanent residents and their rights.*

Notwithstanding anything contained in this Constitution, no existing law in force in the State of Jammu & Kashmir, and no law hereafter enacted by the Legislature of the State —

(a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu & Kashmir;

⁴⁸ Trends for the two years subsequent to 2001-02 have been similar as revealed in RBI's annual publication **State Finances — A Study of Budgets.**

or

- (b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects —
 - (i) employment under the State Government;
 - (ii) acquisition of immovable property in the State;
 - (iii) settlement in the State; or
 - (iv) right to scholarships and such other forms of aid as the State Government may provide

shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provisions of this part.”

The above provisions of Article 35A were sanctified in the Jammu & Kashmir State Constitution adopted in November 1956 with five Sections therein dealing with the entity called ‘Permanent Residents’. Gradually came the laws that conferred extraordinary privileges on this entity, leaving the other residents of the State high and dry.

Take the Constitutional aspects first. Description of Permanent Residents was incorporated in the Jammu & Kashmir State Constitution’s Section 6. It is quoted below, word to word.

6. Permanent residents —

- (1) Every person who is, or is deemed to be, a citizen of India under the provisions of the Constitution of India shall be a permanent resident of the State, if on the fourteenth day of May 1954 :**
 - (a) he was a State Subject of Class I or the Class II; or**
 - (b) having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than ten years prior to the date.**

-
- (2) Any person who, before the fourteenth day of May, 1954, was a State Subject of Class I or Class II⁴⁹ and who having migrated after the first day of March, 1947, to the territory now included in Pakistan returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of any law made by the State Legislature shall on such return be a permanent resident of the State.

Section 8 of the State Constitution gives the State Legislature the right to define Permanent Residents while Section 9 permits the State Legislature to alter the definition of Permanent Residents, make provisions conferring any special rights or privileges on them and regulating or modifying such special rights and privileges.

With the blessings of Article 35A, the Jammu & Kashmir State Legislature has enacted laws that actually confer certain rights and privileges on Permanent Residents while denying them to those who are not the State's Permanent Residents. According to Arvind P. Datar, senior advocate, Chennai, for example,

1. Only Permanent Residents are entitled to transfer any land in their name under Section 4 of the Land Alienation Act, 1995;
2. In terms of Rule 17 of the Jammu & Kashmir Civil Services Rules, employment under the Jammu & Kashmir Government is permitted only to Permanent Residents but denied to other State residents persons even though they are citizens of India.

⁴⁹ The definition of 'State Subject' of Class I, Class II and Class III was set out in the State Maharaja's Notification of 20th April 1927 read with the Notification of 27th June 1932. It was based on the criteria of year of birth in the State, on the period of permanent residence in the State and on the acquisition of immovable property in the State. 'State Subject' of Class IV category referred to Companies meeting certain criteria. The full Notifications are available in Anand *ibid*, pp. 506-508. **In the Order of 31st January 1927 of Maharaja Bahadur, clause II forbade outsiders to purchase immovable property in the State. (*ibid* p.29)**

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3. A person who is not a Permanent Resident is disqualified from being a member of a Village Panchayat under Section 6(a) of the Panchayati Raj Act, 1989.

Similarly, those who are not Permanent Residents are denied State government scholarships and even the right to contest for a seat in the Village Panchayat.

On top of the above, there is the provision in the State Constitution's Section 140 which stipulates "every person who is a permanent resident of the State . . . shall be entitled to be registered as a voter" for elections to the Legislative Assembly. Thus, the right to vote for the Assembly is denied to those who are not Permanent Residents. Perversely enough, those who are not Permanent Residents of Jammu & Kashmir but are otherwise Indian citizens residing in that State are eligible to vote for the Lok Sabha polls in their constituency!!

The above perverse situation can lead to frustration among thousands of Indian citizens in Jammu & Kashmir. Read the report from 'Free Press Journal', Mumbai, of 18th April 2004 reproduced verbatim below :

Pakistani refugees in J&K shut their doors on political parties

PALLANWALA (LOC)

Living as 'unwanted citizens' of Jammu and Kashmir since the partition, over one lakh people who crossed over from Pakistan are closing the door on politicians knocking their door steps for votes with a promise to get them 'citizenship rights' in the state, reports PTI.

"We have closed our doors on politicians and candidates campaigning for the Lok Sabha elections. They are repeating the same 50-year-old promise to get us citizenship in Jammu and Kashmir. We are now fed up of them and their tall promises made every time during the polls" 81-year-old West Pakistan refugee Chowdary Hari Ram told PTI at Rangpur Sidhriya village on the Indo-Pak border in Jammu constituency.

Ram, who settled in the village after escaping the 1947 holocaust in which his family members were massacred, said, "We have lost faith in this electoral or democratic process and have accepted our fate of living as unwanted citizens."

Over one lakh refugees from West Pakistan have settled along the Indo-Pak border in Jammu after 1947. These WP refugees have Indian citizenship and can vote in Lok Sabha elections. But they do not have the right to vote in assembly elections as they are not given citizenship in Jammu and Kashmir even 57 years after they settled in the state.

"The WP refugees had voted for Congress, BJP and even National Conference in different Lok Sabha polls from 1967 to 2002 by-polls in Jammu. But our demand was never fulfilled by anyone," Bachan Lal, who fought the cause of the refugees from lower court to the Supreme Court, said. "All have duped us with false promises. We continue to live as unwanted people devoid of basic rights including education, voting in assembly elections, civic bodies, admission in professional colleges and right to own land and houses," Mastesat Paul, who was a government teacher in Pakistan, said.

