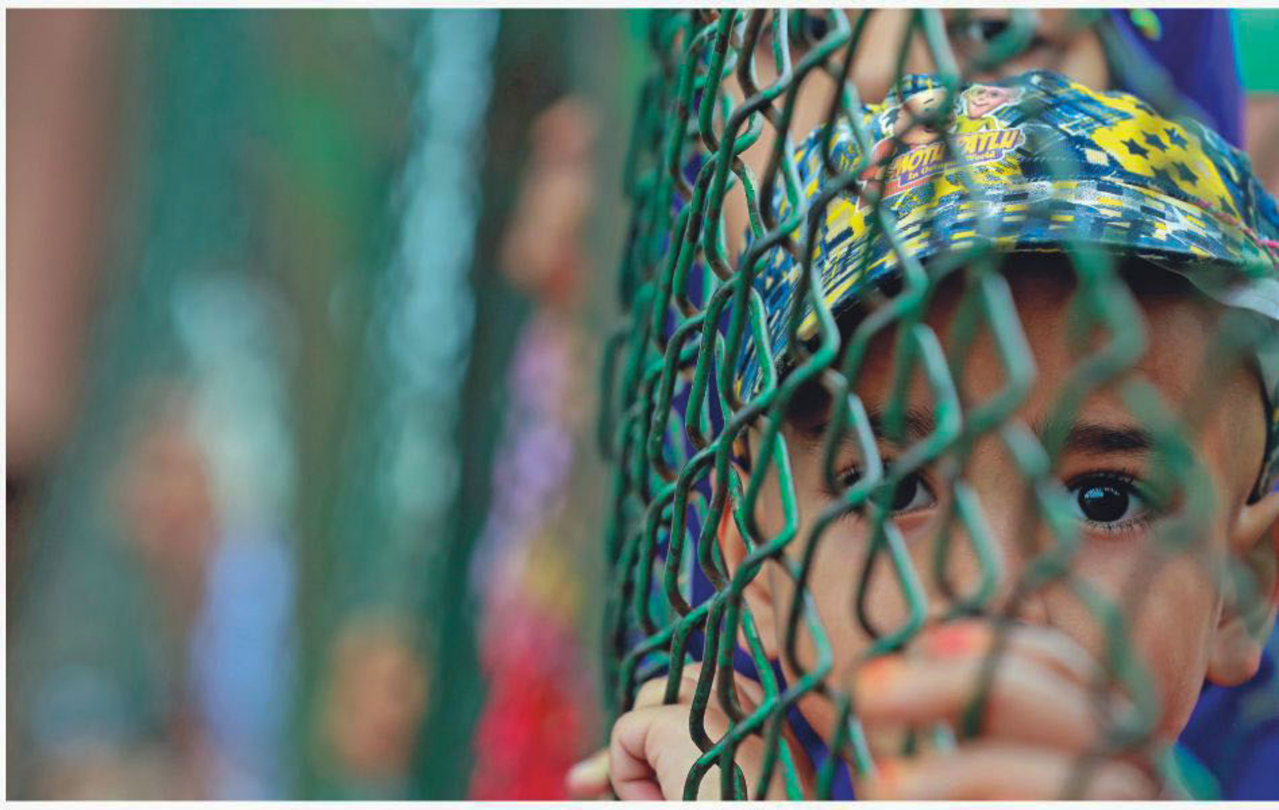
Sheikh Abdullah and Pandit Jawaharlal Nehru during the meeting of the Kashmir National Conference at Srinagar, September 24, 1949.

SOURCE: **KASHMIR LIFE**



A Kashmiri child looks from behind a fence at a protest site after Friday prayers during restrictions after the Indian government scrapped the special constitutional status for Kashmir, in Srinagar, August 16, 2019.

