

THE REAL FACE OF

ARTICLE

370

OF CONSTITUTION OF INDIA

DAYA SAGAR

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Jammu Kashmir Study Center

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FORWARD

Some people, with vested interests have created a riddle out of Jammu And Kashmir, which is as simple and as normal state of India as any other , like Punjab or Uttar Pradesh. The purpose is not to have some innocent fun ,which the riddles are meant for , but a sinister design to complicate the issue by distorting the truth and creating confusion in minds of the people in the State as well as in rest of the India .Much has been written about Jammu And Kashmir in India and abroad but only a handful of publications contain any honest appraisal or analysis based on actual facts. But books written by .Mr Daya Sagar , in this regard have created a special place in the minds of those readers who want to understand the so called problem of Jammu And Kashmir in earnestness .His narrative is neither complex like that of a lawyer nor is it full of political verbosity like a professional politician .It is unfortunate that the case of Jammu And Kashmir has been distorted by untruths and half truths as well as the unfounded fictions .It was unfortunate that the power full Indian leaders like Jawaharlal Nehru should have jumped as a partisan in the power tussle between the Maharaja and the local political leader Sheikh Mohammad Abdulla .It converted the serious matter of national and Geo-strategic importance into a confrontation of personal ego and unbridled political ambitions .The result was for everybody to see. Article 370 is the typical example this mess created by

our leaders . The constitutional provision which was declared as 'temporary" arrangement by the proposer of the bill himself was presented by some anti Indian groups not only as a permanent feature of the Indian constitution but also was declared as the corner stone of the accession of Kashmir with India. It was claimed that the abrogation of the article will automatically nullify the accession of Kashmir also. In fact the article has been used by these factions to keep the Indian Democracy away from the State for their ulterior motives .A new term was coined to show that Jammu And Kashmir was not integral part of India. It was claimed that Jammu And Kashmir did sign the letter of accession but not the letter of merger. Hundreds of Indian States had signed the similar letter of accession to become part of India as did the Jammu and Kashmir .but no other state went for the imaginary process of merger . Was it specially coined for Jammu And Kashmir only ?

Jammu And Kashmir Research Centre has been conducting a national debate on various issues regarding the State of Jammu And Kashmir for last five years. We have been encouraging this dialogue among various groups by conducting seminars and workshops on different dimensions of the related issues . Since dialogue is an exchange of thoughts and ideas among different people, social groups discussions are bound to have different shades and versions. The writers and scholars express their ideas , pose questions , propose their solutions on the basis of their experiences and the studies. Although broadly in agreement in the appraisal of the core issues Jammu And Kashmir Study Centre may disagree with the writers on certain matters of detail .But such minor divergence in views will not diminish the Importance of the dialogue Serious efforts made and effective presentation by Mr. Daya sagar ji will certainly help it go on faster.

PREFACE

For more than six decades Art-370 of Constitution of India, inspite of its being a temporary provision, has remained in controversies. This has also been one of the tools that the separatists & even some so called 'mainstream' leaders have been using to woo the common people (particularly of Kashmir Valley) away from India and for vote bank game plans. Since over the years the issues raised as regards the Indian State of Jammu and Kashmir have not been adequately, timely and properly addressed to by the Indian leadership (of all parties), the anti-elements have surely earned some points. So, there is utmost need for addressing the subject socially , politically and constitutionally. May be the conventional ways and styles of addressing Art-370 too would be requiring some reworking.

Article 370 of Constitution needs proper presentation as regards its origin and continuation. Along with fighting the extra territorial enemies/disruptive elements, Bharat also has to fight simultaneously social and intellectual battles at local levels. Had such approach/actions been taken a few years earlier the conditions would not have been so difficult that the return of Kashmiri migrants (primarily because they are the local Hindu who contest/declare Kashmir as Bharat),

who are away from their lands since more than two decades, has not remained the priority number one for Government of India and the political leadership even till 2014. Unless the real definitions and correction to conceptual deformities are carried deep into the Indian masses (even to the senior leaders who have been otherwise working all these years for abrogation of Article 370), under the present circumstances it may not be that easy (possible) to check further damage in the immediate future. The questions that need be addressed to, in particular, could be

1. What was the need for Article 370 in 1950 ?
2. What after all is Article 370 ?
3. Why should Article 370 be amended/ modified/ repealed ?
4. If Article 370 has to be amended/ modified/ repealed, how could it be ?
5. Miscarriage of Article 370 ?

CHAPTER-1

What was the need for Article 370 in 1950?

In early 1947 Britain announced its intention of transferring power before June 1948 but a few months later new viceroy, Louis Mountbatten proposed and got advanced the date for grant of Independence to India . On 3rd June, 1947, Louis Mountbatten, first Earl Mountbatten of Burma and the then viceroy of India, announced partitioning of British India. Hardly less than 3 months were there now to prepare for a mutually agreeable partition plan, passage of Indian Independence Act of British Parliament and execution of Partition of India . Plan was for carving out of an area out of British India of British Indian Empire for Pakistan, a theocratic Islamic State. Indian Independence Act that was passed by British Parliament received Royal Assent on 18th July, 1947. Some of the territories of India of British Empire were also under the executive rule of the Princes. The Princes acceding to India Dominion had to live as common citizen in democratic India and it could surely be not so simply pleasing for some. Hence some Princes could do the exercise of examining different models of Governance after British Retreat. Staying Independent of Indian Dominion and Pakistan Dominion or working to secure some special

positions for them in the independent republic of India could also be possible models/options/plans for consideration before the Princes .

As a result of the Two Nation theory cultivated by Mohd Ali Jinnah and leaders of his class a new country in the name of Pakistan was to be carved out of India under the provisions of the Indian Independence Act, 1947. And for resolving the issues peacefully and amicably the only option (the best option) available then was to accept the fortunes for the Indian people as were written in the Indian Independence Act, 1947 of British Parliament.

Hence it was not so simple for leaders of Independent India to write the Constitution of India where in a large number of Native states too would have acceded to Indian Dominion.

The pre 15th Aug 1947 British Indian Empire comprised of British India (comprised of Governor Provinces/ Chief Commissioner Provinces) and Native Indian States (commonly known as Princely States). The expression "British India" meant all territories and places within Her Majesty's dominions which were for the time being governed by Her Majesty (British Crown) through the Governor-General of India or through any Governor or other officer subordinate to the Governor-General of India. The expression "India" meant British India together with any territories of any Native Prince or Chief under the suzerainty of Her Majesty exercised through the Governor-General of India, or through any Governor or other officer subordinate to the Governor-General of India. Before partition of India even it could be said that in a way control over, may be around 125 Princely States, was exercised in a way directly (in the name of the British Crown) by the Central Government

of British India, the remaining States were dependents/ jurisdictions of the provincial governments of British India under a Governor, Lieutenant-Governor, or Chief Commissioner.

Princely States of India in Indian British Empire were just nominally sovereign entities of British India during the British Raj. No doubt they were not directly governed by the British, but were rather in a way under a form of indirect rule, subject to a subsidiary alliance and the suzerainty or paramountcy of the British crown. There were 565 princely states in India at the time of independence in 1947, but a large number out of them had in a way only contracted with the Viceroy of India to provide public services and tax collection. Only 20-21 Princely states could be said as having Governments that could be in the real sense named as State governments and from amongst them only four were large identities i.e, Baroda, Jammu & Kashmir, Hyderabad and Mysore.

At the time of independence in 1947, British India had nearly 17 provinces: Ajmer-Merwara-Kekri Andaman and Nicobar Islands, Assam, Baluchistan, Bengal Province Bihar Province, Bombay Province, Central Provinces, Berar, Coorg, Delhi Province, Madras Province North-West Frontier Province, Panth-Piploda Province, Orissa Province, Punjab Province, Sind Province United, Provinces of Agra and Oudh. Upon the Partition of British India into the Union of India and Dominion of Pakistan, For the purposes of Pakistan 3 provinces (Baluchistan, North-West Frontier and Sindh) joined Pakistan, and 3 provinces (Punjab, Bengal and Assam) were partitioned between India and Pakistan.

Integration of Indian native states was also one of the

issues in view of the British even before the grant independence to India. This is indirectly reflected from Indian Independence Act, 1947 that contained the provision like all treaties, agreements, etc. between His Majesty's Government and the rulers of the Indian States to lapse; the words 'Emperor of India' to be omitted from Royal Style and Titles; the Indian states to be free to accede to either of the new Dominion of India or Pakistan; Monarchy to be abolished and hence annexation of the princely states.

Preparatory to installation of Independent Dominions in the National Provisional Government, States Department was formed. Sardar Vallabhbhai Patel headed the States Department. Patel and his aide VP Menon started addressing the patriotic senses of Indian princes much before August 1947 worth persuading them to join the India Dominion / Indian Union. For speeding up the process a common text of Instrument of Accession was designed by Lord Mountbatten for Princely States that were (nearly 550) likely to accede to India Dominion. No such instrument was drafted by Mountbatten for States that could accede to Pakistan since the number of such states (as was then anticipated) would have been just around 15.

Indians had to yet decide for the model (say Constitution) for managing the affairs on their own.

With lapse of British Paramountcy and the Constitution of the Independent India Dominion yet to be drawn, the only immediate proposal that could be mooted for accession of Princely States with India Dominion was to surrender atleast the main subjects that were handled by the British Crown for the Native States ie. Defence, Foreign Affairs,

Communication and the allied ones.

In view of the fact that India was just attaining independence, the Native Rulers were to going lose their Power and the Governing methods/ Constitution for the Independent India were yet to be worked out , the immediate feasibility was seen in the proposals that the local internal governance of the acceding princely states be kept with the local prince as the head and representatives of the people as elected to work with him; and the issues of broader interests like the ones that were being handled by the British crown for States be handed over to the Union Government till the final working Constitution is framed with the common consent/ involvement of the people and the princes . (Section- 8 of the Indian Independence Act, 1947:

Temporary provision as to Government of each of the new Dominions said that

(1) In the case of each of the new Dominions, the powers of the Legislature of the Dominion shall, for the purpose of making provision as to the Constitution of the Dominion, be exercisable in the first instance by the Constituent Assembly of that Dominion, and references in this Act to the Legislature of the Dominion shall be construed accordingly

(2) Except in so far as other provision is made by or in accordance with a law made by the Constituent Assembly of the Dominion under subsection (1) of this section, each of the new Dominions and all Provinces and other parts thereof shall be governed as nearly as may be in accordance with the Government of India Act, 1935; and the provisions of that Act, and of the Orders in Council, rules and other instruments made thereunder, shall, so far as applicable, and subject to any express provisions of this Act, and with such,

omissions, additions, adaptations and: modifications as may be specified in orders of the Governor-General under the next succeeding section, have effect accordingly:).

The process of democratisation was started with the understanding that all acceding Princely States could elect their own Legislatures/Constituent Assemblies for assisting the Prince for internal governance, taking decisions for sharing the subjects outside those listed in the Instrument of Accession with Union in full or part and even participate in the drafting of the Constitution of India. Some Princes took a few days and some a few months to take decisions regarding additional subjects to be shared between the Union and the State. Before 15th August, as many as 136 jurisdictional states had already acceded to the Indian Union. Jammu Kashmir's Maharaja Hari Singh signed the Instrument of Accession on 26th October, 1947 and the Nizam of Hyderabad in 1948. India used its persuasion to get most of the princely states accede with it — the only exception being when it had to send its armed forces to Hyderabad.

Immediately after 15th August, 1947 Indians were being governed not under the Government of India Act, 1935, but the GOI Act, 1935 as adapted under the Indian Independence Act of 1947. It would be more correct to say that a process for "the transition from the provisions of the Government of India Act, 1935 as adapted under the Indian Independence Act of 1947 to the provisions of Constitution of Indian Democratic Republic had started. One can say that Original GOI Act, 1935 had ceased to exist; and Independent India Dominion and the process of integration of the acceded Native states (Princely States like J&K) was governed by the adapted GOI Act, 1935 as envisaged under the Indian Independence Act, 1947. The Indian

Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending or supplementing GOI Act, 1935, were available as interim working Constitution to Independent India till 26th January 1950.

For explanation sake it could be said that when the draft of the Constitution of India was just being worked out after India attained independence in 1947 and Constitution was adopted in November 1949 there were many subjects that could have scope for change even after it was to be put in practice. So, in the initial stages among other provisions, particular/ different State & Union list like work plans were drawn for the Indian State of J&K. The procedures for operating upon the J&K specific "State and Union" lists by the Parliament/ Union were also laid out in Article 370 of Constitution of India.

In 1950, after the Indian Constitution was adopted, the Provinces and acceded Native states of India were reorganized/ renamed under a redrawn scheme of States and Union Territories. India Dominion had inherited variety of Princely States along with the left over Provinces (excluding newly created Dominion of Pakistan) of the British and that were grouped from administrative angles/ local territorial requirements to suitability (nearly 550 Princely/ Native states and 10 Governor administrated units of British India/ Provinces were reduced to 29 States & centrally administered units after regrouping and merger of smaller/ tiny units with each other/ larger states after the first exercise as was completed in 1950). The provinces/ states after regroupings/ readjustments were mentioned in Schedule-1 of the Constitution of India as Part- A, B, C and D states (D- Andaman and Nicobar Islands which was designated as a

Territory of union). In the Constitution of India (1950) the States/ Territories of India under Article 1 of Constitution of India were listed in Schedule-1 to the Constitution.

Part-A consisted of nine states of erstwhile British India which had elected assemblies with Governors. These States were the earlier Governor's Provinces of British India (Assam, Bihar, Bombay, Madhya Pradesh (formerly Central Province and Berar), Madras (now Tamil Nadu), Orissa (now Odisha), Punjab (formerly East Punjab), Uttar Pradesh (formerly United Province) and West Bengal).

Part- B consisted of former princely states. They formed nine states by merging with each other which were governed by a Rajapramukh who happened to be one of the kings and too could have elected legislature. The Rajapramukh was appointed by the President of India. Hyderabad, Jammu and Kashmir, Madhya Bharat, Mysore, Patiala and East Punjab States Union (PEPSU), Rajasthan, Saurashtra and Travancore-Cochin.

In part- C, there were 10 States formed out of states where the British had appointed their own Commissioners. India had assimilated most of the small/ tiny Princely States into the Union within three years of the independence. (Part – C covered both Chief Commissioner/ Commissioners' Province from the British time and some Small Princely states. Ajmer, Bhopal, Bilaspur, Coorg, Delhi, Himachal Pradesh, Kutch, Manipur, Tripura and Vindhya Pradesh. They were governed by a Chief Commissioner appointed by the President of India.)

In Part- D (One territory - The Andaman and Nicobar Islands).

The era of setting constitutional uniformities started with

adoption of COI (Constitution of Sovereign Democratic Republic of India - Bharat, a Union of States) on 26th January, 1950 and repeal of The Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending or supplementing Govt. of India Act, 1935 under Art-395 of Constitution of India.