The monster of Article 35A may well have merrily gone on from 1954 as it has the constitutional authority of Article 370. But after 1973 it should have come under a big black cloud. It was in that year that in *Keshavananda Bharati v. State of Kerala* (AIR 1973 SC 1461) the Supreme Court ruled, *inter alia*, that equality of status and opportunity promised to all citizens of India in the Preamble of the Constitution of India was, along with other ingredients therein, a part of the 'basic structure' of our Constitution and that any law, whether made in the exercise of the constituent power or ordinary legislative power, will be struck down as void if it violates the Constitution of India's 'basic structure'.

Unfortunately, Article 35A has continued merrily, undisturbed by the Supreme Court's landmark verdict of over three decades ago. Even the National Human Rights Commission, which had sprinted to the Supreme Court as soon as it heard of the verdict of acquittal of 21 persons in the Best Bakery trial at Vadodara in 2004, has apparently remained mum on Article 35A that has abjectly humiliated

thousands of Indian citizens in Jammu & Kashmir State.

Similarly, not a soul in this whole nation of ours seems to have raised even a whisper that the provisions for Permanent Residents in the Jammu & Kashmir State Constitution violate the noble objectives specified in the Preamble of that very Constitution. Below is that Preamble :

“We, the people of the State of Jammu and Kashmir, having solemnly resolved, in the presence of the accession of this State of India which took place on the twenty-sixth day of October, 1947, to further define the existing relationship of the State with the Union of India as an integral part thereof, and to secure to ourselves : —

JUSTICE, social, economic and political;

LIBERTY, of thought, expression, belief, faith and worship;

EQUALITY of status and of opportunity, and to promote among us all;

FRATERNITY assuring the dignity of the individual and the Unity of the Nation;

IN OUR CONSTITUENT ASSEMBLY this Seventeenth day of November 1956, do hereby ADOPT, ENACT AND GIVE TO OURSELVES THIS CONSTITUTION.”⁵⁰

Just how can a political Constitution make the above promises of Justice, Liberty, Equality and Fraternity and then go on to add those monstrous Sections on Permanent Residents? Truly a billion dollar question.

IX. Two Irritants

Two issues about Article 370 that have generally escaped public scrutiny concern the ‘consultation’ and ‘concurrence’ aspects.

Begin with the stipulation of ‘consultation with’ the Jammu & Kashmir State Government before a Parliamentary law on matters that correspond to Defence, External Affairs or

⁵⁰ Anand *ibid* p.198

Communications is extended to that State. The irritant : since those three categories of subjects were surrendered by the Instrument of Accession to the Indian Dominion's Legislature, where is the need to at all consult the State Government about it? Why consult when the President of India, acting on the advice of his Council of Ministers, declares that the matter of legislation conforms to any of the three surrendered matters? Is it because the State Government may not trust the Council of Ministers in New Delhi? Is that itself because there is an apprehension that the Council of Ministers will pass off a law on, say, toilet flushes, as a law on either of those three surrendered subjects?

The second aspect of worry is the stage and levels at which consultation is done or concurrence obtained regarding extension of a law of Parliament to Jammu & Kashmir State. Information on this point is not in the public domain and is not easily available either. However, perusal of a couple of actual Bills of Parliament shows that the jurisdiction of a proposed Act — whether whole of India or excluding Jammu & Kashmir State — is indicated in the Bill itself. It seems that before a Bill's introduction in Parliament, the Law Ministry takes a decision on its jurisdiction after discussion with the administrative Ministry concerned. This suggests that it is the relevant Ministry, to which the Bill pertains, that sends the proposed Bill to Jammu & Kashmir Government and, after consultation with it, brings the Law Ministry into the picture.

The above may not be the exact procedure, but there is little doubt that Members of Parliament debate a Bill in which the jurisdiction of the enactment is already shown. This indicates two things: (i) a Bill of Parliament goes to Jammu & Kashmir Government before it is circulated to all the 750-odd members of both Houses of Parliament, and (ii) the MPs not belonging to Jammu & Kashmir State have no knowledge of why a particular Bill is excluded from the jurisdiction of that State — probably because the Jammu & Kashmir Government did not give its approval to it. Thus, while the handful of MPs of Jammu & Kashmir (six in the Lok Sabha) get the

opportunity to debate and vote on a Bill even though it excludes that State from its jurisdiction, the remaining 750-odd MPs of the country get no opportunity at all to either (i) persuade the Jammu & Kashmir representatives in Parliament to accept a Bill rejected earlier by their State Government during the consultation/concurrence stage, or (ii) debate the Bill's rejection by the Jammu & Kashmir Government. What kind of democracy is this ?

X. Abrogation of Article

The Federal Energy Policy Act, 1992, enabled the US Congress to invade the American citizen's toilet. In order to conserve the nation's water resources, the Act set up a national plumbing code under which it was mandated that all homes across the country should, after 1st January 1994, install only such plumbing fixtures as would ensure the maximum flow rate of 1.6 gallons per flush. In India, the Union Government can't apply even the Indian Penal Code to Jammu & Kashmir State although the latter's Constitution avows that it is, and shall be, an integral part of India.

The reason for this illustrative difference between the oldest federal democracy and the world's biggest democracy lies in attitudes towards what constitutes 'national interest'. The powers entrusted to the Federal Government by the US Constitution fall under only 18 specific heads. But over the years, a very liberal interpretation of these heads by the Supreme Court has enabled the US Congress to exercise such enormous power that it has dwarfed the States.⁵¹ National interest has dwarfed all else in America because of the highest judiciary's attitude. In India, on the other hand, 'national interest' plays second fiddle to vote bank politics. Though empowered to enact laws for the country on 99 heads and several others as well under special dispensation, the nation refuses to see what sectarian interests has led to. The nation bows to the Instrument of Accession signed by Jammu & Kashmir at a time when the situation was so radically different. In 1950, it was constitutionally accepted that

⁵¹ M. P. Jain, *ibid*, p.291

the Union's laws for the State would be enacted only on the basis of consultation or concurrence. That promise has been honoured for fifty years and more till date even though the every little country in the world tries its hardest to protect its national interest first and foremost. Hence, all logical pleas to bring about constitutional uniformity between Jammu & Kashmir and the rest of India have been dubbed in certain quarters as a great betrayal.

