

# A working paper on Kashmir – IV

By AG Noorani

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**A** lot of horse-trading will be inevitable on the drawing of the Line of Control. But it is best done as part of the dispute's resolution. If postponed, the LoC will become final in all its hideousness. The 'international boundary through Kashmir', an expression used in the 1963 talks, will be defined, with a map attached in an annexure to the Agreement on the Final Settlement of Jammu and Kashmir, the Shimla phraseology.

It would (a) contain provisions defining self-governance for both parts of the State; (b) provide for consultative bodies between them and between New Delhi and Islamabad; and (c) establish machinery for conflict resolution. The consummation should be crowned with a Treaty of Friendship and Cooperation between India and Pakistan, signed simultaneously with the Kashmir Agreement.

This brings us to the nitty-gritty of the accord, in its internal and external dimensions. Once the substantive part is agreed, the procedure whereby it can be finalised must also be agreed. Last, but not least, the constitutional hurdles which must be crossed in the ratificatory stage must be understood clearly. A Kashmir settlement based on a blend of the Manmohan Singh-Musharraf criteria poses no problem which is not soluble and no hurdle which cannot be overcome. It is necessary to put paid to the false notion that Kashmir already enjoys autonomy and Article 370 protects it. One of its architects, Nehru, himself admitted in the Lok Sabha on November 27, 1963, that Art 370 "has been eroded... This process of gradual erosion of Article 370 is going on. Some fresh steps are being taken and in the next month or two they will be completed". The Union Home Minister GL Nanda said on November 21, 1964, that Article 370 could serve as "a tunnel in the wall" (sic) to enlarge the Union's powers over Kashmir.

This was utterly unconstitutional, as President Rajendra Prasad pointed out in a Note to Prime Minister Nehru on September 6, 1952. Article 370 empowers the president to extend matters which substantially fall within the Instrument of Accession by 'consultation' with the state government; if they go beyond, its 'concurrence' was required provided it was sought before Kashmir's Constituent Assembly was convened (November 5, 1951) and was later

ratified by it. "Repeated recourse to the extraordinary powers" which authorise the executive to amend the constitution was wrong. Art 370 clearly envisaged that it should be "exercised only once" by a single order when Kashmir's Constitution was finalised. Its Constituent Assembly did so and dispersed on November 17, 1956. The ratificatory body vanishes. All subsequent increase of central power is void. The basic structure of the state's constitutional status was destroyed. A governor appointed by the centre replaced the Sadar-e-Riyasat elected by the state assembly. The main order of May 14, 1954, is questionable, though the assembly approved, on February 15, 1954, extension of some provisions of the constitution of India. But, as the Report of the State Autonomy Committee (1999) points out, the order went 'beyond' the Delhi Agreement of 1952 and was made hastily 'before' the State's Constitution was enacted (pages 46-47). Thereafter, New Delhi used its stooge chief ministers, elected by rigged polls, to accord the concurrence since the ratificatory body had dispersed.

In 1959, the Supreme Court took a correct view on this; but changed its view in 1968 'without referring to that ruling' though Justice M Hidayatullah was a member of both benches. Art 370 is the only provision which represented a compact negotiated between Nehru and Sheikh Abdullah between May and October 1949. Designed to protect autonomy, it was freely used to destroy it. The Supreme Court did not help. (AIR 1959 SC 749 and AIR 1970 SC 11; vide the writer's article, "Article 370: Law and Politics" in Frontline, September 29, 2000, reproduced in Constitutional Questions & Citizen's Rights; Oxford University Press, 2005; pages 371-384). The result? On November 19, 1971, Minister of State for Law Netiraj Singh Chaudhury, citing extensions of union powers, assured the Lok Sabha that Art 370 had been withering away and would vanish in course of time. That goal has been reached.

It is insulting to offer this husk of Art 370 as a substitute for 'self-governance' or 'autonomy'. There is no guarantee against future abuse. There is now a total collapse of the entire constitutional scheme in the relations between Kashmir and the union and within Jammu and Kashmir itself. The Sadar-e-Riyasat, elected by the State Assembly, has been replaced by a governor handpicked by New Delhi. A new constitutional set-up is called for. It is possible to devise it consistently with the Constitution of India. COURTESY FRONTLINE

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