Part-VI of the COI (Art- 152 to Art- 237) was incorporated as regards dealing with Constitutional/Legislative/ Executive provisions w.r.t. to Part-A States, Part-VII of COI (Article-238- Application of provisions of Part VI to STATES IN PART- B of the First Schedule excluding J&K) was incorporated to deal with Part-B states excluding J&K, Art-370 was incorporated in Part-XXI of the Constitution to Deal with Jammu & Kashmir as temporary provision and Article 371 was also incorporated as a Temporary Provision with respects to States in Part- B of the 1st Schedule in Part-XXI itself, Part- VIII (Art- 239 to 242 where Art-240 was as regards Creation or continuance of local Legislatures or Council of Advisers or Ministers) was incorporated to deal with the STATES IN PART-C of the First Schedule, Part-IX (Art-243) was incorporated as regards THE TERRITORIES IN PART-D of the First Schedule and other territories not specified in that Schedule, Part-X (Art-244) was incorporated for administration of Scheduled Areas and tribal areas and Part-XI (Art-245 to 263) was incorporated for Legislative and administrative relations between THE UNION AND THE STATES. The State of Jammu and Kashmir though was included in Part-B of the Schedule -I, the Article (Article 238) contained in Part-VII of the Constitution of India was not to cover the State of Jammu & Kashmir. Over the period of time the Articles and Parts of Constitution of India have gone through the process

of transformations/ deletions & renaming and that is enough to demonstrate that the drafting of the COI was not that easy and simple process, rather it was a continuous process, therefore, any provisions that have been included in the COI only for the time being or had been different to other states should not be taken being there only for the reasons of some disputes or compulsions unless such like explanations have been also included in the Constitution.

So, for the State of Jammu and Kashmir that was/ and is also part of the Union as defined under Article 1 of the Constitution of India (included in Schedule-I of the Constitution of India), Art-370 was incorporated in Constitution of India as a temporary provision since the process for bringing constitutional reorganisations and uniformities was not yet complete which is also very clearly reflected from the text of Art-371 ("Notwithstanding anything in this Constitution, during a period of ten years from the commencement thereof, or during such period as Parliament may by law provide in respect of any State, the Government of every State specified in Part B of the First Schedule shall be under the general control of, and comply with such particular directions, if any, as may from time to time be given by, the President : Provided that the President may by order direct that the provisions of this Article shall not apply to any State specified in the order") incorporated in 1950 in Part-XXI (Temporary and Transitional Provisions) as regards Part-B States (formed out of the erstwhile Princely States that also included J&K).

To be brief, to Part-A States Art-152 to Art-237 had to apply and to States in Part-B Art-152 to Art-237 had to apply with exceptions as laid down in Article 238. So, exceptions were not only w.r.t. J&K.

To demonstrate that Constitution of India was still to go through a continuous process of restatements and amendments even after 26th January, 1950 it would be quite relevant to quote some excerpts from the STATEMENT of OBJECTS and REASONS to the Constitution (Seventh Amendment) Act, 1956 that among other things included Amendment of Article 1 and First Schedule to the Constitution : : “In order to implement the scheme of States reorganisation, it is necessary to make numerous amendments in the Constitution with effect from the 1st October, 1956. This bill seeks to make these amendments and also some other amendments to certain provisions of the Constitution relating to the High Courts and High Court Judges, the executive power of the Union and the States, and a few entries in the legislative lists. The reasons for making the amendments are indicated below:-

Clause 2.-The reorganisation scheme involves not only the establishment of new States and alterations in the area and boundaries of the existing States, but also the abolition of the three categories of States (Part A, Part B and Part C States) and the classification of certain areas as Union territories. Article 1 has to be suitably amended for this purpose and the First Schedule completely revised.”.

But the manner in which the Indian State of J&K has been placed in the text of Constitution of India has provided enough of opportunities to anti India ideologies and the adversaries of India republic over the years to distort the facts since those GOI have not taken the affairs that seriously. No doubt improper handling of the Indian affairs at local and international levels during 1946- 1947 and after 26th October, 1947 by the then Indian leaders/ Governments (may be being

without any administrative/ diplomatic experience) has provided enough of support points to those who tried to project the accession of J&K with India as a dispute. But had the provisions regarding J&K been drafted in the Constitution of India in another Part of Constitution of India like Part- VI or VII or VIII or IX & Part-XI (RELATIONS BETWEEN THE UNION AND THE STATES) and not in the form volume of J&K Constitution outside the text of Constitution of India as well as had the GOI/ Parliament of Indian cared to apply timely constitutional dressings as regards the Article 370 (temporary provisions w.r.t. J&K) as included in Part- XXI along with other Articles, it would not have provided opportunity to some to unduly say that J&K is a constitutionally 'separate' State of India.

May be it was for such like apprehensions that some wise elders in 1949, who were not in favour of leaving certain subjects undecided and the style in which Constitution had been drafted in 1950, had debated/ suggested for not keeping the provisions/ drafts in the fashion they have been placed fearing that some people may later misinterpret the contents and style of their placement . And that is what as has been successfully attempted by some anti elements all these years since the Governments and leaders in Delhi did not provide timely proper clarifications/ interpretations to the people J&K and or did not apply the constitutional dressings that were required to be made as regards the temporary provisions kept for J&K. The apprehensions expressed by some leaders in 1949 and 1950s have come true.

But one would ask that when :

1. (i) In 1947 the Princely State of Hyderabad too was a big

Princely State that had (though symbolic) also her own currency, also own postal stamps, her own army as well as her own air lines,

(ii) Nizam of Hyderabad Mir Usman Ali Khan had even sent his representative in 1948 August to UN Security Council ,

(iii) it was in September 1948 that his army surrendered before independent Bharat and it was only after one year that in November 1949 the Nizam of Hyderabad too had expressed total confidence/acceptance for the future Constitution of India that was near final drafting at that time but still why no difference/ confusion / dispute was left with Hyderabad?

2. As soon as it was known that Britain had accepted demands for independence of India (British India) the Prince / King of Native State of Travancore, HH Chithira Thirunal Balarama Varma, is said to have issued a declaration of independence on 18th June, 1947 that was not taken in a friendly manner by the Government of India; discussions were held on behalf of the King with his Dewan/ Minister C. P. Ramaswami Iyer and Indian representatives resulting in decision for accession with Indian Union in July 1947 itself. The State of Travancore-Cochin was established on 1st July, 1949 (with the king of Travancore as the Rajapramukh). The State of Kerala came into existence on 1st November, 1956 after reorganisation in 1956 with a Governor appointed by President as the head of the State. Why no confusions and apparent discrepancies were left in case of Travancore?

3. (i) Where as there were no apparent hindrances as regards J&K from the side of Maharaja Hari Singh of J&K like the one that existed as regards the State of Hyderabad

for securing a Constitutional uniformity w.r.t. the State of J&K. There was also no hindrance from the then Regent of J&K, Yuvraj Karan Singh ; the regent of J&K on behalf of the Maharaja of J&K had on 25th November, 1949 formally expressed total oneness/ confidence in the Constitution of Union (Republic);

(ii). During the debate on draft Art-306A Shri N. Gopaldaswami Ayyangar had said in the Constituent Assembly : “Sir, this matter, the matter of this particular motion, relates to the Jammu and Kashmir State. The House is fully aware of the fact that the State has acceded to the Dominion of India. The history of this accession is also well known. The accession took place on the 26th October, 1947. Since then, the State has had a chequered history. Conditions are not yet normal in the State. The meaning of this accession is that at present that State is a unit of a federal State, namely, the Dominion of India. This Dominion is getting transformed into a Republic, which will be inaugurated on the 26th January, 1950. The Jammu and Kashmir State, therefore, has to become a unit of the new Republic of India. As the House is aware, accession to the Dominion always took place by means of an instrument which had to be signed by the Ruler of the State and which had to be accepted by the Governor-General of India. That has taken place in this case. As the House is also aware, Instruments of Accession will be a thing of 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 the purpose of becoming units of the Republic, but they are mentioned in the Constitution itself; and, in the case of practically all States other than the State of Jammu and Kashmir, their

Constitutions also have been embodied in the Constitution for the whole of India. All those other States have agreed to integrate themselves in that way and accept the Constitution provided. Maulana Hasrat Mohani asked : Why this discrimination, please ? Shri N. Gopaldaswami Ayyangar replied : The discrimination is due to the special conditions of Kashmir. That particular State is not yet ripe for this kind of integration. It is the hope of everybody here that in due course even Jammu and Kashmir will become ripe for the same sort of integration as has taken place in the case of other States. (Cheers) At present it is not possible to achieve that integration. There are various reasons why this is not possible now, I shall refer again to this a little later. In the case of the other Indian States or Unions of States there are two or three points which have got to be remembered. They have all accepted the Constitution framed for States in Part I of the new Constitution and those provisions have been adapted so as to suit conditions of Indian States and Unions of States. Secondly, the Centre, that is the Republican Federal Centre will have power to make laws applying in every such State or Union to all Union Concurrent Subjects. Thirdly, a uniformity of relationship has been established between those States and Unions and the Centre. Kashmir's conditions are, as I have said, special and require special treatment. *I do not want to take much of the time of the House*, but I shall briefly indicate what the special conditions are. In the first place, there has been a war going on within the limits of Jammu and Kashmir State. There was a cease-fire agreed to at the beginning of this year and that cease-fire is still on. But the conditions in the State are still unusual and abnormal. They have not settled down. *It is, therefore*, necessary that the administration of the State should be geared to these unusual conditions *until normal life is*

restored as in the case of the other States.

Part of the State is still in the hands of rebels and enemies. We are entangled with the United Nations in regard to Jammu and Kashmir and it is not possible to say now when we shall be free from this entanglement. That can take place only when the Kashmir problem is satisfactorily settled. Again, the Government of India have committed themselves to the people of Kashmir in certain respects. They have committed themselves to the position that an opportunity would be given to the people of the State to decide for themselves whether they will remain with the Republic or wish to go out of it.

We are also committed to ascertaining this will of the people by means of a plebiscite provided that peaceful and normal conditions are restored and the impartiality of the plebiscite could be guaranteed. We have also agreed that the will of the people, through the instrument of a constituent assembly, *will determine the constitution of the State as well as the sphere of Union jurisdiction over the State.* At present, the legislature which was known as the Praja Sabha in the State is dead. Neither that legislature nor a constituent assembly can be convoked or can function until complete peace comes to prevail in that State. We have therefore to deal with the Government of the State which, as represented in its Council of Ministers, reflects the opinion of the largest political party in the State. *Till a constituent assembly comes into being, only an interim arrangement is possible and not an arrangement which could at once be brought into line with the arrangement that exists in the case of the other States.* Now, if you remember the viewpoints that I have mentioned, it is an inevitable conclusion that, at the present moment, we could establish only an interim system. Article 306A is an

attempt to establish such a system...”.

A number of points emerge from this text. (a). It was said that Kashmir's conditions are special, that does not mean that Kashmir was special. It was said that Kashmir's conditions need special treatment, that did not mean that Jammu and Kashmir as acceded State needed special treatment.

(b). Maharaja Hari Singh of J&K did not sign the Instrument of Accession before 15th August, 1947. The reason more propagated, so far, for the delayed accession has been that Maharaja of Jammu & Kashmir was deliberating with his courtiers on the option of his State remaining independent. No doubt remaining independent of the Dominion or India or Pakistan was also an available option with Maharaja Hari Singh like other Princes but surely it was not in his immediate focus in August 1947. The Constituent Assembly of J&K had ratified on 6th February, 1954 the 1947 Accession document of J&K as was signed by Maharaja Hari Singh with India and had thus also put a formal seal of the people J&K on the accession signed by the Prince of J&K (the erstwhile princely State of British Indian Empire); then what was the need/ compulsion for the Constituent Assembly of India/ Parliament of India to keep the State of J&K out side Part- VII of Constitution of India in 1950 and outside Part-VI of Constitution of India in 1956 or and to keep some of the Constitutional provisions pertaining to J&K in a separate volume of Constitution of India, i.e the Constitution of Jammu and Kashmir?

(c). There was no reference of the Maharaja Hari Singh or the Regent in the address of N. Gopaldaswami Ayyangar while he referred to ground conditions being unripe. This

question is required to be answered with a cool mind, particularly under the present day circumstances, in simple and precise manner to settle the flares (what so ever have been nursed against the Indian goodwill and rights) that otherwise have hence no legal footing. So, the text of the speech of N. Gopaldaswami Ayyangar has to be seen only as part of proceedings and it has to be what has been finally written in the Constitution that has to be interpreted or considered to. Since, it nowhere emerges from records that the Prince of J&K/ Maharaja of J&K had referred to any special conditions or any conditional accession since the state borders had been attacked by the any.

Surely there were also some other unwritten socio-political reasons other than delayed Radcliffe boundary award for Hari Singh not acceding to India by 15th August, 1947. May be Maharaja did not find it appropriate to pointedly mention such issues in his letter of 26th October, 1947 addressed to Governor General. Some feelers surely did emerge indirectly from his letter.

The Quit Kashmir call was given against the Dogra Raj by Sheikh Abdullah in May 1946. The way the Quit Kashmir call was promoted and projected by some Congress leaders surely cultivated bitterness in the mind of the Prince of J&K. And to add to this the Senior Congress leaders, in a way suggested, Maharaja Hari Singh to appoint Sheikh Mohd Abdullah (NC leader) as the Prime Minister of J&K immediately on acceding to India Dominion. Hari Singh was after all Maharaja of a Princely State of British Indian Empire and hence could have taken such attitude of Congress leadership as an irritant. This could also delay his decision regarding accession. Such

like indications do emerge from the contents of the letter dated 26th October, 1947 addressed by Hari Singh to Lord Mountbatten, the then GGDI. The letter says "I may Inform your Excellency's Government that it is my intention to at once set up an interim government and ask Sheikh Abdullah to carry the responsibilities in this emergency with my Prime Minister." and Mountbatten letter dated 27th October to Hari Singh that said "Your Highness' letter dated 26th October, 1947 has been delivered to me by Mr. V.P. Menon. In the circumstances mentioned by Your Highness, my Government have decided to accept the accession of Kashmir State to the Dominion of India. In consistence with their policy that in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government's wish that, as soon as law and order have been restored in Kashmir and its soil cleared of the invader, the question of the State's accession should be settled by a reference to the people. Meanwhile, in response to Your Highness' appeal for military aid, action has been taken today to send troops of the Indian Army to Kashmir, to help your own forces to defend your territory and to protect the lives, property, and honour of your people. My Government and I note with satisfaction that Your Highness has decided to invite Sheikh Abdullah to form an interim Government to work with your Prime Minister"

It is not out of the place to mention here that The Prince was the only designate authority to decide for a peaceful natural accession of a Princely State of erstwhile British Indian Empire with Dominion of India or the newly born Dominion of Pakistan. The text of Instrument of Accession

as was designed for the Princes speaks in itself :

“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 omissions, additions, adaptations and modifications 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 Shriman Inder Mahinder Rajrajeswar Maharajadhiraj Shri Hari Singhji, Jammu & Kashmir Naresh Tatha Tibbet adi Deshadhipati, Ruler of Jammu & Kashmir State, in the exercise of my Sovereignty in and over my said State do hereby execute this my Instrument of Accession and

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 Jammu & Kashmir (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 15th day of August 1947, (which Act as so in force is hereafter referred to as "the Act").

2). I hereby assume the obligation of ensuring that due effect is given to 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 law for this State. 4... 5... 6...7....8... 9..." So, what ever N. Gopaldaswami Ayyangar did say about J&K does not fit into the realities of accession that prevailed at that time. So the people who may try to make use of the deliberations to demonstrate that the accession was conditional would be trying to unduly stretching the half logics.

The final boundaries of Pakistan were not settled till 15th August. As per Indian Independence Act of July 1947 Section - 4 Schedule -II the districts provisionally included in THE NEW PROVINCE OF WEST PUNJAB. {West Pakistan } were (i) from the Lahore Division: the districts of Gujranwala, Gurdaspur, Lahore, Sheikhupura and Sialkot.; (ii) from Rawalpindi Division : the districts of Attock, Gujrat, Jhelum, Mianwali, Rawalpindi, Shahpur and (iii) from the Multan Division : the districts of Dera Ghazi Khan, Jhang, - Lyalipur, Montgomery, Multan and Muzaffargarh. A crude border line for Pakistan had been drawn up by Lord Wavell Viceroy of India prior to his replacement with Lord Louis Mountbatten in February 1947. As per provisional borders of upcoming Pakistan (West Pakistan) the Princely State of Hari Singh had no immediate working surface communication link with Indian Punjab.