Hence the feeling has spread in Jammu & Kashmir's corridors of powers that its government and its people are privileged, having some divine right to be treated as the country's blue-eyed boy — never mind that it was the State which, in October 1947, implored the Indian nation to save it from being robbed, raped and annexed by Pakistan. Successive Central Governments have tolerated this ego (arrogance?) of the Jammu & Kashmir Government. The name of the game has been to appease communal vote banks in a State which, by its own Constitution's Preamble, has chosen not to proclaim itself as 'secular'.

Dislike of this elitist stance of the Jammu & Kashmir State as a whole has long and often come from its Jammu and Ladakh regions. These two regions are big in size and have their own culture. But they are small in clout, and have been dominated all these years by those in the Kashmir Valley who, led by Sheikh Abdullah first, have ruled the State from the time it legally became a part of India. That is why organised groups in Jammu have long wanted the district to be a separate State of India⁵² without the protective status of Article 370 and Ladakh has similarly wanted Union Territory status for itself.⁵³ Even the 3,50,000 or so Kashmiri Pandits who were hounded out from the Valley in 1989-90 want a distinct geographical entity for their ethnic community under the aegis of the Indian Union but without Article 370.

The truly patriotic Indian desirous of physical and emotional integration across the country cannot but be distressed by

⁵² See Appendix VI for details ⁵³ See Appendix VII for details

the fact that, among other things, he is not allowed to purchase immovable property in Jammu & Kashmir, that the laws and Constitutional provisions are not uniform throughout the country, that special economic benefits are given to a State where 'separatists' are given prominence and where difference is expressed between 'Hindustanis' and 'Kashmiris'. The genuine patriot would like nothing better than to abrogate that Article of the Constitution of India that has brought this about. However, the Bharatiya Janata Party has been the only one to demand that abrogation, though it too seems lately to be drifting away from its earlier stand on the issue.

A large section of contrary opinion is opposed to any tampering with Article 370. The reasons vary from indifference and lack of depth to safeguarding the outdated promise of autonomy as the guise for the perpetual soft corner for the minority community rulers based in the Kashmir Valley.

Firstly, there's that issue raised by A. G. Noorani in his article cited earlier. He snidely wonders whether the BJP has considered what the effect of abrogation will be on Article 1 of the Constitution of India. His unstated argument is that Article 1, listing the territories of India, is applicable in relation to Jammu & Kashmir State only through Article 370 and that, therefore, the extinction of Article 370 would mean the exclusion of Jammu & Kashmir from the constitutionally listed territory of the Union of India! Well, that is a very minor snag that a senior lawyer should never have even contemplated. After all, if the BJP does at all effect the miracle of abrogating the whole of Article of 370 through a Constitutional amendment, all it has to do in the process is to add a clause in its Amendment Bill whereby Jammu & Kashmir is included in Article 1 itself, independent of any other provision of the Indian Constitution.

The real problem in the abrogation exercise is the wording itself of the Article. It states that the Article can cease to be operative only if so recommended by the Constituent Assembly of Jammu & Kashmir State. Since that Constituent

Assembly was dissolved in November 1957 but its existence not removed from the Constitutional text till date, its recommendation for axing Article 370 is impossible in practice.

A suggested solution to this obstacle is an amendment of the Indian Constitution under Article 368 to remove the stipulation therein that the recommendation of the Constituent Assembly is necessary to remove the Article. However, because of a Constitution Order of the President under Article 370, any amendment under Article 368 affecting Jammu & Kashmir demands issuing of a Presidential Order under Article 370. This, in turn, means that a constitutional proposal to axe the mention of the Constituent Assembly from Article 370's wording would require the State's concurrence under clause (1)(d) of the existing Article. Such concurrence from either the State Government or the State Legislature appears almost impossible to procure as long as the Kashmir Valley rules the State.

In the USA, such consent would be extracted by resorting to pressure. Federal financial assistance to a State would, for instance, be withheld until the State complies. Adherence to the stipulated high minimum speed limits for cars on the American highways is known to be ensured in that manner. Will any Central Government in India have the spine to use such tactics in order to make Jammu & Kashmir State fall in line?

X. Concluding Remarks

During an informal discussion in mid-January 2005, a pretty senior leader of a national political party's Mumbai unit expressed his personal belief that, "Over the years, the Union Government" had "tightened the screws on the Jammu & Kashmir State and that the State had been adequately integrated with the rest of India." "As it is," he said, "they have a separate Constitution and a separate flag; they may as well continue to have Article 370." His most startling remark, however, was, "Article 370 has at least preserved India's world class tourist spot. Without it, who knows, skyscrapers might have dotted Kashmir."

Leave aside the last obnoxious opinion, which itself reflects the pathetic submission of our political class to the builders' lobby (mafia?), there is evidence to suggest that even the BJP as a whole seems to have made an ideological compromise on Article 370 by its unwillingness to talk about it with the angst and hurt of earlier years.