SOURCE: **REUTERS/DANISH ISMAIL**

Kashmir: Why Article 370 and why its abrogation will prove to be costly

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This year, on August 14 and 15, Independence Day of Pakistan and India, celebrations were tainted with the political tensions that followed the Bharatiya Janata Party led Indian Government's decision on August 5, 2019 to abrogate Article 370 and Article 35a, that granted special status to Jammu and Kashmir, including the right to have its own constitution and its own flag, and residents' rights and privileges, respectively.

Arundhati Roy, writing for the *New York Times* on August 15, 2019, describes the key historical stakes undergirding the current situation, "What happened in the Indian Parliament last week was tantamount to cremating the Instrument of Accession…In the 72 years since then, successive Indian governments have undermined terms of the Instrument of Accession until all that was left of it was the skeletal structure."

Maharaja Hari Singh of the Dogra Rajput Dynasty, signed the Instrument of Accession in October, 1947, after Pakistani forces from North-West Frontier infiltrated the Kashmir Valley, breaking the standstill agreements Kashmir had pursued with both Pakistan and India in September, 1947, to decide the future of the princely, independent state of Jammu and Kashmir. Like the Nizam of Hyderabad, Hari Singh had also imagined that he could've maintained Kashmir's independence amidst the chaos of Partition, evident in the 7th clause of the Instrument of Accession (IoA), where he explicitly mentioned, "Nothing in this Instrument should be deemed to be a commitment in any way as to acceptance of any future Constitution of India, or to fetter my discretion to enter into arrangements with the government of India under any such future constitution."

In negotiations between the Union of India and the Constituent Assembly of Jammu and Kashmir–formed in 1948–the particular conditions highlighted in the IoA were to be *protected* when Article 370 was drafted as Article 306a in 1949 by Gopalaswami Ayyangar, the first cabinet minister without portfolio in the first Union cabinet. According to Indian lawyer and constitutional expert, AG Noorani, "Article 370 recorded a solemn compact, neither side (State and Central Government) could amend or abrogate it unilaterally except in accordance with the terms of that provision."

But the Indian interpretation of the "special status" in Article 370 from the beginning meant integration of Kashmir to India. In his detailed exposition of Article 306a to the Indian Constituent Assembly on October 17, 1949, Ayyangar had stated, "As the House is also aware, Instrument of Accession will be a thing of the past in the new constitution…In the case of practice, all other states other than the state of Jammu and Kashmir...have been embodied in the Constitution for the whole of India...all other states have agreed to integrate themselves in that way and accept the Constitution provided." Famous poet and scholar, Maulana Hasrat Mohani, present at the Constituent Assembly had asked, "Why this discrimination please?" Ayyangar responded, "the discrimination is due to the special conditions of Kashmir. That state is not ripe for integration. It is the hope of everybody here that in due course even Jammu and Kashmir will become ripe for some sort of integration as with the other States."

Similarly, on November 27, 1963, Nehru declared in the Lok Sabha, "There is no doubt that Kashmir is fully integrated. We feel that this process of gradual erosion of article 370 is going on. We should allow it to go on. We don't want to take the initiative in this matter and completely put an end to Article 370." But there was no need to "put an end to Article 370", as Home Minister Gulzari Lal Nanda explained in the Lok Sabha on December 4, 1964, "the only way of taking the Constitution (of India) into Jammu and Kashmir is through the application of Article 370."

The tendentious "erosion" of Article 370 over time, however, cannot be understood without delving into the complex mesh of politics leading up to its enshrinement in the Indian Constitution, and the fact that the Instrument of Accession itself was to be ratified in a referendum vote. The UN Security Council's Resolution of April 21, 1948, following the first Kashmir War, stated, "the Government of India should undertake that there will be established in Jammu and Kashmir a Plebiscite Administration, on the question of accession to India or Pakistan." Prior to seeking out the UN, in a telegram dated, December 31, 1947, from Delhi to Indian Embassy at Washington, Jawaharlal Nehru wrote, "In order to avoid any possible suggestion that India had taken advantage of the State's immediate peril for her own political advantage, the Dominion Government made it clear that, once the soil of the State had been cleared of the invader and normal conditions restored, its people would be free to decide their future by the recognised democratic method of a plebiscite or referendum…"