In order to determine exactly which territories to assign to Pakistan, in June 1947, the British Government appointed Sir Cyril Radcliffe as Chairman for the Boundary Commission for Bengal and Boundary Commission for Punjab. The

Commission was advised to "demarcate the boundaries of the two parts of the Punjab on the basis of contiguous majority Muslim areas and non Muslim areas. Ofcourse there were some other undefined factors that could be kept in view like "natural boundaries, communications, watercourses, irrigation systems, as well as socio-political consideration. Each commission had 2 representatives each from the Indian National Congress and the Muslim League. Radcliffe reached India in 2nd week of July 1947 {May be 8 July }. He had just five weeks to complete the most hard task. Radcliffe wanted more time but was prevailed upon to finish the task by 15th August. To make independence a reality Mountbatten was very particular for holding to the set deadline for completing the partition.

But Radcliffe Award keeping most parts of Gurdaspur District, except for the sub-division of Shakargarh, out of West Pakistan was announced after 15th August, 1947. It was only after this that a direct regular link with India dominion was available to J&K. No doubt the Radcliffe completed the job a couple of days before 15th August, 1947 {British withdrawal} but it would remain a question why the Radcliffe award on borderlines was published/ made public two days after. The Radcliffe Line became the border between India and Pakistan on 17th August, 1947. Although there was no condition for doing accession only before 15th Aug, still it was not done immediately after 17th August by Hari Singh since the environments and priorities had not remained as they were before 14th August, 1947 due to the style in which affairs were taken up with Maharaja Hari Singh by Delhi.

And ofcourse the irritation that the J&K Prince had

about the attitude of Delhi leaders could possibly encourage some of his advisors, well wishers and Muslim Conference leaders (who were against Sheikh Abdullah) to suggest him that he could better stay independent. So, such thinking and opinion, that Maharaja Hari Singh did mention in his letter of 26th October addressed to Lord Mountbatten, was surely a result of circumstances that prevailed in J&K in view of the approach that senior Congress leaders of India adopted for J&K, particularly after May 1946.

Hence, delayed accession can not be simply attributed to the reasons of there being an option for remaining independent before Maharaja Hari Singh.

Although the Indian Independence Act, 1947 did not transfer the Paramount Status, that the Britain held over the Indian Princes, to India Dominion, but still it was not possible for a large majority of them to stay independent of the India or Pakistan dominion. There was no condition laid down in the Indian Independence Act directing that a princely State could accede to India or Pakistan Dominion only by or before 14th August, 1947. Only advisories had been issued to Princes for taking such decision before 14th August to have a peaceful transition. It was an unpleasant fact that Muslim League had got the partition of British India done on the basis of religion.

Pakistan was to come up as an Islamic state. So, it was anticipated that there would be very large movement of Hindu and Muslim across the new boundaries. Since Pakistan was to be a theocratic state, more movement of Hindu from Pakistani areas was expected.

Communal clashes on religious lines were feared. Therefore, it was suggested that decisions by Princely States (that were within British Indian Empire but outside British India) are taken before 14th August, 1947 itself so that movements on the basis of religious faith take place before geographical partition of British India and are not spontaneous.

Therefore, even if the Accession was done by Hari Singh after 14th/ 15th August, 1947 it was fair and legal in terms of Indian Independence Act, 1947 of British Parliament. And in case any one ventures to look into the social and administrative technicalities (of the Instrument of Accession and the right of the Prince of a Princely State) outside the terms of Indian Independence Act then one could even venture into questioning the creation of the State of Pakistan.

But it has been the inexperience, hurried actions and allegedly some PRIME Indian leadership having been caught in the web of extending personal favours to some 'close associates' that could be said to have made those who were given the task for framing the Constitution of Independent Indian Democratic Republic to default leaving some opportunities for some to cultivate some controversies regarding J&K Affairs. And that has been the reason for the style in which Art-370 (text almost matches text of Draft Art- 306A except some changes) has been placed in Constitution of India and the way it has been treated thereafter.

No doubt with the conditions prevailing right since 1946, the way the accession document signed by Hari Singh on 26th October was handled by Delhi and the way Jawahar Lal

Nehru rushed to UNO with so erroneously drafted Complaint against Pakistan did make the Government in Delhi to get entangled in controversies/ confusions and in the net of personal ambitions of some local leaders who were earlier treated with extra faith and favours.

The then National Conference leadership had also taken full advantage of its kinship with the then Prime Minister of India and the inexperience of the then Government of India for getting the provisions pertaining to J&K drafted in such like styles. It too could be thought/ accepted that in 1949/ 1950 the political leadership of India (Congress) must be carrying the fatigue of the freedom struggle/ had got tired and hence might not have been able to exercise that wise vigil, shrewdness and care of that minute diplomatic details while drafting the Constitution of India. It can also not be denied that they (leaders) would not have been able to read/ assess minutely the mindset of some of their own people.

And to be brief it has been all due to the fact that the then Jawahar Lal Nehru Government treated Sheikh Mohd Abdullah above the interests of local people as well as that of the erstwhile Maharaja of J&K. One would ask what were the compulsions for Nehru ? Was there any special inclination towards those in power seat in J&K ? No one from those times is there to answer and therefore let us not enter in to inconclusive debates. In case answer to such like questions are explored or are also obtained by Indian National Congress, it will not be difficult for Delhi to infuse desires for total constitutional uniformity like other Indian States in the minds and hearts of those people of J&K who have so far been made to see their selves as special citizens of India . And ofcourse initiating such like processes would

also push the separatists in far exile.

But at this stage the Indians will have to collectively settle for paying the price for the intentional/ unintentional mistakes or let us say for the “ truthfulness” of their elders instead of remaining lost in controversies/ political fault finding.

CHAPTER-2

What actually is the structure of Article 370?
Does it lay any conditions for J&K being India?
Is it really a 'Bridge' linking J&K with India ?

It is so often said and has also become a belief of many that no law made by Parliament of India becomes applicable in the Indian state of J&K unless it is endorsed/ ratified by Government of Jammu & Kashmir/ Legislature of J&K. Where as it is not a truth . No sincere efforts have been made to undo such dis belief. Where as even as per Constitution (Application to Jammu and Kashmir) Order 1950 Dated 26.01.1950 around 44 matters in the general Union List were identified for operation by only Parliament. The result has been that separatists ideologies do receive support from such like uncontested myths.

Where as any one who would have meaningfully gone through the text of Art-370 of Constitution of India would note that there are a number of subjects that came under the exclusive jurisdiction of Parliament of India in 1950 itself and have been very clearly mentioned in three broader groups i.e Defence, Communication, Foreign Affairs and Allied subjects and identified in nearly 20 sub-groups in Schedule to the Instrument of Accession as was signed by

Maharaja Hari Singh of J&K on 26th October, 1947 .

(A. Defence 1. The naval, military and air forces of the Dominion and any other armed forces 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. 3. Naturalisation.

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 fares, station and services terminal charges, interchange of traffic and the responsibility of railway administrations as carriers of goods and passengers; the regulation of minor railways in respect of safety and the responsibility of the administrations 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 lightships, 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. Election to the Dominion legislature, subject to the provisions of the Act and of any Order made thereunder. 2. Offences against 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 courts ordinarily exercising jurisdiction in or in relation to that State).

Art-246 was incorporated in Constitution of India (COI) for jurisdictional subject-matter of laws to be made by Union Parliament and by the State Legislatures. {Art-246 (1). Notwithstanding anything in clauses (2) and (3), Parliament has exclusive power to make laws with respect to any matters enumerated in List- I in the Seventh Schedule (in this Constitution referred to as the "Union List"-97 items) (2). Notwithstanding anything in clause (3), Parliament, and, subject to clause (1), the Legislature of any State specified in Part A or Part B of the First Schedule also, have power to make laws with respect to any of the matters enumerated in List III in the Seventh Schedule (in this Constitution referred to as the "Concurrent List" -47 items (3). Subject to clauses (1) and (2), the Legislature of any State specified in Part A or Part B of the First Schedule has exclusive power to make laws for such State or any part thereof with respect to any of the matters enumerated in List II in the Seventh Schedule (in this Constitution referred to as the * 'State List"- 66 items), (4). Parliament has power to make laws with respect to any matter

for any part of the territory of India not included in Part A or Part B of First Schedule notwithstanding that such matter is a matter enumerated in the State List) }

So, in case we have a look at the subjects covered in List-II (State List) of the Seventh Schedule of COI we would find that for States other than J&K also there are 66 subjects that are not in the direct arena of parliament of India {1). Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power). 2). Police (including railway and village police) subject to the provisions of entry 2A of List I. 3). Officers and servants of the High Court; procedure in rent and revenue courts; fees taken in all courts except the Supreme Court. 4). Prisons, reformatories, Borstal institutions and other institutions of a like nature, and persons detained therein; arrangements with other States for the use of prisons and other institutions. 5). Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, districts boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration. 6). Public health and sanitation; hospitals and dispensaries. 7). Pilgrimages, other than pilgrimages to places outside India. 8). Intoxicating liquors, that is to say, the production, manufacture, possession, transport, purchase and sale of intoxicating liquors. 9). Relief of the disabled and unemployable. 10). Burials and burial grounds; cremations and cremation grounds. 12). Libraries, museums and other similar institutions controlled or financed by the State; ancient and historical monuments and records other than those declared by or under law made by

Parliament to be of national importance. 13). Communications, that is to say, roads, bridges, ferries, and other means of communication not specified in List I; municipal tramways; ropeways; inland waterways and traffic thereon subject to the provisions of List I and List III with regard to such waterways; vehicles other than mechanically propelled vehicles. 14). Agriculture, including agricultural education and research, protection against pests and prevention of plant diseases. 15). Preservation, protection and improvement of stock and prevention of animal diseases; veterinary training and practice. 16). Pounds and the prevention of cattle trespass. 17). Water, that is to say, water supplies, irrigation and canals, drainage and embankments, water storage and water power subject to the provisions of entry 56 of List I. 18). Land, that is to say, rights in or over land, land tenures including the relation of landlord and tenant, and the collection of rents; transfer and alienation of agricultural land; land improvement and agricultural loans; colonization. 21). Fisheries. 22). Courts of wards subject to the provisions of entry 34 of List I; encumbered and attached estates. 23). Regulation of mines and mineral development subject to the provisions of List I with respect to regulation and development under the control of the Union. 24). Industries subject to the provisions of [entries 7 and 52] of List I. 25). Gas and gas-works. 26). Trade and commerce within the State subject to the provisions of entry 33 of List III. 27). Production, supply and distribution of goods subject to the provisions of entry 33 of List III. 28). Markets and fairs. 30). Money-lending and money-lenders; relief of agricultural indebtedness. 31). Inns and inn-keepers. 32). Incorporation, regulation and winding up of corporations, other than those specified in List I, and

universities; unincorporated trading, literary, scientific, religious and other societies and associations; co-operative societies. 33). Theatres and dramatic performances; cinemas subject to the provisions of entry 60 of List I; sports, entertainments and amusements. 34). Betting and gambling. 35). Works, lands and buildings vested in or in the possession of the State. 37). Elections to the Legislature of the State subject to the provisions of any law made by Parliament. 38). Salaries and allowances of members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof. 39). Powers, privileges and immunities of the Legislative Assembly and of the members and the committees thereof, and, if there is a Legislative Council, of that Council and of the members and the committees thereof; enforcement of attendance of persons for giving evidence or producing documents before committees of the Legislature of the State.

40). Salaries and allowances of Ministers for the State. 41). State public services; State Public Service Commission. 42). State pensions, that is to say, pensions payable by the State or out of the Consolidated Fund of the State. 43). Public debt of the State. 44). Treasure trove. 45). Land revenue, including the assessment and collection of revenue, the maintenance of land records, survey for revenue purposes and records of rights, and alienation of revenues. 46). Taxes on agricultural income. 47). Duties in respect of succession to agricultural land. 48). Estate duty in respect of agricultural land. 49). Taxes on lands and buildings. 50). Taxes on mineral rights subject to any limitations imposed by Parliament by law relating to mineral development. 51). Duties of excise on the following goods manufactured or produced in the State and countervailing duties at the same or lower rates on similar goods manufactured or produced elsewhere in India:— (a) alcoholic liquors for

human consumption; (b) opium, Indian hemp and other narcotic drugs and narcotics, but not including medicinal and toilet preparations containing alcohol or any substance included in sub-paragraph (b) of this entry. 52). Taxes on the entry of goods into a local area for consumption, use or sale therein. 53). Taxes on the consumption or sale of electricity. [54). Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.] 55). Taxes on advertisements other than advertisements published in the newspapers² [and advertisements broadcast by radio or television]. 56). Taxes on goods and passengers carried by road or on inland waterways. 57). Taxes on vehicles, whether mechanically propelled or not, suitable for use on roads, including tramcars subject to the provisions of entry 35 of List III. 58). Taxes on animals and boats. 59). Tolls. 60). Taxes on professions, trades, callings and employments. 61). Capitation taxes. 62). Taxes on luxuries, including taxes on entertainments, amusements, betting and gambling. 63). Rates of stamp duty in respect of documents other than those specified in the provisions of List I with regard to rates of stamp duty. 64). Offences against laws with respect to any of the matters in this List. 65). Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List. 66). Fees in respect of any of the matters in this List, but not including fees taken in any court. } and out of these 9 to 10 could be said as those { 1). Public order (but not including the use of any naval, military or air force or any other armed force of the Union or of any other force subject to the control of the Union or of any contingent or unit thereof in aid of the civil power). 2). Police (including railway and village police) subject to the provisions of entry 2A of List I. 5. Local government, that is to say, the constitution and powers of municipal corporations, improvement trusts, districts boards, mining settlement authorities and other local authorities for the purpose of local self-government or village administration. 7). Pilgrimages, other than pilgrimages to places outside India. 9). Relief of the disabled and unemployable. 38). Salaries and allowances of

members of the Legislature of the State, of the Speaker and Deputy Speaker of the Legislative Assembly and, if there is a Legislative Council, of the Chairman and Deputy Chairman thereof. 41). State public services; State Public Service Commission. 42). Taxes on lands and buildings. 53). Taxes on the consumption or sale of electricity. [54). Taxes on the sale or purchase of goods other than newspapers, subject to the provisions of entry 92A of List I.] Jurisdiction and powers of all courts, except the Supreme Court, with respect to any of the matters in this List.) that have remained in discussions regarding J&K where in accusations have been laid on J&K Governments/ Assembly for not acting in the public interest under the garb of Art-370.

Article 249 of Constitution of India lays down the Power of Parliament to legislate with respect to a matters in the State List in the National interest. {249(1) Notwithstanding anything in the foregoing provisions of this Chapter, if the Council of States has declared by resolution supported by not less than two-thirds of the members present and voting that it is necessary or expedient in the national interest that Parliament should make laws with respect to any matter enumerated in the State List specified in the resolution, it shall be lawful for Parliament to make laws for the whole or any part of the territory of India with respect to that matter while the resolution remains in force. }

Since J&K State was not included in the broader scope of Part-VI of the Constitution of India in 1950, for explanation purposes it could be said that for the Indian State of J&K at the first instance particular/ different State & Union lists were drawn. The procedure for minutely nominating the subjects to be included in the said lists as well as procedures for operating upon the J&K specific "State list' and Union list by the Parliament/ Union were , for the time being ,

laid out in Article 370 of Constitution of India as regards J&K like it was laid in Art-246, Art-248. And Art-249 for other Indian States.