Such a compromise ignores facts set out in this exposition about the overall ill effects that pampering of one State has brought to the dignity of this country's two supreme institutions — the national Constitution and the Indian Parliament. It is a national humiliation that members of the Legislature of Jammu & Kashmir State, its Chief Minister and its Chief Justice are required to swear allegiance to the State Constitution and not the nation's Constitution. And besides other constraints mentioned earlier, Appendix V of this exposition is one more proof of the Indian Parliament's impotence with regard to Jammu & Kashmir.

This pampering of Jammu & Kashmir has not only ignored the injustices caused by Article 370 to other States of the nation but may well have been responsible for all the talk of the 'separatists' and 'secessionists' and 'freedom fighters' that's gone on for the last 15 years or so, thereby dissipating the nation's energy required for rapid socio-economic development.

Tragically, this pampering has also almost closed the doors forever on the long-standing grievances of Jammu and Ladakh regions set out in Appendix VI and Appendix VII respectively. Continuing with Article 370 also ignores the aspirations of the entire Kashmiri Pandit community which, forced to live as refugees in their own country since 1989-90, desires a geographical entity of its own without the yoke of Article 370.

Now there is no doubt that a fairly large number of Parliamentary laws and provisions of the Constitution of India have been extended to Jammu & Kashmir State over the last five decades, especially in relation to the Supreme

Court's jurisdiction, the Election Commission, and imposition of President's Rule under Article 356.

There is no doubt, nevertheless, that despite giving the biggest financial aid of all States to Jammu & Kashmir, the Central Government still suffers from several nationally humiliating constraints: the inability to unilaterally alter the borders or even the name of that State, to grant equal rights to all Indian citizens in that State and to use the CBI and the Indian Penal Code in that State etc. For accomplishing all this and more, the 'mighty' Government of India needs, not the authority of the nation's supreme Parliament, but permission of a mere constituent unit that, for years together in bygone history, used to pay a fee to remain a subjugated protectorate of the British Empire. Today, that very protectorate of old has not only extracted much more than its pound of flesh from its protector but is arrogantly asking for more without so much as a word of gratitude.

There is no doubt, finally, that Article 370 does not seem to be amenable to abrogation legally as long as its wording contains the "recommendation of the Constituent Assembly of the State" as the prerequisite for revocation and as long any constitutional amendment relating to Jammu & Kashmir itself needs that State Government's approval. Politically, too, adequate support for abrogation is improbable, if not altogether impossible, what with the 'secular' parties unwilling to upset the Muslim majority politicians of the dominant Kashmir Valley. And no Jammu & Kashmir government run by the leaders of the Valley will by itself ever agree to the abrogation. After all, who will give up 'free lunches'?

But we ought not to close our eyes, do nothing and let the present situation continue. Time has come for every Indian worth his salt to stand up and echo to the Kashmiri the words Dr. Ambedkar uttered long ago to Sheikh Abdullah: "You want that India should defend Kashmir, India should develop Kashmir, and Kashmiris should have equal rights as the citizens of India, but you don't want India and any citizen of India to have any rights in Kashmir. I cannot

betray the interest of my country.”

The necessary action must begin with a judicial and political mix.

Legal eagles should go to court asserting that Article 35A (granted to Jammu & Kashmir State in May 1954) violates the principle of equality that is part of the basic structure of our Constitution which, our Supreme Court has ruled, cannot be violated. They should also contest that the Sections in the Jammu & Kashmir State Constitution creating a privileged class of citizens designated as Permanent Residents violate the noble principles enunciated in the Preamble of that very Constitution. Our judiciary could well look upon these two legal challenges sympathetically and secure equal rights to all the Indian citizens in the State. That itself would be a mighty relief from the burden of Article 370.

To supplement the legal actions, determined financial pressure, like the one used by the Federal Government in the USA, could obtain Jammu & Kashmir’s concurrence in creating separate political entities for Jammu and Ladakh regions and for Kashmiri Pandits, besides persuading the Jammu & Kashmir State to amend its own Constitution so that its MLAs, Ministers and judges swear to the supremacy of the nation’s Constitution, the Constitution of India. Ideally, the State must merge itself totally with the Constitution of India.

Till that happens, if at all, there is need too to coax the Jammu & Kashmir Government into accepting that on matters that President of India decides as conforming to Defence, External Affairs and Communications, there is no need to have any consultation with the State Government for extending Parliamentary laws to that State; after all, those three matters are those surrendered to the Indian Dominion by the Instrument of Accession and no further consultation is required.

Meanwhile again, with respect to securing concurrence for

Parliament laws other than on Defence, External Affairs and Communications, it would only be fair to the concept of parliamentary democracy that the Lok Sabha and Rajya Sabha are given the right to debate, without voting, Jammu & Kashmir Government's decision to reject the applicability in its State of this or that law being enacted by Parliament. Such a debate should be permitted also for those provisions of the Constitution of India as are not acceptable to that State. Such transparency in Parliament's working will reveal the psyche of all concerned and help mutual understanding.

The ultimate goal, of course, should be to bring Jammu & Kashmir within the mainstream of the Indian Constitution without Article 370. Catching the light at the end of the tunnel will mean burying the last lethal legacy of small sovereign Indian States that the British Raj had so devilishly intended to leave behind. The task may seem impossible. But where there's a will, there's a way. The problem is whether the Indian nation at all has the will. And, as Sardar Patel said in the context of Article 370's future: "If we cannot have confidence in our own strength, we do not deserve to be a nation."⁵⁴

⁵⁴ V. Shankar, **My Reminiscences of Sardar Patel** cited by L. K. Advani **The Indian Express**, 17-2-1992

APPENDIX I

Signed Instrument of Accession

INSTRUMENT OF ACCESSION OF J. A. M. U. A. S. O. K. A. S. R. M. S. D. T. A. T. E.

