

A working paper on Kashmir

By AG Noorani

The moment has arrived in the relationship between India and Pakistan where only a great act of faith is required of both to find a permanent solution to the Kashmir dispute

PARLIAMENT has enacted a law which 'permits' cession of territory. The Unlawful Activities (Prevention) Act 37 of 1967 penalises advocacy of secession or questioning of India's "territorial integrity". But Section 13 (3) says: "Nothing in this section shall apply to any treaty, agreement or convention entered into between the Government of India and the government of any other country or to any negotiations therefore carried on by any person authorised in this behalf by the Government of India". Cession of territory is an exercise of sovereign power. An Act of Parliament, assented to by the president, overrides resolutions.

In the Rann of Kutch case (Maganbhai vs Union of India AIR 1969 SC 783), the Supreme Court ruled that no cession of territory was involved in a resolution of a boundary dispute. If it does, constitutional amendment would be required. But little is it realised that in respect of Kashmir that would not be necessary.

Remember that the Constitution of India was enacted when the dispute was before the UN Security Council and plebiscite was official policy. Article 370 was so drafted as to facilitate the state's secession, if India lost the plebiscite. Time has rendered it impossible. It has not affected the constitution.

Moving for the adoption of Art 370 in the Constituent Assembly, N Gopalaswamy Ayyangar said: "We are still entangled with the UN in regard to J&K. We shall be free from it, but that will take place only when the Kashmir problem is satisfactorily settled" (*Constituent Assembly Debates*, October 17, 1949, Vol X, page 424). Which is why Krishna Menon assured the Security Council on February 8, 1957: "If as a result of a plebiscite, if ever it did come, the people decided that they did not want to stay with India, then our duty at that time would be to adopt those constitutional procedures

which would enable us to separate that territory" (*Kashmir: Mr Krishna Menon's Speeches in the Security Council*; Publications Division, 1958, page 128).

The Ministry of External Affairs' Secretary-General GS Bajpai gave a similar assurance to the United Nations Commission for India and Pakistan (UNCIP) on November 21, 1949 ("cease to operate"; S/1430/Add 1; page 166), and so did Nehru to parliament on June 26, 1952 ("we would change our Constitution about it"; *SWJN*; Vol 18; page 418). What 'were' the "constitutional procedures" which Krishna Menon had in mind? Simply, an Order by the President under Clause (3) to Art 370 to declare "that this article shall cease to be operative". Article 1 of the constitution, establishing the Union, applies to Jammu and Kashmir by virtue of Clause (1) (C): "The provisions of Article 1 and of this Article shall apply in relation to that State." The effect of an order under Clause (3) would be to sever Jammu and Kashmir's links with India. Union Home Minister SB Chavan warned parliament as much on March 1, 1993, about this "only link". So did prime minister PV Narasimha Rao on June 2, 1996: "Abrogation of the Article is just not possible, unless you want to part with the State." It stands to reason that if India could, under the constitution, allow the State entire to secede, it could with perfect legality cede to Pakistan the part it now administers and without a constitutional amendment, too. Ratification of the accord is another matter.

For, there is another provision which treats the future of Jammu and Kashmir as an open question and permits accord on it. Article 253 is an overriding provision for implementing by law not only a treaty or agreement but also "any decision made at any international Conference", even on a matter in the State List. But in regard to Jammu and Kashmir, it has this proviso: "Provided that after the commencement of the Constitution (Application to Jammu and Kashmir) Order, 1954, no decision affecting the disposition of the State of Jammu and Kashmir shall be made by the Government of India without the consent of the

Government of that State."

We are not making any such decision on Jammu and Kashmir's "disposition", only writing off legally what has not been ours in reality since January 1, 1949, if not earlier. All that an accord on the lines mentioned earlier requires is an Order under Art 370 (3) to accomplish two objectives; first, vis-a-vis the State, to give effect to the new settlement on its autonomy in place of the one that was battered beyond recall. Clause (3) also says that Art 370 can be made "operative only with such exceptions and modifications and from such date as he (the president) may specify". 'The Order should delete the word "temporary" in the marginal note and the president's power to make further Orders' - a power he never legally had in any case - and thus 'entrench the new accord so that neither the Union nor the State can alter it unilaterally'. This Order will restore Jammu and Kashmir's autonomy, its self-governance, and undo the wrongs so brazenly perpetrated since 1954. But, a proviso says that the recommendation of the State's Constituent Assembly "shall be necessary before the president issues such a notification".

This very requirement in Clause (2) did not deter the Union from eroding Art 370 even after that assembly had vanished on November 27, 1956. It did so through the state government, which readily accord "concurrence". A new Legislative Assembly elected under a New Settlement can make the recommendation. In strict law, this would not be valid. But sheer necessity faces us after years of gross constitutional abuse. In the Bihar Assembly dissolution case, Justice Arijit Pasayat cited rulings of the European Court of Justice on moulding reliefs in the light of necessities. (*Rameshwar Prasad versus Union of India*, 2006, 2 Supreme Court cases 1 at page 237). Judges reckon with realities.

We are embarking on a new constitutional regime building on the foundations of the old, wiping out the debris of the wrongs. Courts are not blind to political realities. Could the British Parliament have repealed the Indian Independence Act, 1947, the day after it was enacted or after August 15, 1947? A similar argument a propos the Statute of

Westminster, 1930 (on the Dominions' independence), was ridiculed by the Privy Council in *British Coal Corporation & Ors vs The King* (1935) AC 500. "The Imperial Parliament could as a matter of abstract law repeal or disregard the Statute. But that is theory and has no relation to realities."

No court can ignore the facts of history or the cardinal fact that Jammu and Kashmir remains a member of the Union; that India and Pakistan notified withdrawal of the question from the UNSC, and concluded a treaty to crown their achievement. India prepared a draft treaty on the eve of the Tashkent Conference in January 1966; but "within an hour it was bodily returned to us", CS Jha, foreign secretary, records (*From Bandung to Tashkent*, page 231). In a White Paper on Jammu and Kashmir in 1977, Bhutto admitted that, quoting an Article. On August 13, 1982, foreign secretary MK Rasgotra presented a draft "Treaty of Peace, Friendship and Cooperation" when he went to Islamabad. It ran into 14 Articles (for the full text vide the writer's article "No-war pact parleys"; *Frontline*, January 14, 1994).

The alternatives are grim - continued strife; an estranged neighbour, snubbed for its overtures for peace; and an alienated populace to whom nothing is offered - not even relief from violations of human rights. Only the political will needs to be mustered. The Constitution 'facilitates' accord.

On the eve of the signing of the Anglo-Irish Treaty on December 6, 1921, a wise statesman, Austen Chamberlain, counselled die-hard Unionists at a party conference on November 17, 1921: "Now and again in the affairs of men, there comes a moment when courage is safer than prudence, when some great act of faith touching the hearts of men and stirring their emotions achieves a miracle that no art of statesmanship can compass. Such a moment may be passing before our eyes now as we meet."

Such a moment has now arrived in the relations between India and Pakistan and a great act of faith is required of both. COURTESY FRONTLINE

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