So it could be said that the subjects and jurisdictions of the Center (Union) and States have been classified in Schedule-VII of the Constitution of India under Article 246 (1950) as (I) UNION list, (II) State list and (III) Concurrent List but in a way J&K specific Union List was temporarily defined under Article 370 of COI (a temporary Provision) in Clause- 1 (b) of Art-370 {<Art-370 (1) (b) (i): the power of Parliament to make laws for the said State shall be limited to— 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 Art-370 (1) (b) (ii) laid down the procedure for the Union / Parliament to operate upon the J&K 'specific' state list {< such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify>} and Art-370 (1) (d) says that 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....

So, Art-370-1(b-ii and d) in a way provide for procedure as regards the Parliament operating upon the J&K Specific State list and unmarked subjects like Art-249 (1) is there for enabling in National interest the Parliament to make laws with respect to any matter enumerated in the State List for the whole or any part of the territory of India with respect to that matter and Art-248 for left over matters.

But no body so far has said that Art-249 is to extend the constitution of India to the States. But it is very often said that Art-370 is for extension of Constitution of India to J&K hence it is surely not a correct explanation,

Art-370 of Constitution of India was incorporated in the text of Constitution of India after 16th October, 1949 debates in the Constituent Assembly of India as a Temporary Provision with respect to the State Indian State of Jammu & Kashmir and positioned in Part-XXI of The Constitution of India (Temporary and Transitional Provisions) along with Art-369 and Art-371 (Temporary provisions with respect to States in Part B of the First Schedule) to Art -392 . The title of Article 371 was changed to Special Provisions w.r.t states of Maharashtra and Gujarat by the Constitution (Seventh Amendment) Act, 1956, s. 22 but the title of the Article 370 was still retained as Temporary. Later under Constitution (Thirteenth Amendment) Act, 1962, s. 2, the title of the Part-XXI of the Constitution of India was changed from “TEMPORARY AND TRANSITIONAL PROVISIONS” to Temporary, Transitional and Special Provisions (w.e.f. 1-12-1963). Even Article 238, 379.—391 were repealed *by the Constitution (Seventh Amendment) Act, 1956*. The rationalisation process continued. But as regards Art-370 that was temporary with provision for its repeal or retention only with exceptions and modifications (Art-370 Clause-3) no any rationalisation was done, why ?, could be a question

- 1). It is unfair to say that Article 370 is for extension of Constitution of India to J&K.
- 2). (i) In Art-370(1-c) it has been mentioned that the provisions of Article 1 and of this Article shall apply in

relation to that State is not because Art-1 applies through Art-370 . Art-1 has been mentioned along with Article 370 there to demonstrate that Art-1 and Art-370 are totally Indian Union subject (“J&K specific Union List Subject”) and no any clarifications/ interpretations/ consultations/ concurrences are to be made/ obtained/ with/ from State Government / State concerning any matter pertaining to Art-1 as well as Art-370 as has otherwise been said regarding other subjects in Art-370 for identification of minutes of subjects of “J&K specific” Union or State list .

(ii) It is wrong/ unfair to say that in case Article 370 is modified /repealed /removed/ J&K will be no more a part of Sovereign Indian Democratic Republic because in the text of Art 370(1-c) Article 370 and Article 1 have been mentioned with the word 'and' separating them.

Similarly Constitution (Application to Jammu and Kashmir) order 1950 C.O. 10 dated 26th January 1950 too says at S.3 *that in addition to the provisions of Article 1 and Article 370 of the Constitution, the only other provisions of the Constitution which shall apply in relation to the State of Jammu and Kashmir shall be those specified in the Second Schedule to this Order, and shall so apply subject to the exceptions and modifications specified in the said Schedule and to the modification that all references in the said provisions to the Rajpramukh shall be construed as references to the Sadar-e-Riyasat of Jammu and Kashmir.*

The Constitution (Application to Jammu and Kashmir) Order, 1954 that refers to some Articles of Constitution of India that would apply to J&K also mentions Article 1 and Article 370 separately. It does not mention only Article 370.
*Had the application of Article 1 been only through

Article 370 then there was no need to mention Article 1 separately in the text of Constitution (Application to Jammu and Kashmir) Order, 1950 and Constitution (Application to Jammu and Kashmir) Order, 1954.

*{[THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1950 dated the 26th January 1950 said “< In exercise of the powers conferred by clause (1) of Article 370 of the Constitution of India, the President, in consultation with the Government of the State of Jammu and Kashmir, is pleased to make the following Order, namely:--

1.(1) This Order may be called the Constitution (Application to Jammu and Kashmir) Order 1950. (2) It shall come into force at once. 2. For the purposes of sub-clause (b) (i) of clause (1) of Article 370 of the Constitution, the matters specified in the First Schedule to this Order, being matters in the Union List, are hereby declared to correspond to matters specified in the Instrument of Accession governing the accession of the State of Jammu and Kashmir to the Dominion of India as the matter with regard to which the Dominion Legislature may make laws for that State; and accordingly, the power of Parliament to make laws for that State shall be limited to the matters specified in the said First Schedule. 3. In addition to the provisions of Article 1 and Article 370 of the Constitution, the only other provisions of the Constitution which shall apply in relation to the State of Jammu and Kashmir shall be those specified in the Second Schedule to this Order, and shall so apply subject to the exceptions and modifications specified in the said Schedule and to the modification that all references in the said provisions to the Rajpramukh shall be construed as

references to the Sadar-e-Riyasat of Jammu and Kashmir]. [Similarly THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1954 C.O. 48 says “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 (2) It shall come into force on the fourteenth day of May, 1954 and shall thereupon supersede the Constitution (Application to Jammu and Kashmir) Order, 1950. 2..... in addition to article 1 and article 370, shall apply in relation to the State of Jammu and Kashmir and the exceptions and modifications subject to which they shall so apply shall be as follows:- <(1) THE PREAMBLE.... (3) PART II Citizenship . (a) This Part shall be deemed to have been applicable in relation to the State of Jammu and Kashmir as from the 26th day of January, 1950.]*

(iii) So keeping in view what has been said at (i) to (ii) reference of Article 1 in the text of Article 370 should not be mis quoted.

3. There is no reference of grant of Special Status or Autonomy to J&K in Article 370 or in any other Chapter/ Article of Constitution of India or not even in Constitution of J&K. It has not been only J&K State for what particular (temporary) constitutional provisions were kept, it has been the case with some other States also. To quote Article 238 was incorporated in the Constitution of India (Part-VII) in 1950 to deal with the particular constitutional needs (prevailing at that time) w.r.t. to Art-152 to Art-237 as contained in Part VI of Constitution of India (drafted for 9 States included in Part-A of the 1st Schedule to Constitution of India that were

earlier Governor provinces of British India) for 8 states (other than Jammu & Kashmir) of Indian Union (that were earlier the Indian Princely States of British Indian Empire) Grouped as Part-B States in 1st Schedule of Constitution of India along with Jammu & Kashmir State. Similarly Art- 239-242 were kept as regards the 10 States grouped as Part-C States (that were Units/States with Commissioneries in 1947) and Art- 243 was incorporated for Part-D States. To deal with affairs of J&K Article 370 was kept as a temporary provision in 1950 where as Art 152 to 243 were placed in a regular manner for Part-A states.

During the debate on draft Art-306A Shri N. Gopaldaswami Ayyangar had said in the Constituent Assembly that Kashmir's conditions are special and require special treatment . He did not say Kashmir is special, he said conditions in Kashmir are special. So, the considerations while drawing the constitutional procedures were to be cared in a special/ particular way and not in a 'separatist' style as has been mostly interpreted by many all these years.

Some people have also been laying their questions/arguments on some portions of the statements as made during debate on draft Art-306A by Shri N. Gopaldaswami Ayyangar in the Constituent Assembly in Oct 1949 {like ...<. "*As the House is also aware, Instruments of Accession will be a thing of 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 the purpose of becoming units of the Republic, but they are mentioned in the Constitution itself; and, in the case of practically all States other than the State of Jammu and Kashmir, their constitutions also have been embodied in the Constitution for the whole of India. All*

*those other States have agreed to integrate themselves in that way and accept the Constitution provided. That particular State is not yet **ripe for this kind of integration. It is the hope of everybody here that in due course even Jammu and Kashmir will become ripe for the same sort of integration as has taken place in the case of other States...". >}*

But these wise persons do not make the reference of Proclamation as of 25th November, 1949 as made by Yuvraj Karan Singh, The Regent of Jammu & Kashmir (working on behalf of Maharaja Hari Singh of J&K) ** that had in a way formally completed the formality for preparedness for further constitutional integration like other Indian states by ordering :: <“I now hereby declare and direct—That the Constitution of India shortly to be adopted by the Constituent Assembly of India shall in so far it is applicable to the State of Jammu & Kashmir, govern the constitutional relationship between this State and contemplated Union of India and shall be enforced in this State by me, my heirs and successors in accordance with the tenor of its provisions; That the provisions of the said Constitution shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State. >” :: Hence, the conditions were made suitable for adopting a process of uniformity with respect to J&K as well undoing the apprehensions as had been assessed and expressed by persons like N. Gopaldaswami Ayyangar.

{Proclamation For the State of Jammu & Kashmir Dated the 25th November, 1949 :: <Whereas with the inauguration of the new Constitution for the Whole of India now being framed by the Constituent Assembly of India., the Government of India Act, 1935 which now governs the

constitutional relationship between this State and the Dominion of India will stand repealed ; And WHEREAS, in the best of interest of this State, which is closely linked with the rest of India by a community of interests in the economic political and other fields, it is desirable that the constitutional relationship established between this State and the Dominion of India , should be continued as between this State and the contemplated Union of India ; and the Constitution of India as drafted by the Constituent Assembly of India, which includes duly appointed representatives of this State, provides a suitable basis for doing so; I now hereby declare and direct—That the Constitution of India shortly to be adopted by the Constituent Assembly of India shall in so far it is applicable to the State of Jammu & Kashmir, govern the constitutional relationship between this State and contemplated Union of India and shall be enforced in this State by me, my heirs and successors in accordance with the tenor of its provisions; That the provisions of the said Constitution shall, as from the date of its commencement, supersede and abrogate all other constitutional provisions inconsistent therewith which are at present in force in this State. Sd/ KARAN SINGH Yuvraj Regent of Jammu & Kashmir C. GANESAN. Dy. Secy > :: }

Any how we should go only with the laws drawn out finally as has been Art-370 and not draft Art-306A; as well as final listing of Art-370 in Part-XXI of Constitution of India, simply a Temporary Provision and not as a Special provision.

It is the uncontested and unclarified myth of grant of so called “special constitutional rights” under Indian Constitution to J&K that has cultivated more of difficulties for India and has been providing some launching pads to the separatist elements/ those so called main stream political

groups who accuse Delhi for not honoring the special commitments made by the then GOI/ Prime Minister with “Kashmiries” in 1947 thereby keeping Kashmir affairs in turmoil.

4. In part-XXI of Constitution of India Art-370 is mentioned as Temporary Provisions w.r.t the State of Jammu and Kashmir and the procedure too is laid down in Art-370 (3)*** for modifying this article or declaring this article to cease to be operative or be operative only with exceptions and modifications.*** {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}***. Therefore, it could be asked that do all those who plead that the text of Art-370 can not be touched mean to say that the Authors of Constitution of India had temporarily included J&K in territory of India? In case they opine so then any fair mind would surely take pity on them.

Briefly speaking, it is the style in which the text of Constitution of India was drafted and placed in 1949-1950 that has given opportunity to some people to create extra constitutional controversies as regards Indian state of J&K.

But as said earlier had the provisions regarding J&K been drafted and placed in the Constitution of India in another Part of Constitution of India like Part- VI or VII or VIII or

IX & Part-XI (RELATIONS BETWEEN THE UNION AND THE STATES) and not in the form volume of J&K Constitution outside the text of Constitution of India & had the GOI/ Parliament of India cared to apply timely constitutional dressings as regards the Article 370 (temporary provisions for J&K) included in Part- XXI along with other Articles, it would not have provided opportunity to some to say that J&K is a constitutionally 'separate' State of India..

5. Article 370 and Constitution of India : To be brief, Article 370 is simply an Article of Constitution of India that was incorporated temporarily in 1950 by the authors the way they did appreciate the circumstances as that time with provision for modification/repeal as the process of development of Constitution of India was still on as could be well read also the way some parts of COI (Part-VI/ Part-VII) went through major transformations and some Articles of constitution were either repealed or totally transformed (like Art-238, Art-371). Article 370 to Constitution of India as regards the Indian State of J&K ,as on date, is like Art-246, Art-248 & Art-249 are to other Indian States. More so it can not be ignored that the amendment of Constitution is like writing Constitution using the constituent power as could be read from the text of Art-368. Only thing that reflects from the text of Article 370 is that it is constitutional toll like other articles and has a built in provision for its modification/abrogation even by a Presidential order and ofcourse Art-368 to is there for amendments to the Constitution and even for amending the laid down procedures. There is no purpose in making reference of any other texts of debates/ speeches here and only the written final laws need be referred and quoted.

6. Article 370 and Jammu & Kashmir Constitution : To be brief Art-370 as on date is an Article of Constitution of India that mentions/ provides the procedure as regards the subjects/ items of internal governance that can grouped under the J&K specific Union list and State List (that could be worked upon under the procedures laid down in the Constitution of J&K). Sections like 51, 127 and 140 of J&K Constitution that discriminate between the Indian Citizens belonging to Indian States other than J&K and those Indian Citizens who belong to J&K are not given constitutional validity under Art-370 but have been so far given constitutional validity under Art-35A of the Constitution of India that to me has been added in the Constitution of India as a new Article after Article 35 merely by amending the COI by a Presidential order for what President had power/ delegation worth amending the Constitution of India that could be amended only by Parliament of India. It could be said that Art-370 has been 'wrongly'/ unconstitutionally referred for providing a cover for amending the constitution, how has it gone un challenged for so many years could be a real question.

It is so often said that restrictions on the non permanent residents of J&K (non State Subjects of J&K) as regards securing job with J&K Government or as regards owning property in J&K are because of the provisions laid in Art-370 of COI. Where as the truth is that even if Art-370 is modified or abrogated still Art- 35A would be there to protect the J&K Laws and Sections- like 51 (A person shall not be qualified to be chosen to fill a seat in the Legislature unless he [(a) is a permanent resident of the State.....),127 (Transitional provisions.-Until other provision is made in this behalf under this Constitution, all the laws in force

immediately before the commencement of this Constitution and applicable to any public service or any post which continues to exist after the commencement of this Constitution, as service or post under the State, shall continue in force so far-as consistent with the provisions of this Constitution), 140 (Elections to the Legislative Assembly to be on the basis of adult suffrage.-The elections to the Legislative Assembly shall be on the basis of adult suffrage ; that is to say, every person who is a permanent resident of the State) of J&K Constitution that violate the Fundamental rights of Indian citizens who are residents of Indian States other than J&K. So, the discrimination is allowed/ is due Art-35A and not Art-370. Parliament of India can atleast undo the Art-35A , if not Art-370 (without going into the controversies of recommendations of 'constituent assembly'), since it has been added by amending the Constitution of India under a Presidential Order for what President did not have any jurisdiction.