Whether or not Nehru's words translated into an actual implementation of the plebiscite became an age-old controversy, a facet of which can be understood by examining his eruptive relationship with the most prominent Kashmiri politician of the National Conference, Sheikh Abdullah. As secularists, Nehru had rapport with Abdullah; on December 2, 1947, Nehru sent Hari Singh a letter saying Abdullah should become prime minister. But tension had begun brewing between Abdullah and the Indian lawmakers when Article 306a was being drafted by Ayyangar in 1949.

In a letter dated October 17, 1949, Sheikh Abdullah had written to Ayyangar, "I had told you that the draft of Article 306-A… was not acceptable to us, as it failed to implement the pledges given to us by Panditji on behalf of the Government of India…we submitted our alternative draft, which restricted the power of Parliament to make laws for the State and application of the provisions of the Constitution in relation to the State." In other words, Sheikh Abdullah, leading then the Constituent Assembly of Jammu and Kashmir initially rejected the unilateral alteration of Article 306a which bound the region to the Constitution of India, essentially violating the 7th clause of the Maharaja's IoA 1947, which had stated, "Nothing in this Instrument should be deemed to be a commitment in any way as to acceptance of any future Constitution of India."

In 1950 was issued, the first Presidential Order under Article 370, which stated, "In exercise of the powers conferred by clause (1) or 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—This Order may be called the Constitution (Application to Jammu and Kashmir) Order, 1950."

On the other hand, the plebiscite was still lurking in the air as suggested by extracts regarding the special provisions recorded in *White Paper on Indian States, Ministry of States, Government of India, Delhi 1950*, which stated "The Government of India, no doubt, stand committed to the position of the accession of this State is subject to confirmation by the people of the State."

Similarly, in a speech at a public meeting in Calcutta in 1951, Nehru said, "If, then, the people of Kashmir tell us to get out, we will do so…If tomorrow, Sheikh Abdullah wanted Kashmir to join Pakistan, neither I nor or all the forces of India would be able to stop it." But in his letter, that he had sent to Sheikh Abdullah on August 25, 1952, suggests otherwise. In that confidential note, that followed the Delhi Agreement 1952, which brought Kashmir and the Union of India closer by abolishing the monarchy and extending the jurisdiction of the Supreme Court of India to the State, Nehru wrote to Abdullah, "If the Constituent Assembly told India to get out of Kashmir, we would get out…As far as I know, the Constituent Assembly will not do such a thing."

In the same note, he also ended the lingering climax–the difference between his public democratic stance on Kashmir, and the void of a plebiscite–as he stated to Abdullah, "after some experience of the UN, I came to the conclusion that nothing substantial could be expected from it…I have not mentioned the plebiscite, because it became clear to me then that we would never get the conditions which was necessary for a plebiscite..."

The relationship between the two politicians went downhill from there, and eventually led to the Kashmir Conspiracy case—a legal case launched by the then Sadr-i-Riyasat (Head of State) Dr Karan Singh, (son of the erstwhile Hari Singh) in conjunction with the Investigative Departments of the Government of India, that accused Sheikh Abdullah and Mirza Afzal Beg for allegedly espousing the idea of an independent Kashmir and thereby conspiring against India. Abdullah was replaced by Bakshi Gulam Mohammad. On February 15, 1954, Bakshi and 64 of the 75 members of the Constituent Assembly cast a unanimous vote ratifying the Jammu and Kashmir's accession to India. *The Hindu* recorded on February 17, 1954 that premier Bakshi had, amidst cheers, declared, "We are today taking the decision of final and irrevocable accession to India and no power on earth could change it."