WHEREAS the Indian Independence Act, 1947, provides that as from the fifteenth day of August, 1947, there shall be set up an independent Dominion known as INDIA, and that the Government of India Act, 1935, shall, with such omission, additions, adaptations and modification as the Governor-General may by order specify be applicable to the Dominion of India;

AND WHEREAS the Government of India Act, 1935, as so adapted by the Governor-General provides that an Indian State may accede to the Dominion of India by an Instrument of Accession executed by the Ruler thereof;

NOW THEREFORE

I, Shri Maharaja Kalyanadas Rajwade Maharaja of the State of Jammu and Kashmir, Ruler of J. A. M. U. A. S. O. K. A. S. R. M. S. D. T. A. T. E. in the exercise of my sovereignty in and over my said State Do hereby execute this my Instrument of Accession and

Shri Han Singh
Jammu Kashmir
Rajwade Taluk
Tibet side
Deshadlegate

1. I hereby declare that I accede to the Dominion of India with the intent that the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall, by virtue of this my Instrument of Accession, but subject always to the terms thereof, and for the purposes only of the Dominion, exercise in relation to the State of J. A. M. U. A. S. O. K. A. S. R. M. S. D. T. A. T. E. (hereinafter referred to as "this State") such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India on the fifth day of August 1947 (which Act as so in force is hereinafter referred to as "the Act").

2. I hereby assume the obligation of ensuring that due effect is given to the provisions of the Act within this State so far as they are applicable therein by virtue of this my Instrument of Accession.

3. I accept the matters specified in the Schedule hereto as the matters with respect to which the Dominion Legislature may make laws for this State.

4. I hereby declare that I accede to the Dominion of India on the assurance that if an agreement is made between the Governor-General and the Ruler of this State whereby any functions in relation to the administration in this State of any law of the Dominion Legislature shall be exercised by the Ruler of this State, then any such agreement shall be deemed to form part of this Instrument and shall be construed and have effect accordingly.

5. The terms of this my Instrument of Accession shall not be varied by any amendment of the Act or of the Indian Independence Act, 1947 unless such amendment is accepted by me by an Instrument supplementary to this Instrument.


6. Nothing in this Instrument shall empower the Dominion Legislature to make any law for this State authorising the compulsory acquisition of land for any purpose, but I hereby undertake that should the Dominion for the purposes of a Dominion law which applies in this State deem it necessary to acquire any land, I will at their request acquire the land at their expense or if the land belongs to me transfer it to them on such terms as may be agreed, or, in default of agreement, determined by an arbitrator to be appointed by the Chief Justice of India.

7. Nothing in this Instrument shall be deemed to commit me in any

8. Nothing in this Instrument affects the continuance of my sovereignty in and over this State, or, so far as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.

9. I hereby declare that I execute this Instrument on behalf of this State and that any reference in this Instrument to me or to the Ruler of the State is to be construed as including a reference to my heirs and successors.

Given under my hand this 26th day of August,
Nineteen hundred and forty seven. OCTOBER


Maharaja Hari Singh of Jammu and Kashmir State
Raj

I do hereby accept this Instrument of Accession.
Dated this 26th day of August, Nineteen hundred and forty seven.


(Governor-General of India)

APPENDIX II

The Matters with Respect to which the Dominion Legislature may make Laws for this State

A. DEFENCE

1. The naval, military and air forces of the Dominion and any other armed force raised or maintained by the Dominion; any armed forces, including forces raised or maintained by an acceding State, which are attached to, or operating with, any of the armed forces of the Dominion.
2. Naval, military and air force works, administration of cantonment areas.
3. Arms, fire-arms; ammunition.
4. Explosives.

B. EXTERNAL AFFAIRS

1. External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's dominions outside India.
2. Admission into, and emigration and expulsion from India, including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India or subjects of any acceding State, pilgrimages to places beyond India.

C. COMMUNICATIONS

1. Posts and telegraphs, including telephones, wireless, broadcasting, and other like forms of communication.
2. Federal railways; the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fare, station and services terminal charges, interchange of traffic and the responsibility of railway administration as carriers of goods and passengers; the regulation of minor railways in

respect of safety and the responsibility of the administration of such railways as carriers of goods and passengers.

3. Maritime shipping and navigation, including shipping and navigation on tidal waters; Admiralty jurisdiction.
4. Port quarantine.
5. Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port authorities therein.
6. Aircraft and air navigation; the provision of aerodromes; regulation and organisation of air traffic and of aerodromes.
7. Lighthouses, including light ships, beacons and other provisions for the safety of shipping and aircraft.
8. Carriage of passengers and goods by sea or by air.
9. Extension of the powers and jurisdiction of members of the police force belonging to any unit to railway area outside that unit.

D. ANCILLARY

1. Elections to the Dominion Legislature, subject to the provisions of the Act and of any order made thereunder.
2. Offences against the laws with respect to any of the aforesaid matters.
3. Inquiries and statistics for the purposes of any of the aforesaid matters.
4. Jurisdiction and powers of all courts with respect to any of the aforesaid matters but, except with the consent of the Ruler of the Acceding State, not so as to confer any jurisdiction or powers upon any courts other than ordinarily exercising jurisdiction in or in relation to that State.

Source : ***The Constitution of Jammu & Kashmir — Its Development & Comments*** by Justice A. S. Anand, p. 470

APPENDIX III

Specimen Constitution Order

The Constitution (Application to Jammu And Kashmir) Amendment Order, 1969 (Vide GSR 303 dated 17th February, 1969)

In exercise of the powers conferred by clause (1) of Article 370 of the Constitution, the President, with the concurrence of the Government of the State of Jammu and Kashmir, is pleased to make the following Order :

1. (1) This order may be called the Constitution (Application to Jammu and Kashmir) Amendment Order, 1969.