CHAPTER-3

Why should Article 370 be amended/ modified/ repealed?

Simple, the Article itself is temporary, has built in provision for modification or repeal. So, review has to be there, even it could be for retention with betterment. So, it is a built in spirit. Rather it should had been done in atleast in 1957 if not earlier.

Art-370 of Constitution of India was incorporated in the text of Constitution of India as a Temporary Provision with respect to the State of Jammu & Kashmir and positioned in Part-XXI of The Constitution of India (Temporary and Transitional Provisions) along with Art-369 (Temporary power of Parliament to make laws with respects to certain matters in the State List as if they were matters in the concurrent list), Art-371 (Temporary provisions with respect to States in Part B of the First Schedule) to Art -390, and Art-391 (power of the president, time between the passing of this Constitution and its commencement, to amend 1st and 4th Schedules in certain contingencies) to Art-392. As said earlier the title of Article 371 was changed to Special Provisions w.r.t states of Maharashtra and Gujarat by the Constitution

(Seventh Amendment) Act, 1956, s. 22. Article 238, 379—391 were repealed *by the Constitution (Seventh Amendment) Act, 1956*. The rationalisation process was taken up even after commencement (26th January 1950) of Constitution of India and continued for some time in quite regular manner out of the needs and experiences gained while running a democratic independent republic. But Art-370 of the COI that was placed as a temporary provisions with respect to the Indian State of J&K with built in intentions lying therein (Art-370 Clause-3) to declare by even a Presidential notification 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, the Article has neither been modified nor repealed although the spirits underlying did demand its modification or even repeal so as to place the contents in a rational manner as was done in many other cases. Instead some people have all these years been working to give a 'separatist' face lift to Art-370 of COI and those who had to watch the interest of the Nation and counter/ correct the anti- ideologies have not taken the affairs with true commitment. So a provision of Indian Constitution that was kept in 1949 as a temporary provision with a built in objective for its use, modification and even repeal as per the needs has instead been used unfairly by to build emotional and psychological barriers between the people of J&K (Kashmir) and the rest of India, thus in a way also fostering a psychology of separatism. Not only this Art-370 provision and controversies have been used by some (including associates of Pakistan) in the valley to mock at the very concept of 'India being Kashmir to Kanyakumari'.

More so, Article 368 also being there for amending Constitution & the Procedure for amending the Constitution

of India by Parliament of India and even Article 371 also being available upto 1954 as Temporary provisions with respect to States in Part B of the First Schedule no rationalisation was attempted even upto 1954. And instead more “pages” (not well considered) were added that instead of doing some thing good provided opportunities to anti elements for creating controversies. Delhi's silence/ non seriousness added more of fuel. And hence for more than six decades, Art-370 of Indian Constitution, inspite of its being a temporary provision, has remained in controversies.

Those who have held the reins of the political parties in J&K and those who claim that J&K was granted special status in 1950 must let people know what good they have done to their people by having obtained more subjects in the J&K specific State List ? Have they given to their people better local governance and rights as compared to other Indian States?

Recently discussions on Art-370 have been made to shift from a Debate on abrogation to simple audit of gains & losses for the people of J&K since that was otherwise also required in view of Clause-3 of Art-370.

They should have no problem in doing a logical analysis. But instead even terms like 'autonomy', 'special status', 'accession not merger' have been successfully associated by some with Art-370 simply to send the messages that Art-370 distances the State of J&K from India where as such terms no where reflect from the contents of this article.

Some people have taken liberties to even sermon that this Article was incorporated to give special status to 'Kashmir' for its being the only muslim majority state of India. Hence times do demand that Art-370 be operated

upon as per the underlying intentions in the text of this article, and more to undo the separatist facelift it has been given over the years and the communal facelift that some people have been attempting to give it.

Instead the Article -370 has all these years been wrongly projected, even by the mainstream parties of Jammu and Kashmir, as a symbol to show that J&K State is distantly placed from Delhi as compared to other Indian States. Hence instead of doing some good the people some experts have been counting upon some disadvantages that have occurred to the common man of J&K due to Article 370.

And to add to that a number of myths have been cultivated in the name of Article 370 to misguide the common people of J&K (Kashmir Valley in particularly), world community and even some analyst/ commentators with in India .

The way Ministry of Home Affairs has handled the Interlocutors for J& K Report (2011) confirms the continued non seriousness at the level of GOI even after 1990. More so, the separatists and anti-India nation elements too have hence at occasions used this Article for carrying their ideologies to even the outside world.

Not only this, even those who support some Kashmiri leaders saying that Article 370 cannot be modified/ abrogated too have been taking the liberties to their choice to suggest such like constitutional recasting that need modification of same Article 370. Dileep Padgaonkar Team of Interlocutor Report (Oct. 2011) could be quoted as one of the instances and so strangely Government of India has so far not made any comment on this report publically. The Interlocutors Report suggests for appointment of a Constitutional Committee that should decide the

needed amendments to Constitution of India as well as Constitution of J&K to be considered by the Parliament of India for incorporation under Article 370 (keeping in view the constitutional status as existed before signing of '1952 Delhi Agreement') and even modification/abrogation of Article 370 where as so far experts of the same class were advocating that even Parliament of India with absolute majorities can not operate upon even the text of Article 370.

The contents of the report (2011) of Dileep Padgaonkar lead team of Interlocutors for J&K do reflect how even senior media people too have got carried by the uncontested propaganda of some anti India government / anti National elements. The IR uses erroneously the term Pakistan Administered J&K for Pakistan Occupied Jammu and Kashmir (POJK) areas although for all purposes that areas have officially been defined and recognized as Pakistan Occupied Areas (POK-POJK) and simultaneously the same report quotes 22nd February, 1994 Parliament Resolution (that demands that Pakistan must vacate the areas of the Indian State of Jammu and Kashmir, which they have occupied through aggression;). Similarly the Dileep Padgaonkar Report erroneously names the Displaced persons from Pakistan Occupied (1947/48) areas of J&K as Migrants where as the official term used for them as per order No : 1476-C of 1950 dated 16.12.1950 issued under the signatures of Sheikh Mohd Abdullah the then Prime Minister (appointed by acceding Maharaja Hari Singh) of J&K is and has been Displaced Persons (DPs).And so erroneously the report recommends that POJK DPs (“ migrants”) be given the status of State Subjects (Executive Summary- IX page-8 Road Map) where as the POJK DPs are already

State Subjects. The report on page 39 makes reference of a report of the European Parliament in 2007, authored by Baroness Emma Nicholson, interpreting the 'claimed' 'four-point formula' that had emerged from the Man Mohan Singh-Pervez Musharraf talks as providing self-determination for the former Princely State. One would ask had the interlocutors taken confirmation/ explanation from GOI for such reference as made in the report of the European Parliament in 2007 ?. But since the then Union Home Minister did not find any thing wrong in that regard (since he got the report loaded on the website on 25th May, 2012 without any comments from his ministry) such like reference in the report were surely to push the innocent people of J&K into more confusing distress. But since On page-6 item -V the report even dilutes the scope of the Accession 1947 with India by excluding even the subjects of Foreign affairs and Communication by recommending that : “Parliament will make no laws applicable to the State unless it relates to country's internal and external security, and it's vital economic interests especially in the areas of energy and access to water resources....” And the like. Contents of this report required a very serious examination but the impressions that have gone are that the report was simply got loaded on the website by Home Minister, may be even without reading it. The way Ministry of Home Affairs has handled the Interlocutors' Report confirms the continued non seriousness at the level of GOI. Government of India must atleast now come out with a statement since the Interlocutors' Report is on the Government website now.

1. Let us have a look at the myths associated with

Art-370:

(A). Article-370, A Bridge ? : One so commonly made statement is that in case Article 370 is abrogated J&K will be no more be a part of Sovereign Indian Republic . This has gone uncontested at appropriate times and by appropriate authorities. Where as facts are as under :

(i). In Art 370(1-c) it has been mentioned that the provisions of Article I and of this Article shall apply in relation to that State is not because Art-1 applies through Art-370. But Art-1 has been mentioned along with Article 370 there to demonstrate that like that Article, Art-370 Art-1 is totally an Indian Union subject (Union subject) for Article 1 no opinion/ consultation/ concurrence/ acceptance was / is needed from the State Government/ Constituent Assembly of J&K as regards its applicability as is needed for identifying the subjects that would form the part of Union list as well as the State w.r.t. of the Indian State of J&K. Further under Art 370(1-c) Article 370 and Article 1 have been mention with the word 'and' separating them. So, reference of Article 1 in the text of Article 370 should not be mis quoted. Similarly as said earlier The Constitution (Application to Jammu and Kashmir) Order, 1954 that refers to some Articles of Constitution of India that would apply to J&K also mentions Article 1 and Article 370 separately. It does not mention only Article 370. Had the application of Article 1 been only through Article 370 then there was no need to mention Article 1 separately in the text of Constitution (Application to Jammu and Kashmir) Order, 1954.

(ii) Article 370 is a temporary provision and hence how could it be called a special status provision. In part-XXI of

Constitution of India Art-370 is mentioned as Temporary Provisions w.r.t. the State of Jammu and Kashmir, so do those who plead that Art-370 can not go mean to say that the Authors of Constitution of India had temporarily included J&K in territory of India ? Any fair mind would surely take pity on them.

(iii). In case Art-370 is amended or abrogated still Section-3 of J&K Constitution would be there that says that the State of Jammu and Kashmir is and shall be an integral part of the Union of India. Similarly in case Article-370 of COI is amended/ abrogated Art-1 of COI is there that describes J&K as territory of India in First Schedule. {Art-1(3) The territory of India shall comprise- (a) the territories of the States;}

(B). Art-370 is non negotiable / irrevocable ? :: Where as (Art-370 Clause-3) itself has a provision to declare by even a Presidential notification 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.

I. Art-370 is for extension of Constitution of India to J&K ? ::Art-249 is there in the Constitution of India for Parliament to operate upon subjects in State List for other Indian States where as Article 370 is to operate upon the Union and State list pertaining to J&K by the Union Government / Parliament. Similarly Art-371 had been kept for some Indian States. It is not proper to say that Art-370 is for extension of Constitution of India to J&K since Art-249 is not for extension of Constitution of India to other States.

(D). Art-370 accorded special status / Autonomy ? :: Article 370 is it self a temporary provision, it no where has any reference of Autonomy or Special Status in its text. Nor

has it any reference like that for possible secession.

I. Art-370 was incorporated in view of some conditions in instrument of accession? :: There was no any condition laid for special status or autonomy in Instrument of Accession by the Prince of J&K / the Maharaja or his Regent after accession.

Such like myths are not even in the socio-political interests of people India as long as they are linked with Art-370. But although not impossible, still it will be too elaborate an exercise to undo such myths at different levels. Central Government will have to counsel even the prime leadership like Omar Abdullah that in this context, the Princely State of Hyderabad had not 'merged' into Bharat but had 'only' acceded. No any princely state had merged into Bharat for being part of India. Some smaller princely States were merged with each other or with larger states for administrative convenience. It is also very important to even make 'their' advisers too understand this simple fact as otherwise these people will keep on mentally disturbing the common man in future too. No doubt such people have been calling 'Kashmir' as an integral part of India and will keep on saying so, side by side they have been also making some controversial interpretations of the facts. At occasions 'they' do say some words in favour of India or against Pakistan, but they do so just for keeping the constitutional doors to the power corridors open for them.

2.(i) The fundamental and human rights of women are more violated in J&K both constitutionally and administratively even when J&K Kashmir State has been given more subjects in the J&K 'specific' State List and encroaching upon the powers of Parliament of India Art-35 A was added in

Constitution of India (by amending it) on 14th May, 1954 merely by a Presidential order to provide a cover to the J&K State Assembly even for creating some discriminatory provisions for the permanent residents of J&K to the extent of violating the fundamental rights of others. But it could be assessed that the people who ruled J&K instead used such provisions to create environments where in it could be shown that J&K has not completely adopted the 'Indian Nationalism' and constitutionally is far apart from India.

(ii) Unfortunately for India Delhi too did not do much to carry the real definitions to the people and instead demonstrated more of recognitions for terms like 'special' and 'Kashmiriat'. Rather the terms like 'special status' and 'merger- accession' controversies were allowed to be cultivated. Article 370 that is a temporary provisions in Constitution of India with a built in provision as well for modification and repeal has been allowed to stay on for over 60 years where as it should not have stayed in its original form beyond 1956.

(iii). "Equality for women is progress for all". But in J&K still the rights of woman are mercilessly violated under the provisions as laid down for Permanent Residents of J&K (Section-6 of J&K Constitution), Section-51, Section-127 and Section-140 of J&K Constitution even when provisions are available there under Section-8, Section- 9 and Section-147 of J&K Constitution for applying corrections.

Question is have those who held the reins of Government all these years tried to have a look in the 'Mirror" of Naya Kashmir to see for themselves that how far they have stood to what has been laid down in Section-10 (Rights of the Permanent Residents of J&K), Section-21 (Rights of

children) and Section- 22 (Right of women) of Jammu and Kashmir Constitution ?

Although Article 370 of Constitution of India, a temporary provision, does not provide any special status to J&K over and above other Indian states still some leaders from Valley (it was earlier only National Conference but now more like PDP, even local Congress leaders like Saif u Din Soz have joined the race) have all these years been claiming that they had in 1949 succeeded to obtain special rights/ sanctions from Delhi . But inspite of there being Section-10 (Rights of the permanent residents), Section-21 (Rights of children, Section- and 22 (Right of women) in the Constitution of Jammu and Kashmir the rights of even the women who are Permanent Resident of J&K & their children (what to talk of women from outside J&K) are inferior to men in J&K ? Instead there should have been special rights for all children and women. A woman Permanent Resident (commonly understood as State Subject) of J&K if marries some one from Punjab her children will have no rights (regarding owning lands, joining state government service, contesting election to J&K Legislature, studying in J&K State professional colleges, contesting elections to J&K Legislature) like her in their maternal “home”, how strange. Where as in case a Permanent Resident man, if he marries a girl from Rajasthan she and their children become Permanent resident of J&K. Can there be any sex based discrimination inhuman than such type ? Are not National Conference/ some Kashmiri leaders holding fast to some provisions of the State Subject law of pre independence days (Notification No. 1-L/84 dated the twentieth April, 1927, read with State Notification No. 13/L dated the twenty-seventh June, 1932) that violate the fundamental and

human rights of local women just to make people think that J&K is a Indian State of different type ? Women in J&K are treated inferior to men! What 'special status' is it ?

Not only this no corrections have been made in the Permanent Resident (PR) definitions and the executive orders concerning PRs of J&K inspite of there also being some direct/ indirect advisories having been issued by Supreme Court of India and J&K High Court.

3. Leaders like Farooq Abdullah should have rather used the presence of more subjects in J&K specific State list for giving to their people better laws and living than what Delhi has given for other states or other states have drawn out on their own But instead they have used all their energies to project Art-370 only worth giving J&K an identity to stand at equal footings with India. So strangely when the J&K leaders (so far leads have remained with Kashmiri leaders and Delhi too have been recognizing only Kashmir Valley leaders as the voice of J&K) are questioned for the local Governments and the legislature having not given some welfare laws as are available to other Indian Citizens to the local people (commonly recognised as permanent residents of J&K) still they do not make the needed provisions. The only reason could be that the Kashmiri leaders want to send messages that J&K is not subject not to central laws or J&K is distantly placed w.r.t India.

People like Farooq Abdullah should take note of such things otherwise they can not escape the allegations that they oppose abrogation/ modification of Article-370 only because they want to carry this provision simply as a symbol of “distances” from the Union.