Debates on whether the new Constituent Assembly's motives were genuine, or rather, manoeuvred by political games, are still ongoing today. AG Noorani's article "A Dubious Constitution," published on the *The Hindu's Frontline* in January, this year, opined on the unresolved controversy, "All the main committees were 'reconstituted.' It was such an Assembly which accorded its 'concurrence' to the increase in the Centre's powers over Kashmir and which drafted its Constitution." Noorani's basis for the claim stemmed from "a note of July 31, 1953, recorded by Nehru's private secretary and confidante M.O. Mathai (Selected Works of Jawaharlal Nehru, hereafter SWJN, Volume 23, pages 303-305)," which allegedly "contained detailed instructions for Sheikh Abdullah's dismissal from the office of Prime Minister of Jammu & Kashmir and his arrest, complete with the role of the Army and the rest."

The Constitution of Jammu and Kashmir, which was also drafted in 1954 and came into full force in January, 1957, included the third clause (part II: The State), "The State of Jammu and Kashmir is said and shall be an integral part of India." Once the Assembly surreptitiously ceased to exist (it dissolved itself on November 17, 1956), no Presidential order could at all be made thereafter, for the ratifying body was gone. "Yet, 47 such orders were made after November 17, 1956, with 'the Concurrence' of the State governments," writes Indian lawyer, A. G. Noorani.

On May 14, 1954, the "Major Presidential Order under Article 370" finalised the incorporation of Article 370 in the Amendment of the Constitution section, Part XXI, while in Appendix I, Constitution (Application to Jammu and Kashmir) Order, 1954, added a new article named Article 35a, that warranted special rights relating to permanent residents of Kashmir, such as protection from acquisition of Kashmiri property.

Article 370 specifically exempted Jammu and Kashmir from complete applicability in relation to the Constitution of India, limited Central Legislative Powers to foreign affairs, defence and communications, ratified that other constitutional powers of the Central Government could be extended only with concurrence, and mentioned that the provision could be abrogated or amended only upon the recommendation of the State's Constituent Assembly. This last part is mentioned in a specific clause in Paragraph (3) as "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 exceptions and modifications and from such date as he may specify: Provided that the recommendation of the Constituent Assembly of the State referred to in Clause (2) shall be necessary before the President issues such a notification." It was incorporated under "temporary, transitional and special" provision in that its applicability was intended to last till the formulation and adoption of the State's (Jammu and Kashmir's) constitution.

Earlier in a statement to the State Constituency on the Delhi Agreement 1952, on August 11,1952, Sheikh Abdullah explained that "the temporary nature of this Article" arose "merely from the fact that the power to finalise the constitutional relationship between the State and the Union of India has been specifically vested in the Jammu and Kashmir Constituency." Ayyangar, in his detailed exposition of the draft in October 17, 1949, also wrote, "Till a constituent assembly comes into being, only an interim arrangement is possible." Put another way, at face value, the temporality of Article 370 at the time, agreed by both the Central and State government, meant standstill autonomy of Jammu and Kashmir. However, as we showed earlier, Ayyangar and the Union of India's main goal was to integrate Kashmir, rather than extending autonomy.

But Article 370 was not only eroded by the efflux of its 1959s birthing decade. It was rather a gradual process of denuding its content by the Central governments that succeeded Jawaharlal Nehru, after he died on May 27, 1964.

In 1975, Sheikh Abdullah and Prime Minister, Indira Gandhi agreed to a common ground to deter his movement on plebiscite fronts and nominal autonomy of the region under Article 370. Known as the "Kashmir Accord," the document dated November 1974, included in its second clause, "the residuary powers of legislation shall remain with the State; however, Parliament will continue to have power to make laws relating to the prevention of activities directed towards disclaiming, questioning or disrupting the sovereignty and territorial integrity of India…or causing insult to the Indian National Flag, the Indian National Anthem and the Constitution."