(2) It shall come into force at once.

2. In paragraph 2 of the Constitution (Application to Jammu and Kashmir) Order, 1954, —

(1) in sub-paragraph (6) (relating to Part XI), for clause (b), the following clauses shall be substituted, namely :

(b) For article 248, the following article shall be substituted, namely :

248 Residuary powers of Legislation. — Parliament has exclusive power to make any law with respect to prevention of activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India from the Union or causing insult to the Indian National Flag, the Indian National Anthem and this Constitution.

(2) In sub paragraph (22) (relating to the Seventh Schedule), in clause (a), —

(a) for item (ii), the following item shall be substituted, namely :

(ii) entries 8,9,34 and 60, the words 'and

records' in entry 67, entry, 79 and the words 'Inter-State migration' in entry 81 shall be omitted;

(b) in item (iii), the word "and" shall be added at the end;

(c) after item (iii), the following item shall be inserted, namely :

'(iv) for entry 97, the following entry shall be substituted, namely :

97. Prevention of activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or secession of a part of the territory of India from the union or causing insult to the Indian National Flag, the Indian National Anthem and this Constitution.'

Source : The Constitution of Jammu & Kashmir — Its Development & Comments by Justice A. S. Anand, pp.488-489.

APPENDIX IV

The Delhi Agreement, 1952

Even as the work of the Jammu & Kashmir Constituent Assembly was going on, the representatives of Kashmir Government led by M. A. Beg, the then Revenue Minister, conferred with the representatives of Indian Government and arrived at an arrangement. This arrangement was later on known as the 'Delhi Agreement, 1952'. The main features of this agreement were :

- (i) in view of the uniform and consistent stand taken up by the Jammu & Kashmir Constituent Assembly that sovereignty in all matters other than those specified in the Instrument of Accession continues to reside in the State, the government of India agreed that, while the residuary powers of legislature vested in the Centre in respect of all States other than Jammu & Kashmir, in the case of the latter, they vested in the State itself;
- (ii) it was agreed between the two Governments that in accordance with Article 5 of the Indian Constitution, persons who have their domicile in Jammu & Kashmir shall be regarded as citizens of India, but the State legislature was given power to make laws for conferring special rights and privileges on the 'state subjects' in view of the State Subject Notifications of 1927 and 1932 : the State legislature was also empowered to make laws for the 'State Subjects' who had gone to Pakistan on account of the communal disturbances of 1947, in the event of their return to Kashmir;
- (iii) as the President of India commands the same respect in the State as he does in the other Units of India, Articles 52 to 62 of the Constitution relating to him should be applicable to the State. It was further agreed that the power to grant reprieves, pardons and remission of sentences etc., would also vest in the President of India;
- (iv) the Union Government agreed that the State should have its own flag in addition to the Union flag, but it was agreed by the State Government that the State flag would not be a rival of the Union flag; it was also

recognised that the Union flag should have the same status and position in Jammu and Kashmir as in the rest of India, but for historical reasons connected with the freedom struggle in the State, the need for continuance of the State flag was recognised;

- (v) there was complete agreement with regard to the position of the Sadar-i-Riyasat; though the Sadar-i-Riyasat was to be elected by the State Legislature, he had to be recognised by the President of India before his installation as such; in other Indian States, the Head of the State was appointed by the President and was as such his nominee but the person to be appointed as the Head, had to be a person acceptable to the Government of that State; no person who is not acceptable to the State Government can be thrust on the State as the Head. The difference in the case of Kashmir lies only in the fact that Sadar-i-Riyasat will in the first place be elected by the State legislature itself instead of being a nominee of the Government and the President of India. With regard to the powers and functions of the Sadar-i-Riyasat, the following was mutually agreed upon :
 - (vi) the Head of the State shall be a person recognised by the President of the Union on the recommendations of the Legislature of the State;
 - a. he shall hold office during the pleasure of the President;
 - b. he may, by writing under his hand addressed to the President, resign his office;
 - c. subject to the foregoing provisions, the Head of the State shall hold office for a term of five years from the date he enters upon his office;
 - d. provided that he shall, notwithstanding the expiration of his term, continue to hold the office until his successor enters upon his office;
 - (vii) with regard to the fundamental rights, some basic principles agreed between the parties were enunciated; it was accepted that the people of the State were to have fundamental rights. But in view of the peculiar position

in which the State was placed, the whole chapter relating to 'Fundamental Rights' of the Indian Constitution could not be made applicable to the State; the question which remained to be determined was whether the chapter on fundamental rights should form a part of the State Constitution or of the Constitution of India as applicable to the State,

- (viii) with regard to the jurisdiction of the Supreme Court of India, it was accepted that for the time being, owing to the existence of the Board of Judicial Advisers in the State, which was the highest judicial authority in the State, the Supreme Court should have only appellate jurisdiction;
- (ix) there was a great deal of discussion with regard to the 'Emergency Powers'; the Government of India insisted on the application of Article 352 empowering the President to proclaim a general emergency in the State; the State Government argued that in exercise of its powers over defence (Item 1 on the Union List), in the event of war or external aggression, the Government of India would have full authority to take steps and proclaim emergency but the State delegation was, however, averse to the President exercising the power to proclaim a general emergency on account of internal disturbance.

In order to meet the viewpoint of the State's delegation, the Government of India agreed to the modification of Article 352 in its application to Kashmir by the addition of the following words :

“but in regard to internal disturbance at the request or with the concurrence of the Government of the State.” at the end of clause (1).