4. (a) Under the J&K Specific 'state list' the rights for regulating the J&K Legislature as regards the constituencies in the legislature, reservation of seats in the legislature, delimitation of single member segments in the J&K Legislative Assembly were given to the State. The delimitation of J&K Legislative Assembly is not carried along with other Indian States. The state instead of doing some better legislations mis used the delegated functions. No reservations to the schedule tribe (ST) have been kept in the J&K Assembly. The people Ladakh region of J&K have hence denied their special rights for 6 decades since the whole lot of people there qualify for ST.

(b) As per J&K Constitution Section-50 there are 14 elected seats in the Legislative Council for Jammu Region and 12 for Kashmir Valley. The J&K Delimitation commissions had over the years defaulted to the extent that inspite of very clear and elaborate guidelines there in J&K Representation of Peoples Act, 1957 the Commission even in 1995 so wrongly distributed 46 MLAs over areas that had just 12 elected MLCs where as distributed just 37 MLAs over the areas (Jammu Region) that had 14 elected MLCs.

c) The people of J&K who had been suffering under separatist and militant pressures gave absolute majority to National Conference, and the Kashmir Valley centric party leaders instead inflicted the biggest onslaught on the legislative rights of the common people 29th Amendment to Constitution of J&K in 2002 thereby deferring any future delimitation of J&K Assembly segments till census figures of census done after 2026 AD are announced (in a way till 2031 AD) since they feared that since the people are becoming more and more aware it will not be possible to hold to practices of unfair delimitations any more. When some

people objected to 29th Constitutional amendment, the 'elite' Kashmiri leaders pushed the common man into unfair regional controversies and divides. Among other things THE CONSTITUTION OF JAMMU AND KASHMIR (TWENTY-NINTH AMENDMENT) ACT, 2002 (23rd April, 2002) demonstrates the mis use of the temporary 'J&K Specific' State list draw through Art-370 for J&K in 1950 to the extent of denying the rightful public representation even in the State Legislature and this too calls for serious review under the provisions as laid in Clause -3 of the Art-370 for modification / repeal.

5. No doubt the issues like corruption in Government institutions, social & material security of common man, development and issues like unemployment do concern the people of J&K but unlike other Indian States the extent to what these issues matter as regards the vote bank politics are overshadowed by issues like Accession 1947, Art-370 of Constitution of India, plebiscite demands, autonomy, Kashmir Valley centric politics, the question ridden State- Center relations. Over the years the Kashmir valley centric leaders and political parties have succeeded in bringing even the National leaderships under their influence.

6. Since valley centric politics has been paying dividends to some in Valley, there has been a mushroom growth of valley centric parties and leaders. Kashmir Valley has many now to exploit the locals in the Name of Kashmiriat and other issues. This is quite evident from the manner in which even the separatists have joined with NC & PDP in the dragging the call for discussions on Art-370 to debate

on abrogation of Art-370 to the extent of pushing the locals into emotional traits.

7. A few of the unrealistic and illogical actions taken and policies carried on by the J&K political leadership under the 'J&K State specific, State List temporarily drawn under the procedure laid in Art-370 of Constitution of India in 1950 and carried for even more than 6 six decades thereafter by the Union could be listed as under :

i) J&K Constitution (29th amendment) Act, 2002 amending Section-47 (sub section-2 and sub-section-3) of J&K Constitution imposing restrictions for constitution of Delimitation Commission for Single member Assembly Segments in J&K Legislative Assembly till Census data for census done after 2026 AD are announced (it will be only after 2031 AD). The number of MLAs for SC Constituencies will not be re-determined and relocated till 2031 (it was last done in 1994/95). It has been only due to provisions contained in Art-370.

ii). Section-4 Sub Section-2 Clause-b of J&K Representation of People Act 1957 is for re-distribution of constituencies reserved for the Schedule Castes in different parts of the State but seats have presently over stayed in one area for more than 3 elections). Even inspite of there being restrictions due to J&K 29th Constitution Amendment Act, 2002 for constituting a new delimitation commission, if needed in the absence of a regular delimitation Commission some thing could be done through alternate means as was done at occasion in the past but no such intentions have been shown inspite of there being great public demand.

iii) (a). Section-49 of J&K Constitution did not include

Political Reservation in Legislative Assembly for Schedule Tribe (ST) along with the Schedule Caste (SC) in 1957 and even till 2014 Section-49 has not been amended to provide ST reservation in J&K Legislative Assembly even when it could be said that Ladakh region of J&K is practically all tribal region. Even the Schedule tribes in J&K could be notified only in 1989.

(b). J&K has 11.9 % ST population and pushing for reserving One Lok Sabha seat for ST should not have been difficult.

iv). There were enough reasons to impress upon the Union for re-allocating and Delimiting the Lok Sabha Seats concerning J&K and increasing the seats from 6 to 8 keeping in view that Jammu Region has nearly 13000 sq km area per MP, Kashmir Region has about 5300 sq Km area per MP and Ladakh region has much more. The miseries, backwardness, illiteracy, poverty and ill health has grown in the far flung areas. But it has not been done.

v). Discrimination being done under Permanent Resident Laws/ rules with the Women of J&K. It can be said that National Conference/ some Kashmiri leaders are holding fast to some provisions of the State Subject law of pre independence days (Notification No. 1-L/84 dated the twentieth April, 1927, read with State Notification No. 13/L dated the twenty-seventh June, 1932) that violate the fundamental and human rights of local women just to make people think that J&K is a Indian State of different type. Women in J&K are treated inferior to men!

vi). 1947 Refugees from West Pakistan who entered J&K were allowed by Maharaja's government to stay in J&K (mostly in Jammu Region). Some of the refugees were

even allowed under Government of Jammu & Kashmir Notification No.578-C 0/5 1954 of 7.5.1954 , State Cabinet's decision No. 9578-C of 1954 to possess and cultivate the lands then occupied by them. They are citizens of India and are staying in J&K for more than 6 decades but since they are not designated as permanent residents of J&K they are hence denied rights to own property in J&K, apply for service under J&K Government, participate in elections to J&K Legislature (they can participate in Parliament of India), take admission in J&K Government run professional colleges and right to special local aids taking cover of Art-35A of Constitution of India (that is added to constitution of India under unfair use of Art-370) . The definitions of Permanent Resident of J&K could be changed/ modified for which there exists Section-8 and Section-9 of J&K Constitution or by suitably amending the legislations without having to amend the J&K Constitution. And where ever possible through executive orders like amending the Jammu & Kashmir Civil Services, Classification, Control and Appeal Rules and orders as regards admission to professional colleges. But it has not been done. J&K is a welfare state but the local leadership does not appear to carry any values for doing welfare legislation even when provisions exist worth applying corrections.

vii) Some prime leaders have been saying that in case permanent resident certificate laws are amended in favour of Indian citizens like 1947 West Pakistan refugees this would change the demography of J&K, open out doors for Indian citizens from other Indian states for laying hands on properties and government services in J&K. Some have gone to the extent of even saying for vote bank politics that relaxing or un doing permanent resident of J&K laws would

change the muslim majority character of J&K. Such thinking is against the inter-community oneness character of J&K and the interests of the residents of J&K. So, such like J&K specific provisions have been instead misused.

But under the present conditions such laws can not be held unconstitutional/ fundamental rights of other citizens of India since under the cover of Art-370 Constitution of India has been unduly amended to add a new Article by the name Art-35A on 14th May, 1954 by a presidential order mentioning Art-370 (1) although this clause of Article 370 gave no such power to President of India.

viii). Defying all principles of natural justice J&K Government has not ensured a uniform identification, rehabilitation and financial as well as material assistance actions/ policies for the 1990 turmoil affected migrants from all the regions of J&K. It was the state Government that has to even approach the union Government to fill up the gaps that are beyond the capacity of local Government.

ix). J&K has her own Panchayati Raj Act and Panchayati raj concept also forms part of Naya Kashmir slogan of National Conference. To make the governance reach the lowest levels neither the J&K Panchayati Raj is amended suitably nor the better features of 73rd Constitutional amendment to Constitution of India have been taken in. Since under the J&K Specific state list identified under the procedure laid in Art-370 is state subject there appears no other reason for the J&K Government (local leaders) not adopting better welfare features than to simply to project that J&K is not as good an Indian state as others.

It is surely not fair.

x) Right to Information Act is for transparency in governance and fight against corrupt practices . Name of temporary Article-370 has been rather misused to even restrict the use of J&K Right to information Act only to Permanent Residents of J&K. How strange? In case some non-permanent resident citizen of India asks for some information under J&K RTI he is denied and in case he/ she asks under Central RTI he/ she too is denied suggesting that under the cover of Art-370 J&K is not obliged to provide the information. So, it is very unfair use of Art-370 and only reflects to distance only for the sake of distancing.

xi) Just for the sake of maintaining distances J&K has not extended a few seats in medical education to the Central Pool and the result has been that a few thousand seats for what J&K residents could also apply have not been kept open to youth of J&K.

xii) The socio economic goodwill of the Indian state of J&K has hence fallen and inspite of the J&K Government having come forward with some incentives for the 'Non State Subject' entrepreneurs and investors the people who can contribute for development of sectors like industry, tourism, communication, science & technology, research and infrastructure are not coming forward for investment in J&K. *So, there is utmost need for confidence building measures so that the employment , trade, industrial, professional services, education and tourism opportunities in J&K grow. The 'distancing' look given to Art-370 has to be repainted and their does exit provision for that.*

xiii) Neither the State Government has done on her own nor has it worked out plans and demands to be placed before GOI for development of new summer/

winter/adventure Tourism Circuits in unexploited and unexplored areas outside Kashmir Valley (particularly Udhampur/ Reasi/ Doda/ Kishtwar/ Rajouri/ Poonch/ Kathua Districts/ Kargil). Kashmir Valley centric mindset has this way tried to win the valley vote bank and when people from other regions raised questions they were pushed into regional/ communal controversies.

xiv). Article 370 has become a play card of separatism for some.

xv). *So, it can also be said that all these years an entirely otherwise and wrong picture of Article 370 has been posted by the local leaders (particularly Kashmir Valley leaders) who have been enjoying full patronage of those holding reins in Delhi . Rather even the separatist have started using it for carrying their separatist ideologies . Hence , it would be better for India to look for ways and means for modification/ or repeal Art-370 of Constitution of India for what provisions do exist with in and Article-368 too is there for amendment of COI & procedures there of so as to provide suitable place to constitutional matters pertaining to J&K along with other States in some appropriate Part of Constitution of India.*

CHAPTER 4

If Article 370 has to be amended/ abrogated/ repealed, how could it be?

Article 370 was not included in the Constitution of India to harm the interests of Indian nation or the people of J&K. Rather no Article in the Constitution was included for harming the people. More so, in the Constitution of India there are enough of provisions for amending the articles of Constitution of India where ever it is found that some amendment or repeal is required for betterment or to suit the unforeseen requirements without violating the basic spirits behind the writing of the Constitution of India. So, have been the provisions also for Article 370, a Jammu & Kashmir state specific Article of Constitution of India.

The Article 370 has in its text also laid down the procedure for amendment or repeal of this Article. Before taking the discussion further , it will be better to have a look in to the text of Article 370 as was in 1950 (first edition of The Constitution of India) :-

Temporary provisions 370. (1) Notwithstanding anything in *With respect to the State of* this Constitution, (a) the provisions *Jammu and Kashmir* of Article 238 shall not apply in

relation to the State of Jammu and Kashmir; (b) the power of Parliament to make laws for the said State shall be limited to

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State ; and

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

Explanation. For the purposes of this article, the Government of the State means the person for the time

being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948 ;

(c) the provisions of article I 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 to in the last preceding proviso shall be issued except with the concurrence of that Government.

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

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify : Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

On the basis of text of Article 370 it could be inferred that :

1. Article 370 in part-XXI of Constitution of India Art-370 (Temporary and Transitional Provisions in 1950 and Temporary, Transitional and Special Provisions in 2014) is mentioned as Temporary Provisions w.r.t. the State of Jammu and Kashmir and hence the intentions of the authors of the Constitution of India were surely for its recasting/ repeal/ modification. Those who contest that Art-370 is

irrevocable and non- negotiable must go through the text of the Art-370 truthfully.

2. Those who plead that Art-370 cannot go since it is a bridge between India & J&K argue that Article 1 applies to J&K through this Article and quote Clause (1) Sub- Clause-c of Art-370 in their support (“the provisions of article I and of this article shall apply in relation to that State”. But the question such people need be asked is that “do they mean to say that Authors of Constitution of India had temporarily included J&K in territory of India?”.

No, the people who draw such like inferences are surely wrong since :

(i) In Art-370(1-c) it has been mentioned that the provisions of Article 1 and of this Article shall apply in relation to that State is not because Art-1 applies through Art-370 . Art-1 has been mentioned along with Article 370 there to demonstrate that Art-1 and Art-370 are totally Indian Union subject (“J&K specific Union List Subject”) and no any clarifications/ interpretations/ consultations/ concurrences are to be made/ obtained with/ from State Government/ State concerning any matter pertaining to text of Article-1 as well as Art-370 as has otherwise been said regarding other subjects in Art-370 for identification of subjects of “J&K specific” Union or State list . Nor there is any need for the President to issue any order regarding these (Art-1 and Art-370) provisions of the Constitution of India so as to apply in relation to the State J&K subject to such exceptions and modifications as the President may specify.

(ii) It must be noted that in the text of Art -370(1-c) Article 370 and Article 1 have been mentioned with the word 'and' separating them.

(iii). As said earlier The Constitution (Application to Jammu and Kashmir) Order, 1954 also mentions Article 1 and Article 370 separately. Had the application of Article 1 been only through Article 370 then there was no need to mention Article 1 separately in the text of Constitution (Application to Jammu and Kashmir) Order, 1954.

No advisory has been issued to those leaders who name Art-370 as a Bridge between India and J&K by those in GOI or those who mattered in this regard. Hence, a wrong picture has been in a way posted over the years and therefore it will be in the interest of J&K in case this Art-370 is modified or repealed.

3. The other argument advanced is that since there is no Constituent Assembly of J&K available to recommend for its modification/retention in changed form/or repeal, therefore, it can not be modified or repealed. They quote Clause (3) of Article 370 to support their argument i.e “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”. This inference/ opinion too has been expressed by most of the political leaders from Kashmir Valley irrespective of the political affiliations they held and no otherwise opinions have been expressed by those who have been holding the reigns of Governance in Delhi. Therefore, such opinions have found some acceptance even with people holding independent opinions and even with

some of the senior media persons. People may have different opinions in this regard, but some final opinions will have to be pinned as otherwise J&K affairs would remain in controversies and the State would remain politically as well as socially disturbed. I would place before the people of India in general and the students of law in particular a few points for consideration and in this regard.

(i) The J&K Constituent Assembly was assigned a job in 1951. The Constituent Assembly was also aware of the Clause (3) of Article 370. Therefore, it was mandatory for the Constituent Assembly (that is said to have ultimately dispersed after writing and adopting Constitution of J&K in November 1956) Assembly to make some recommendations to the President in this regard since it was a Temporary Provision w.r.t. to J&K. But the CA did not do so. Do, those who contest on this ground mean to say that there is no way out for getting the job left half done in 1956 by the Constituent Assembly of J&K so as to complete it in 2014? No, sir it is not fair. Parliament of India or the President of India cannot be held helpless before an Institution that did not complete its job or a nonexistent Institution/ Body. Nor can the COI be so silent about the action that would be need with time flow that had never to stop. The provision for amending the Constitution and even for amending the procedures for amending the Constitution has been kept in Art-368 of COI only for this purpose.