Shortly after, in February 25, Indira Gandhi withdrew support, and the accord collapsed.

On July 23,1975, the President made an Order. No. C.O. 101, supposedly under Article 370, to amend the State's Constitution to debar the State's Legislature from amending Kashmir's Constitution in respect of the Governor, the Election Commission, and even the composition of the upper house, the Legislative Council "being matters specified in Sections 138, 139, 140 and 50 of the Constitution of Jammu & Kashmir" unless it received the Government of India's consent. Section 147 of the State's Constitution requires the Governor's assent for constitutional amendments. This further curtailed the special status, and fuelled public turmoil, for which was introduced a seditious Public Safety Act 1978, that allowed authorities to carry out "preventive detention" of non-violent dissenters on grounds of being threats to the law and sovereignty of India.
The law still remains uncontested, while last year in June, a UN report was published, titled "'Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan", that revealed that over 1,000 Kashmiris were held under the PSA between March 2016 and August 2017.

Twelve years after the aborted 1975 Kashmir Accord, the messy politics of Kashmir reached a breaking point, after Faroq Abdullah leading Muslim United Front, who was expected to win the 1987 elections lost to now-turned pro-India, National Conference Congress. It was widely believed that the elections had been rigged, and that it had caused widespread disillusionment among the Kashmiris who felt that their voices had been repressed once again. On September 14, 2002, *BBC News* revealed that Khem Lata Wukhloo, a leader of the Congress Party at the time, recalled, "I remember that there was a massive rigging in 1987 elections. The losing candidates were declared winners. It shook the ordinary people's faith in the elections and the democratic process." And so, many writers such as Arundhati Roy and AG Noorani, believe that the election manipulation was the watershed that transformed the non-violent demands for autonomy to a blustering struggle for freedom.

It would be foolhardy to not mention the involvement of Pakistan who did not want any peaceful resolution of the Kashmir problem and used every opportunity to fuel the fire of discontent in the area. It provided arms and radicalised a section of Kashmiris and fomented the conflict between Jammu and Kashmir and India. After the 1987 agitation following the allegedly rigged elections, Pakistani involvement increased and gave it a jihadist form. The situation aggravated further as Hindu nationalism in India arose in India. Over the last 30 years, an estimated 70,000 people, civilians, militants and security forces have been killed in the conflict.

Kashmiri rights activists overtime were deemed as "separationists"—untrustworthy subjects whose credibility in seeking autonomy were undermined by alleging their affiliations with Islamist terror groups. In a televised address to the nation on the August 8, Narendra Modi in explaining the BJP's latest step said that Article 370 was being used as a weapon to wield terrorism, and that the "historic" decision will now be able to free Jammu and Kashmir from terrorism and separatism.

What Arundhati Roy refers to as "military lockdown" today parallels news reports of 1949, that described Jammu and Kashmir as a police state. But the similarities between the current situation and the past end there.

While Jawaharlal Nehru and his successors acted out of what they thought to be in the national interest, they did so within legal parameters set by the Article 370. In other words, they at least acknowledged that a distinct voice of Kashmir exists. Narendra Modi set out to banish those very parameters and silence that voice entirely, which represents a fundamental departure from the history of Jammu and Kashmir.

As widely understood from the Indian perspective that propelled its drafting, Article 370 was enshrined as a tunnel that would slowly integrate Jammu and Kashmir. But for all these years, integration was attempted through negotiations and talking with the Kashmiris. But Hindu fundementalist BJP has ended the possibility of further discussions. To them, the ideals of Hindutva represent India, and Kashmir as an "integral part of India" should now be integrated into that national identity. In an interview with HuffPost India on August 5, 2019, AG Noorani said, "What they mean by integration is just to remove its identity."

If leaders had previously eroded Article 370, it is Narendra Modi's government that murdered it, and such, the Indian Historian, Irfan Habib, has dubbed the scrapings as an "act of betrayal against the Kashmiri residents."

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