Both the parties agreed that the application of Article 356, dealing with suspension of State Constitution and 360, dealing with financial emergency, was not necessary.

Source : The Constitution of Jammu & Kashmir — Its Development & Comments by Justice A. S. Anand p. 121

APPENDIX V

Items of legislation excluded from Parliament's purview in respect of Jammu & Kashmir

Entries in List I — Union List

(Seventh Schedule of Constitution of India)

- No. 2A.** Deployment of any armed force of the Union or any other force subject to the control of the Union or any contingent or unit thereof in any State in aid of the civil power; powers, jurisdiction, privileges and liabilities of the members of such forces while on such deployment.
- No. 8.** Central Bureau of Intelligence and Investigation.
- No. 9.** Preventive detention for reasons connected with Defence, Foreign Affairs, or the security of India; persons subjected to such detention.
- No. 34.** Courts of wards for the estates of Rulers of Indian States.
- No. 79.** Extension of the jurisdiction of a High Court to, and exclusion of the jurisdiction of a High Court from, any Union territory.

Substitutions :

(i) Existing No. 97

“Any other matter not enumerated in List II or List III including any tax not mentioned in either of those Lists”
substituted by—

“97. Prevention of activities —

- (a) involving terrorist acts directed towards overawing the Government as by law established or striking terror in the people or any section of the people or alienating any section of the people or adversely affecting the harmony amongst different sections of the people;
- (b) directed towards disclaiming, questioning or disrupting

the sovereignty and territorial integrity of India or bringing about cession of a part of the territory of India or a secession of a part of the territory of India from the Union or causing insult to the Indian National flag, the Indian National Anthem and this Constitution;

taxes on foreign travel by sea or air, on inland air travel and on postal articles, including money orders, phonograms and telegrams.

Explanation — In this entry, ‘terrorist act’ has the same meaning as in the Explanation to Article 248.

(ii) Existing No. 3.

“Delimitation of cantonment areas, local self-government in such areas, the constitution and powers within such areas of cantonment authorities and the regulation of house accommodation (including the control of rents) in such areas.”
substituted by —

“3. Administration of cantonments.”

Entries in List III — Concurrent List (Seventh Schedule of Constitution of India)

- No. 3 Preventive detention for reasons connected with the security of a State, the maintenance of public order, or the maintenance of supplies and services essential to the community; persons subjected to such detention.
- No. 5 Marriage and divorce; infants and minors; adoptions; wills, intestacy and succession; joint family and partition; all matters in respect of which parties in judicial proceedings were immediately before the commencement of this Constitution subject to their personal law.
- No. 6 Transfer of property other than agricultural land; registration of deeds and documents.
- No. 7 Contracts, including partnership, agency, contracts

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- of carriage, and other special forms of contracts, but not including contracts relating to agricultural land.
- No. 8 Actionable wrongs.
- No. 9 Bankruptcy and insolvency.
- No. 10 Trust and trustees.
- No. 11A Administration of justice; constitution of and organisation of all courts, except the Supreme Court and the High Courts.**
- No. 12 Evidence and oaths; recognition of laws, public acts and records, and judicial proceedings.
- No. 13 Civil procedure, including all matters included in the Code of Civil Procedure at the commencement of this Constitution, limitation and arbitration.
- No. 14 Contempt of court, but not including contempt of the Supreme Court.
- No. 15 Vagrancy; nomadic and migratory tribes.
- No. 17 Prevention of cruelty to animals.
- No. 17A Forests**
- No. 17B Protection of wild animals and birds**.
- No. 20 Economic and social planning.
- No. 20A Population control and family planning**
- No. 21 Commercial and industrial monopolies, combines and trusts.
- No. 27 Relief and rehabilitation of persons displaced from their original place of residence by reason of the setting up of the Dominions of India and Pakistan.
- No. 28 Charities and charitable institutions, charitable and religious endowments and religious institutions.

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- No. 29 Prevention of the extension from one State to another of infectious or contagious diseases or pests affecting men, animals or plants.
- No. 31 Ports other than those declared by or under law made by Parliament or existing law to be major ports.
- No. 32 Shipping and navigation on inland waterways as regards mechanically propelled vessels, and the rule of the road on such waterways, and the carriage of passengers and goods on inland waterways subject to the provisions of List I with respect to national waterways.
- No. 33A Weights and measures except establishment of standards.**
- No. 37 Boilers
- No. 38 Electricity
- No. 41. Custody, management and disposal of property (including agricultural land) declared by law to be evacuee property.
- No.44. Stamp duties other than duties or fees collected by means of judicial stamps, but not including rates of stamp duty.

**Denotes non-applicability to Jammu & Kashmir State.

Note : Substitute text for entries 1, 2, 12, 13, 25, 30 and 42 in Concurrent List and modification of entry 45 therein are excluded because they do not appear very significant.

Source : (i) Appendix II The Constitution of India (As on the 1st January, 2000) Govt. of India, Ministry of Law, Justice & Company Affairs.

(ii) The Constitution of India P. M. Bakshi, 2002, Universal Law Publishing Co. Pvt. Ltd.

APPENDIX VI

Delink Jammu & Ladakh from Valley

(Excerpts from the article in **The Tribune**, August 27, 2000 by **Hari Om**, Professor of History, Jammu University, and Member, Indian Council of Historical Research)

Let us examine the status of the 'alienated Kashmiris' (read a section of the Kashmiri-speaking Sunnis whose political demands range from merger with Pakistan to independence to greatest autonomy, bordering on sovereignty) in the country's polity.

Strange may it sound but it is a fact that these Kashmiris, who roughly constitute 22% of the State's population, have obtained from the Centre a system of government which is almost exclusively of them, for them and by them.