(ii) The Constituent Assembly of India as well Constituent Assembly of J&K were to draft the Constitution. They enshrined in the Constitution some basic spirits/ principles. The Parliament of India and the J&K The Constituent Assembly did have an intrinsic purpose to go by the spirit of intentions behind framing the Constitution as was conceived

then but amending the Constitution too is like writing a constitution except that while amending the constitution the basic spirits that had formed the basis for framing a Constitution can not be violated by the legislators that followed those who performed the job of the Constituent Assembly.

Legislatures have all these years performed many acts of rewriting the Constitution through amendments without disturbing/violating the basic spirits underlying the Constitution. Making recommendations for declaring that Article 370 shall cease to be operative or shall be operative only with such exceptions and modifications is not against the basic underlying principles of the Constitution since Article 370 in principle has been named as Temporary provision subject to modifications/ repeal. So recommendations can be made even by the Legislative Assembly of J&K since it is competent to perform the functions of Constituent Assembly of rewriting the Constitution through amendments of Articles of Constitution or adding/ repealing Articles without violating the basic spirits/ principles underlying the Constitution. Hence, if still required, the recommendations can be made by the Legislative Assembly of J&K in the name of non-existent Constituent Assembly (by name).

4. Some people very particularly base their arguments on the Proviso: "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". They stress on Clause (2) to push their argument saying that Constituent Assembly means only the one that was convened to frame the Constitution of J&K.

If we go by anti arguments then legally Article 370 too should have got amended the same day when the 'Constituent Assembly' first completed its job in November, 1956. Why was not it done ? Did Constituent assembly make any recommendations to President in this regard ? Surely not. The 'professors' of otherwise doctrines must reply for the benefit of the innocent people of J&K who have been misinformed regularly over the years.

Though such like arguments do not stand to logics, still to dismantle such opinions and take the innocent common people out of the wrong understandings cultivated around them, it will be of some relevance to discuss history of convening the Constituent Assembly, performing constituent assembly functions and performance of Legislative functions in J&K upto 1957.

(i). Question here is on what day the members of Constituent Assembly disperse? And the answer would be they did not disperse, only the function of writing the Constitution that they were performing ended and the members elected in 1951 for Constituent Assembly stayed for more time and functioned as Legislative Assembly to handle the legislative affairs of J&K till regular elections to J&K legislature were held under the provisions listed in the new Constitution of J&K drafted under the aegis of Constitution of India.

(ii) A proclamation issued by Yuvraj (Regent) Karan Singh's in 1951 had in 1951 named the Praja Sabha/ Constituent Assembly/ Legislative Assembly to be same as far as legislature/ legislative function was concerned. Jammu and Kashmir Constitution (Amendment) Act, 2008 (Samvat) said "Whereas it is expedient further to amend the Jammu and Kashmir Constitution Act, 1996, with a view to bring it in

accord with the spirit of Proclamations dated 5th March, 1948, 20th June, 1949 and 20th April, 1951 and the changes brought about in the actual governance of the State, in the manner hereinafter appearing: \..... In Part III of the said Act, for the words "Praja Sabha" wherever they occur the words "Legislative Assembly" shall be substituted..... The Legislature of the State shall consist of His Highness and a House to be known as the Legislative Assembly..... Notwithstanding anything contained in this Act, the powers of the Legislative Assembly under this Act shall, until other provision is made by or in accordance with a law made by the Constituent Assembly set up under the Proclamation, be exercisable by the said Constituent Assembly and references in this Act to the Legislative Assembly shall be construed accordingly Until rules are made under sub-section (3), the rules of Procedure and standing orders in force in relation to the Praja Sabha shall apply to the Legislative Assembly, subject to such modifications and adaptations as may be made therein by the Speaker of the Legislative Assembly....." Therefore 'Constituent' is still there in the form of Legislative Assembly of J&K. Hence in case still required the J&K Legislature can perform the duty for completing the job left undone by the Constituent Assembly as regards making recommendations.

(iii) Yuvraj Karan Singh too had addressed the then Constituent Assembly as Legislative Assembly of J&K in his order dated 09-08-1953 appointing Bakshi Ghulam Mohd as Prime Minister of J&K that said "..... Will you, therefore, make it convenient to meet me immediately so that we might discuss the formation and composition of the new Cabinet. I need hardly impress the

continuance in office of the new Cabinet will depend upon its securing a vote of confidence from the Legislative Assembly during its coming session.”

(iv). Similarly Ministry of Law, GOI, Order No. C.O. 44, dated the 15th November, 1952 too reads as under : “In exercise of the powers conferred by this Article the President, on the recommendation of the Constituent Assembly of the State of Jammu and Kashmir, declared that, as from the 17th day of November, 1952, the said Art-370 shall be operative with the modification that for the Explanation in clause (1) thereof, the following Explanation is substituted, namely:— “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 *Sadar-E-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office.” So, the function of Legislative Assembly to elect first Sadar-E-Riyasat was performed by 'Constituent Assembly' and hence why can not, if still needed (although the non existent bodies do not count), the function of the Constituent Assembly be performed by Legislative Assembly?

No Constituent Assembly has to stay permanently and hence using the term Constituent Assembly here otherwise indicates that the Art-370 had to stay for a shorter period. But some people do argue that Art -370 can not be abrogated since now there is no Constituent Assembly. For argument sake even this logic can be brushed aside since the J&K Constituent Assembly was also named as the Legislative Assembly under the Constitution of J&K 1996 amended in

2008 Samvat. So, the Legislative Assembly can perform the function in case need arises.

(v) From the text or 368. ¹[Power of Parliament to amend the Constitution and procedure therefor].— ²[(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article.] ³[(2)] An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House and by a majority of not less than two-thirds of the members of that House present and voting, ⁴[it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill:

.....
.....

¹ Subs. by the Constitution (Twenty-fourth Amendment) Act, 1971 s. 3, for “Procedure for the amendment of the Constitution”. , ² Ins. by s. 3, ibid. , ³ Art- 368 renumbered as clause (2) by s. 3, ibid. , ⁴ Subs. by s. 3 ibid., for “it shall be presented to the President for his assent and upon such assent being given to the Bill,”.

.....
.....

From the text of Art-368 it is evident that the power to amend the Constitution is 'constituent power' i.e. When ever Parliament amends the constituent it is in a way

also performing the function of a Constituent Assembly and the same should also be true for the Legislative Assembly where ever applicable.

Hence it would not be unconstitutional in case the recommendations of the 'Constituent Assembly' of J&K for this purpose are made by Legislative Assembly of the State where the job in question is amendment of the Article 370 and that too when it involves no violation of the basic principles enshrined in COI.

5. Article 368 (amendment of Constitution of India) does not provide any ultimate immunity to Article 370 as regards amending it. Article 370 can be modified/ amended/ abrogated as per Constitutional provisions. So far, it has not been amended/ abrogated / modified.

6. More so the Article 370 can be modified and the procedure has been laid down in the Constitution of India. There is set procedure laid down for modifications or repeal of Article 370. What matters is the Constitutional will and intentions. Whether the Legislature/ Parliament shall go for modifying/ amending/ abrogating Article 370 is a separate question.

7. It could also be opined that the mention of 'obtaining recommendations of the Constituent Assembly' that as per the opinion of some is non existent body in 2014 has technically lost significance and the President can perform the needed functions for modifying or repealing Article 370 without getting lost in the controversy of 'recommendations' of a non existence identity.

8. And to add to the considerations discussed in fore going paras, more so under Article 368 of COI

procedure for amendment of Constitution can also be modified. It can not be accepted that procedures for amending the Constitution of India can never be modified / amended. And if needed this course too could be used.

9. Parliament and State Legislature are there to apply corrections/ modifications/ additions without overstretching the basic spirits of the Constitution. And the basic purpose and spirit do reflect from what has been said in the Preamble of J&K Constitution.

What Mr. Gopalswami Ayyangar (GSA) said in the Constituent Assembly in October 1949 though can not be taken as law but let us still have look at that since some people use that for distancing J&K. GSA : "We have also agreed that the will of the people through the instrument of the Constituent Assembly will determine the Constitution of the State as well as the sphere of Union jurisdiction over the State..." Though quotes being made could be argued by some saying that GSA had gone beyond the subjects of instrument of accession without concurrence of the Maharaja/ Regent, still it cannot be overlooked that the Constituent Assembly of J&K had also ratified the 1947 Accession on 6th February 1954 (though it could be argued by some that it was not needed). Why some people still talk of conditional accession at occasions when they depend so much on the CONSTITUENT Assembly logic to substantiate their arguments?

More over there is no purpose in going into the proceedings and discussions held during process of framing the Constitution (unless it is very-very necessary). Lets us go only with what the orders/ acts/ laws say and not enter into debates by quoting the expressions of individuals. Go by

what has been finally written and laid as order/ Law/ Constitutional provision. Otherwise arguments and debates would never end.

The separatists and even some mainstream political parties have all these years seized opportunities for posting Art-370 as a symbol of separatist ideologies whereas constitutionally it is not so. It is more for this distorted/ 'assumed face' of Article 370 that need is more for its modification/ repeal.

Observations made by experts {like Interlocutors for J&K (2010) in their report 2011} that getting rid of Article 370 would cast a shadow on Accession do not test to real logics since the authors of Constitution of India have named Article 370 as a Temporary Provision. Article (1) of Constitution of India has no reference of Article 370 while defining the territories/ States of India. Section-3 of J&K Constitution - Relationship of the State with the Union of India - too lays down that The State of Jammu and Kashmir is and shall be an integral part of the Union of India.

And ofcourse under the prevailing circumstances the operations as regards Art-370 modification/ repeal just on the legal lines will not be enough. The issues will have to be handled in a trident approach i.e constitutionally/ legally , politically (carrying the political parties out of the web of Kashmiri wave lengths) and socially (reaching the innocent common man with new definitions/ descriptions of Article 370).

CHAPTER -5

Miscarriage of Article 370

Article 370 has all these years been wrongly projected by the regional mainstream parties of Jammu and Kashmir as a symbol to show that J&K State is distantly placed from Delhi as compared to other Indian States, rather at occasions, in total defiance to Article 1 of Constitution of India, some people have gone to the extent of even advocating that J&K is not as good a part of Indian Democratic Republic as are other states. Such like expressions have been expressed right since 1950 and unfortunately for India the Delhi leaders have not taken the affairs seriously and hence as said earlier a number of myths have been cultivated in the name of Article 370 to misguide the common people of J&K (Kashmir Valley in particular).

In 1950s India had just attained Independence, it was only Indian National Congress that carried the total writ to handle the socio-political affairs. The questions regarding Article 370 and the wrong projections as regards J&K have not been corrected.

In spite of Article 370 having been kept as a temporary provision with respect to the Indian state of J&K with enough provisions for medication/ modification and repeal,

some people have been all these years allowed to wrongly presenting Art-370 as a symbol of J&K State being distantly placed from Delhi as compared to other Indian States, rather some 'experts' have at occasions got so much encouraged that they have advocated for J&K not being as good a part of Indian Democratic Republic. The result has been that the separatists and anti India nation elements too have at occasions used this article for carrying their ideologies to even the outside world.

Briefly speaking, it is the style in which text of Constitution of India was drafted and placed in 1949-1950 that has given opportunity to some people to create extra Constitutional controversies as regards Indian state of J&K.

Some people from Kashmir Valley (particularly National Conference) have all these years been claiming that they had in 1949 succeeded to obtain special rights/ sanctions from Delhi in the form of Article 370. This Article of Constitution of India, a temporary provision, does not provide any special status to Jammu and Kashmir but still some leaders of J&K have been opining that it provides special powers to J&K Government for betterment of the people of State. But no one has so far made the people of State to ask these leaders why did they take these specials temporarily and what good have they done to their people out of these specials?

Before 1947 the way some Kashmiri leaders had started agitation against the Dogra Regime and senior Indian leadership had disturbed the conditions in J&K by supporting the movement against the local Prince led by Sheikh Mohd Abdullah, the same way after 1947 some so called main stream leaders of J&K (mainly focusing on Kashmir Valley) in their lust for being in the power seat have been directly or indirectly behaving in a way that would help

the cause of even separatist elements.

And in 2014 the conditions are such that even those who never believed in holding the instrument Accession 1947 unfair are today found believing that in case they have to participate in the election process and have to target the vote in Kashmir Valley they will have to raise some questions on the Bharat Rashtra and Bharat Sarkaar.

Kashmir Valley leaders have so far used the unduly cultivated controversies about Art-370 like provisions only to conceal their fault lines and keep the local people away from the ground realities. Hon'ble Prime Minister Narendra Modi had tried to summarize the situations when while in Jammu he said on 1st December, 2013, "Aesa lagta hai hamarae desh mein agar papoan se bachna hai.. kukarmao se bachna hai.. jeemaebardon se bachna hai... jababdehi se bachna hai to ek asee jadee bootee kush logoan ne khoj lee hai ke oos ke saharae bo bach letae hain , bachnae ka rasta bo khoj letae hain .. aur bo hai secularism, secularism ka bas bolna shooru kar do sarae paap maaf ho jatae hain , ... Jammu kashmir mein eis ke saath saath ek aur cheej ka oopyog hota hai aur bo hota hai dhara 370 ka . baieo behno, sambhidhan ke tehat rajneetic patal par dhara 370 rahae na rahae oos kee debate chalti hai chalti rahae gee lekin ab samay ki maang hai ki janta janardan ke sandharv mein - jahan ke logoan ke hitoan ke sandharv mein- jammu kashmir ke nagrikoan ke adhikaar ke sandharav mein kam se kam jaamukashmir mein aur poorae hindhustan mein keyaa dhara 370 se jahaan ke samanay manvi ka bhala huya hai eis ki charcha to kam se kam karo, charcha tak karna ko teyaar nahin..... ek aesa kabach bana leeya hai, dhara 370 ka oopyog ek kabach ke natae hota hai, oos ko smapradaeekta ke gehnae pehna deeyae gey hain aur eis ke kaaran oos ki sahee charcha nahin ho rahee

hai ...main chahta hoon desh ke sambhidhan ke jaankar lok eis par charcha karein 60 saal ka iteehaas dekh lee jeeyae sirf 50 parivaroan ne eis ka faeda oothaeya haialagabbadi taktoan ko sahara deeya geyaa hai” . It reflects that some Kashmiri leaders have so far more used Art-370 to project that J&K State is not fully 'integrated' an Indian state and there can be no larger a harm than this.

It can also be said that such conditions/ environment has not been there outside Kashmir valley since all these years any voices that have emerged against Delhi or/and on J&K being total India/ 1947 accession have been only from some Kashmir valley leaders who have maintained a valley centric approach. But those holding the strings in Delhi too have more concentrated on Kashmir ghati centric Kashmiriat and a few of the 'kashmiri' leaders. Even Atal Bihari Vajpayee was fed valley centric inputs that even in 1990s he too had seen secularism only in Kashmir Valley.