Take, for example, their total control over the state's political scene as well as an effective say in the New Delhi's corridors of power. In October 1947, when the state acceded to the Indian Dominion as per the stipulations of the Indian Independence Act, they and their leader, Sheikh Abdullah, practically hoodwinked and blackmailed Prime Minister Nehru.

They plainly told Nehru that they would endorse Maharaja Hari Singh's decision on the state accession only if the political power was transferred from Jammu to the Valley-based National Conference chief (Sheikh Abdullah). And Nehru obliged them. It was at their behest (and much to the chagrin of the people of Jammu and Ladakh and others in Kashmir) that Article 370 was incorporated in the Indian Constitution.

Ever since, they have been ruling over the State, with the people of Jammu and Ladakh and others in the Valley being reduced to a nullity.

The factor that has helped them most to retain control over

the state is the mechanism they diligently evolved in 1951 which could always enable them to capture nearly 50% of the seats in the Assembly from the small Valley itself and three of the six seats in the Lok Sabha. (The Valley has 46 Assembly segments as against 41 in Jammu and Ladakh which are far superior to Kashmir both in terms of population and land area). And, all this, notwithstanding the unambiguous rules laid down by the Indian Representation of the People's Act or the Jammu and Kashmir Representation of the People's Act of 1957.

As for their share in the vital service sector, they hold over 2,30,000 positions out of a nearly 2,40,000 positions in the government and semi-government organisations in the Valley. In addition, they corner nearly 25% of the jobs in the regional services of Jammu and Ladakh.

Similarly, all the professional and technical institutions, universities and all the big public sector industrial units like the HMT watch factory, the television factory, the telephone factory and the cement factory located in the Valley are their sole preserve. Besides, they manipulate for themselves more than 50% of the seats in the Jammu's ill-equipped and understaffed medical and engineering colleges and the Sher-e-Kashmir Agricultural University, R. S. Pura, leave alone Ladakh where no such institution exists.

Not only this, they control trade, commerce, transport and industry and own big orchards and landed estates. None of them is without a house. Likewise, the per capita expenditure on woollen clothes in Kashmir is perhaps highest in the world. No wonder then that none in Kashmir till date has, unlike Bihar, UP and Orissa, died of either hunger or cold.

Interestingly, yet not unexpectedly, a vast majority of them do not pay even a single penny to the State in the form of revenue due to it. It is only Jammu and Ladakh which contribute over 90% to the state exchequer and a major part of this money is spent not in the extremely backward and under-developed Jammu and Ladakh but in the already highly prosperous and developed Kashmir Valley.

But these are only a few of the several such examples which serve to show that it is the Kashmiris and Kashmiris everywhere and all others in the State exist nowhere. All this also points to the fact that they do have the power to shape and control fully their political destiny as well as control (and exploit) the hapless and neglected Jammuites, Ladakhis, Shiite Muslims, Gujjar and Bakerwal Muslims, Darad and Balti Muslims, Kashmiri Hindus, Christians and the Sikhs.

APPENDIX VII

No point in keeping Ladakh as part of J&K

(Excerpts from an interview given by Thupstan Chhewang, Chairman, Ladakh Autonomous Hill Development Council to Claude Arpi@Rediff.com August 5, 2002)

We have been saying that Ladakh possesses all the norms to create a separate state; unfortunately because of the Kashmir issue with all its international ramifications, nobody is ready to consider our demands.

... as a compromise we accepted the LAHDC, but, though some powers have been delegated to the council, we are facing a lot of problems in implementing decisions. Everything has to be routed through Kashmir. Until and unless we are separated from Kashmir, our problems will not be addressed and solved. There is no point in keeping Ladakh as part of Jammu and Kashmir.

We shall continue to try to convince the GOI and the government in Srinagar. For the time being, they are telling us that because of Article 370, there is no provision for the division of the State. But we have pointed out that there are also protests in Jammu which wants a separate state. Ultimately, there has to be some kind of reorganisation of the state. There is the need for three distinct political entities; otherwise the people will never be satisfied, their demands as well as their needs and requirements will not be fulfilled.

Today, the political scene in the State is dominated by the Kashmir Valley.

When people talk about Kashmir, they do not think about Ladakh, they do not also think about Jammu, although in terms of area, Ladakh alone is more than 2/3 of the state. In terms of population, the regions of Jammu and Ladakh together are more important than the Valley, so how can the government continue to neglect these two regions of the state ?

They (the government) only have this kind of policy to appease the majority of the Valley which are Muslim. So, something has to be done. Unless and until the problems of Jammu and Ladakh are taken into consideration, there will be no solution.

Ladakh was an independent kingdom till 1836, when it was invaded and annexed to the Dogra State of Jammu. In 1947, when India was granted independence, we were part of the principality of Jammu & Kashmir. It is how we became part of the Jammu & Kashmir State.

At the time of partition, the people of Ladakh approached the Maharaja and later (in 1949), they approached the Indian Prime Minister with the same demand : we do not want to be part of the Jammu & Kashmir State. We wanted Ladakh to be directly administered by Delhi. We already had an apprehension that Ladakh would be discriminated against by the Kashmiris and it has happened now for the past 40 years. At that time already, our leaders had asked that Ladakh should be considered as a separate unit, but once the Kashmir issue became an international issue, we have been used as scapegoats.

Ladakh is today kept as part of the State to balance the demand of the Valley for azadi, but it is at the cost of the aspirations of the people of Ladakh.

Article 370 has to be abrogated and in fact, it could bring the people of Kashmir in the mainstream. It has separated Kashmir from the rest of the country.