Those who have called Art-370 a bridge to link J&K with India need to know that (i) The State of Jammu Kashmir acceded with India through Instrument of Accession as signed by Maharaja Hari Singh and not through any thing like Art-370 (ii) in part-XXI of Constitution of India Art-370 is mentioned as Temporary Provisions w.r.t. the State of Jammu and Kashmir. So, do those who plead that Art-370 can not be modified/ repealed go mean to say that the Authors of Constitution of India had temporarily included J&K in territory of India ? In case they opine so then any fair mind would surely take pity on them (iii) It should also be understood that at Art-370(1-c) it has been mentioned that the provisions of Article I and of this Article shall apply in relation to that State is not because Art-1 applies through Art-370 but Art-1 has been mentioned along with Article 370

there to demonstrate that Art-1 is totally an Indian Union subject (Union subject) and no any clarifications/interpretations are to be made concerning any matter pertaining to Article 1 as has otherwise been made regarding other subjects to be seen as subjects of Union or State list. (iv). There is no reference of grant of Special Status or Autonomy to J&K in Article 370 or in any other chapter/Article of Constitution of India. Such opinions have been expressed in past also but unfortunately Central Government has not corrected such leaders or issued any advisory for atleast mainstream leaders expressing.

The other question for those who held the reins of Government all these years is that how far they have stood to what has been laid down in Section-10 (Rights of the Permanent Residents of J&K), Section-13 (Socialist order), Section-16 (organisation of village panchayats and units of self government), Section-20 (Rights of free and compulsory education for every permanent resident), Section-21 (Rights of children), Section- 22 (Right of women), Section-23 (Protection of educational, material and cultural interests of socially and economically backward sections) and Section-25 (Duty of the State to foster equality and secularism) of Jammu and Kashmir Constitution ?

Jammu Kashmir Governments have been at occasions accusing the Governments in Delhi but have these Governments any time tried to assess how far they have succeeded in doing those welfare jobs on their own that they could do even still better than Delhi or other Indian States ?

J&K Governments have instead violated the rights provided by COI to women of J&K under the garb of 1927 State Subject law of Maharaja's Government in the name of Permanent Resident of J&K inspite of there being a

provision in Section-8 & 9 of J&K Constitution for amending/ relaying the provisions as regards Permanent Residents of J&K ?. Not only this no corrections have been made in the permanent resident definitions and the executive orders concerning Permanent Residents of J&K inspite of there being some direct/ indirect advisories having been issued by Supreme Court of India and J&K High Court. There is nothing wrong for some one trying to project his/her self in different way but it has to be in better sense and not in bad sense. A woman of J&K if marries some one from Punjab her children will have no rights like her in their maternal "home", how strange. Similarly in case the Schedule Tribe are not given political preferences (reservations) in J&K when their counter parts have the same in other States, this too is not is worth being proud of for those who carry the banners of 'Special Status and Naya Kashmir'.

So, in case Kashmiri leaders really care for the people of J&K they must explain why inspite of there being Section-10 (*Rights of the permanent residents*), Section- 13 (socialist order), Section-16 (organisation of village panchayats), Section-20 (*Rights of free and compulsory education*), Section-21 (*Rights of children*), Section- 22 (*Right of women*), Section-23 (*Protection of educational, material and cultural interests of socially and economically backward sections like Schedule Tribe*), and Section-25 (Duty of the State to foster equality and secularism) in the Constitution of Jammu and Kashmir. In J&K even after 6 decades the women rights are inferior to men, real Panchayati Raaj has not reached the villages, free university level education is not available for all PRs of J&K, special rights are not there for all children, sabee nari jatee ke adhikaroan ke sangrakshan aur vidbaon (widows) ke sahaerae ke leeyae khaas prabhdaan keon nahin hain, pichdee jateon aur jan jateon ke oothaan ke leeyae aur dharam nirpekshata

ko adhaar denae balae kanoon aur prabhdaan keon nahin banaey jo bharat ke sansad dawara ya doosarae rajeeon dawara banaey geyae prbhdanoan se achchae hoan ?

So, the point that needs be agitated for the consideration of the common local voter citizen is that those who have so far held the reigns of governance have not ventured either into making their own better welfare laws or atleast adopting some of the welfare laws made regarding the concurrent/ state lists subjects pertaining to other Indian States simply to show that J&K is different than other Indian States. The result has been that the common man of J&K is the ultimate loser and some separatists too have made use of the controversies for cultivating their ideologies.

Some politicians are holding fast to some provisions of the State Subject law of pre independence days just to make people think that J&K is an Indian State of different type. The socio-economic goodwill of the Indian state of J&K has hence fallen and inspite of the J&K Government having come forward with some incentives for the 'Non State Subject' entrepreneurs and investors the people who can contribute for development of sectors like industry, tourism, communication, science & technology, research and infrastructure are not coming forward for investment in J&K. So, there is utmost need for confidence building measures so that the employment, trade, industrial, professional services, education and tourism opportunities in J&K grow.

So, since as Art-370 or the J&K Specific State List have not delivered as was expected in their present form, for the interest of people of J&K there is sure need for looking at the temporary character of Art-370 for any modification or repeal that may be the need of the day.

These are some of the questions that even the people J&K must ask their leaders.

People like Farooq Abdullah should take note of such things otherwise they can not escape the allegations that they oppose modification/ repeal of Article 370 only because they want to watch material and political interests of a few in the State and want to carry this provision simply as a symbol of “distances” from the Union. It is not out of place to mention here that Farooq did tell an interviewer that he personally is against the discriminatory provisions against the women in the Permanent Laws/ rules in J&K but his party colleagues do not go with him.

The wrong presentation of Art-370 by some Kashmir Valley leaders of J&K has not been the only wrong doing . So unfortunately , some serious wrongs have also been got done by Delhi leaders under the undue garb of Article 370 of Constitution of India that have remained unquestioned for nearly six decades by the people of India. Even the Indian leaders appear so much hypnotized by the myths cultivated in the name of Art-370 that inspite of there being around 12 to 15 % likely schedule tribe class population in J&K there is no seat in Lok Sabha reserved for schedule tribe in J&K where as there should be atleast one seat reserved for ST in J&K .So, the damage to ST population is not only at the level of J&K Assembly but it is also at the level of Lok Sabha.

Contents of the Presidential, THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1950 C.O.10 Dated the 26th January, 1950 & THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1954 C.O 48 of 14th May 1954 could be quoted here to demonstrate the loss. .To

be brief to me it appears that the provisions in Article 370 of the Constitution of India that were for making simple exceptions and modifications had been used for amending even Constitution of India by a presidential order, like adding a new Article by the name 35A in COI after Article 35. Some other Articles too have been made victim since when ever a Clause is added to an Article or is substituted for a clause of an Article; or when ever an Article is added to the Constitution; or a proviso is added to a Clause of an Article or to an Article, to me it is amendment of Constitution/ Article of Constitution and President of India cannot on his own issue any order in exercise of the powers conferred by Clause (1) of Article 370 of the Constitution only on receipt of concurrence of the Government of the State of Jammu and Kashmir.

Under the provisions of Article 370 (1) President can only declare such cases after consultation with/ concurrence of State Government where a law is to be made/ Constitution of India can be operated/ is to be operated/ constitution is to be amended by the Parliament as per provisions laid in Art-370 Clause (1) Sub-Clause (b-i) & (b-ii). A number of references contained in C.O 48 THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1954 C.O. 48 of 14th May, 1954 do fall in the class of amendment to COI and that could be done only by the Parliament of India after reference/ declaration is made by President under Clause (1) Sub clause (b-i) & (b-ii). The expressions like “add”/ “substitute” in Article or In Clause ... of Article..... have been used in the said order. Article 35 & 35A; Article 368, Article 7, Article 19, could be quoted for examination. In a way it appears to me that Article 16 (rights to employment in

Government , Article 19 (right to property/ trade) have been violated even by the manner in which Article 35 A has been added in the Constitution of India by a simple Presidential order encroaching upon the powers of Parliament. It appears that the amendments have been ordered vide said order under the cover of Sub-Clause(d) of the Clause-1 of Article 370 of Constitution of India that does not empower the President to perform the functions of Parliament but only empowers the President to only order which laws passed by Parliament can be applicable to J&K also in toto or with some deletions/ modifications. Modification here surely does not mean that President can amend an Article of Constitution of India without absolutely making no reference to Parliament.

It is often said that J&K Laws are violating the fundamental rights of Indian Citizens since J&K has a Separate Constitution.: No it is not so due a 'separate Constitution' but it is due to the fact that J&K State had been allowed by GOI to violate some fundamental rights of Citizens of India and provisions as contained in Articles like Article 16 (Art- 16.1 There shall be equality of opportunity for all citizens relating to employment or appointment to any office under the State.16.2 No citizen shall, on grounds only of religion, race, caste, sex, descent, place of birth, residence or any of them, be ineligible for, or discriminated against in respect of, any employment or office under the State.16.3 Nothing in this article shall prevent Parliament from making any law prescribing, in regard to a class or classes of employment or appointment to an office under any State specified in the First Schedule or any local or other authority within its territory, any requirement as to residence within that State prior to such employment or appointment.

16.4 Nothing in this article shall prevent the State from making any provision for the reservation of appointments or posts in favour of any backward class of citizens which, in the opinion of the State, is not adequately represented in the services under the State) and Art-19 (19.1 All citizens shall have the right(a) to freedom of speech and expression (b) to assemble peaceably and without arms ; (c) to form associations or unions ; (d) to move freely throughout the territory of India ; (e) to reside and settle in any part of the territory of India ;(f) to acquire, hold and dispose of property ; and (g) to practise any profession, or to carry on any occupation, trade or business) while further defining the existing relationship of the State with the Union of India as an integral part thereof . And the Constituent Assembly incorporated in J&K Constitution the Sections like Section-51 (candidature for J&K Legislature) , Section- 127 (employment in J&K government institutions and Section-140 (voter eligibility for Assembly Elections). This has been done under the Cover of 'Article 35A' of constitution of India.

In a way the power of Parliament to make laws/Acts under Articles like Article 16, Article 19 to make special provisions for classes saving the fundamental rights was delegated to J&K Constituent Assembly/ J&K Legislature under Art- 35 A of COI. Property rights of Indian Citizens who do not hold PRC of J&K have been held back in a very concealed manner by referring to existing laws coming from the Maharaja Government.

The anomalies created by amending Article 35 of Indian Constitution by a Presidential order are against the spirit of COI . Adding after Article 35, the new Article 35 A in Constitution of India is amending the Constitution of

India by a Presidential order with the concurrence of State Government and could be seen as unconstitutional since Constitution of India can not be amended by a Presidential order under Article -370 but can be amended only under the provisions and procedure as laid down in Article 368 of COI. It has remained unquestioned over more than 6 decades. Although enough damage has been done to the Interests of India as a nation as well as citizens of India but still the corrections could be got constitutionally applied, if agreeable, reference could be made to Hon'ble Supreme Court of India .

Even Article 368 of Constitution of India has been unconstitutionally amended in the said Presidential Order. So strangely the amendments made to Constitution have been concealed from 'general audit' by not mentioning the same in the text of editions of main constitution and the amendments have been mentioned in the Appendix-1 [Constitution (application to Jammu and Kashmir) Order 1954}and the Appendix-II (Re-statement, with reference to the present text of the Constitution, of the exceptions and modifications subject to which the Constitution applies to the State of Jammu and Kashmir). The result has been that there may be some people even in the legal profession as well who are not aware of such amendments.

But since addition of Art- 35A in the COI and adding a Proviso to Art-368 are of serious implications, the same have been particularly discussed by me with in the capacity of my humble wisdom.

Maybe an expert /legal review of the contents of the orders like Constitution (Application to Jammu and Kashmir) Order 1954 would make a case for approaching the Hon'ble SC of India for applying corrections. I wish it could be placed

for review before the Apex court that (i) how could Article 368 of Constitution of India could be so handicapped as regards "application" to J&K Affairs. And in case even an amendment by Parliament of India by way of Clause -4 (No amendment of this Constitution - including the provisions of Part III- made or purporting to have been made under this article [whether before or after the commencement of Section 55 of the Constitution Forty second Amendment Act, 1976 shall be called in question in any court on any ground) and Clause-5 (For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article) to Art-368 is against the basic spirit of COI , then why is not Art- 35A of Constitution of India (even some more amendments) against the basic structure of Constitution of India since amendment of Constitution adding Article 35A has not been under Article 368 but by a simple Presidential Order. There has been a blanket violation of fundamental rights of citizens of India through an unconstitutional action/ actions . Clauses. (4) and (5) were ins. in Article 368 by s. 55 of the Constitution (Forty-second Amendment) Act, 1976. These section have been declared invalid by the Supreme Court in *Minerva Mills Ltd. and Others Vs. Union of India and Others* (1980) 2 S.C.C. 591.) [s.55 of Constitution Forty Second Amendment Act 1976 : 55. Amendment of article 368.- In Article 368 of the Constitution, after clause (3), the following clauses shall be inserted, namely:-"(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of section 55 of the Constitution (Forty-second Amendment) Act,

1976] shall be called in question in any court on any ground.(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend by way of addition, variation or repeal the provisions of this Constitution under this article."].

Some people of Kashmir valley have surely got into the web of such like 'clever' game plans of Valley centric leaders and hence the prime Indian leaders who still think that they can woo the Kashmiries simply by talking of Kashmiries being the only symbol of secularism will have to do some rethinking. Instead there is utmost need to do ground work and make the common man aware of their rights and for getting the unimplemented welfare provisions as laid in the Constitution of J&K executed through their elected representatives.

Unless real definitions and deformities are carried deep into the Indian masses (even to the senior leaders who have been otherwise working all these years for repeal/ modification of Article 370) under the present circumstances it may not be possible to check further damage in the immediate future.

Daya Sagar is a free-lancer scribe. He freely and critically covers social, education, economy, international relations, human rights, and subjects like J&K affairs/history of J&K. He has over 900 articles published in different newspapers / magazines .Engineer by profession with a Post Graduate Degree (1971) writer has . Professionally also has excelled as Engineer. He has worked in Private as well as Public Sector for 34 years. Sagar is an original thinker. He is working in the voluntary sector for the social / human needs & rights of the under privileged / needy since 1980.He has even headed some organisations like J&K Samaj Kalyan Kendra primarily working for the welfare of the Hearing Handicap)/ Handicapped / under privileged , Jammu Gramin Vikas Sanstha (working in the rural health and education sector), etc .Sagar is Advisor to International Human Rights Protection Council, Jammu(J&K). He has remained President of J&K Confederation of Voluntary, Social and Charitable Organisations. Daya Sagar has the distinction of having promoted the idea of Social Audit through a voluntary group-- Group Research and Audit on Social Programmes (GRASP INDIA) in 1990s. He is particularly working on promoting the concept of HUMANITARIAN COEFFICIENT (HQ) along with Intelligence Coefficient (IQ) since no intelligence is of use to Humanity unless it is used for the WELFARE / CAUSE of Others. VOICE of the unheard :

Working for carrying awareness to remotely placed Indians for standing against the divisive designs of those who promote caste or religion based politics. He is always available for joining any effort for the cause of humanity.

Daya Sagar belongs to a family that has remained associated politically and administratively with the times of Maharaja Hari Singh, Sheikh Mohd Abdullah / pre 1953 days/ times of Bakshi Gulam Mohammed/Shams u Din/ G.M. Sadiq / Sayed Mir Qasim/ Sheikh Abdullah 1975 once again. The cause of the rural, backward and economically weaker sections of society is priority number one for him.

Books by Daya Sagar: 1. J&K Affairs : Mishandled - Misquoted - Miscarried 2. Jammu and Kashmir State : 1947 Accession : Events Thereafter 3. Article 370 - Law and Politics- Daya Sagar Looks into the Mirror of A G Noorani 4. A Look Through the Mist : PDP Self Rule 5. History of Delimitation in J&K 6. Jammu Kashmir— A Victim of Personal Ambitions of some and Mis-handling by the Core Indian Leadership (under print)

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