

Legal Perspective Of Kashmir Issue

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Abstract

With just a passage of nearly 70 years post-independence, people belonging from the previously known state, Jammu and Kashmir are still expecting all rights of self-determination, as secured by the UN. It is stated that there exist nearly 25 resolutions by the United Nations, lined-up to answer this issue, where India is quite reluctant in granting the people of Kashmir with proper self-determination rights. Since the previous 25 years, the Indian Security Forces are doing hard duties in Indian Held Kashmir (IHK). Where the disagreement concerning the state under question is a difficulty of self-determination right for the people living in Kashmir. The Kashmir issue is a burning issue in the Indian Politics. Thus, the current study throws the light on the Legal Perspective of Kashmir Issue.

Introduction

The India-Pakistan partition which took place in 1947 proved to be the biggest source of tension among the two states, which gave rise to the dispute of princely state of Jammu and Kashmir. Few months after the partitions, an expression of fear stated that “the problem of Kashmir may well drag on for several years before a definitive solution is reached.”¹ This stood correct for approximately 50 years, with three of the major wars fought between Indian and Pakistan army, the dispute is still fresh and might result in heavy hostilities in the area.

We still can't deny the fact that the main source of disputed took place in British India before independence, although it can be said that the fire-up to this conflict was the way in which the two nations were partitioned after the end of the British Raj. Disputes among the two nations were unavoidable, however were triggered because the Britishers were not able to make sufficient provisions as per the postcolonial order, specifically in terms of the future these nations will have in the coming years. However legal claims for Kashmir were valid as

¹ Pitman B. Potter, The Principal Legal and Political Problems Involved in the Kashmir Case, 44 AM. J. INT'L L. 361 (1950).

provided by both the nations post-independence, these were then diluted with politics where the absence of international will on such an extent, that their relevance is long lost. Although, every party's persistence over the acceptability of their arguments as well as prevailing some unilateral acts helps in creating a stalemate which are not willing nor politically able for conceding to any ground. These issues have now risen up to an extent where an approach of strict legalistic are not workable any longer and should be abandoned so as to work in an approach which is more equitable and conflicts in some solution.

Kashmir's Status and the Accession

The largest princely state, Kashmir holds a geographically strategic position among the new territories and with Soviet Union and China borders. Near about 80% Muslims resided in the Kashmir part of the state by 1947, where the Hindu and Buddhists population constituted to reside in two of the five regions of the state.² Economically and geographically, Kashmir is also quite closely touching the territory of the area which comes under the neighboring country Pakistan. The region was connected with the outside world with Srinagar-Rawalpindi Road and Indus River, where both were connected to Pakistan. Provided such natural connections, it was logical that Kashmir has an accession with Pakistan.

Maharaja Hari Singh was at that time the ruler of the Kashmir who was Hindu by caste.³ In opposition with the concept to be linked to Pakistan, the ruler felt quite reluctant to agree with India with a fear of losing power politically.⁴ Hari Singh then entered a Standstill Collaboration with the newly formed government of Pakistan in August'1947 where the nation attempted for administrating the operation of railroad and communication services in

² The religious compositions of the five regions were as follows: the regions of Vale of Kashmir and Poonch both held Muslim majorities of at least 90%; the Gilgit region also contained a Muslim majority; the Jammu region was 59% Hindu; and the region of Ladakh and Baltistan was predominantly Buddhist. Howley, supra note 10, at 88.

³ Shahid Javed Burki, PAKISTAN: THE CONTINUING SEARCH FOR NATIONHOOD 191 (1991). Kashmir was ceded by the British to Gublab Singh and his heirs under the 1846 Treaty of Amritsar in exchange for a sum of money. Riyaz Punjabi, Kashmir: The Bruised Identity, in PERSPECTIVES ON KASHMIR.

⁴ SarDesai, supra note 4, at 83 (describing the Maharaja's fear of dominance by the National Conference of Kashmir, which was closely linked to Nehru's Congress Party).

Kashmir.⁵ There exists written proofs that at time he took into consideration the concept of independent Kashmir.⁶

The concept of freedom did not have a long-lasting effect, as the states started to experience certain aspects of unrest. October 22, 1947 a group of Muslims revolted in the District Poonch of Kashmir where an inter-communal subsequent violence gave rise to Kashmir Invasions under the Pakistani Pathan tribesmen.⁷ On the same time, an accusation was made by the Kashmir authorities in the government of Pakistan regarding the serving lines being supplied in Kashmir. Eager for maintaining his grip on power, Maharaja Hari Singh asked India for help. By 26th October he appealed in front of India's then Governor-General, Lord Mountbatten, for the army intervention, and on same day executed the Instrument of Accession. Next day the General formally accepted his accession, and declared, "I hereby accept this Instrument of Accession." In writing⁸

Legality of Accession

The mechanism then carried out was set in legal terms which provided to determine the future these princely states had, although the legal impact of Accession as well as the Indian Government acceptance given by Mountbatten became a topic of debate. It led to a wild argument regarding the acceptance of this accession by the Indian government was just a provisional method allowing the intervention of Indian Army.⁹ This accession was just a legally temporary tool used for permitting assistance. Such perspectives heavily depend in the content letter written by Mountbatten to Hari Singh, specifically stating that the dispute of accession must only be referred to the people residing in Kashmir. More support to the temporary terms of accession were discovered in statements released by Jawahar Lal Nehru, then Indian Prime Minister showing their government believes that a conditional accession must be supported with the referendum of the people of Kashmiri.¹⁰

⁵ James Howley, *Alive and Kicking: The Kashmir Dispute Forty Years Later*, 9 DICK. J. INT'L L. 87, 87 (1991).

⁶ Pervaiz Iqbal Cheema, *Pakistan, India, and Kashmir: A Historical Review*, in PERSPECTIVES ON KASHMIR, supra note 4, at 96-97.

⁷ Howley, supra note 10, at 89-90. The violence resulted in the massacres of over 200,000 Muslims

⁸ James Howley, *Alive and Kicking: The Kashmir Dispute Forty Years Later*, 9 DICK. J. INT'L L. 94 (1991).

⁹ Howley, supra note 10, at 95; Khan, supra note 2, at 508; Potter, supra note 1, at 361; Tremblay, supra note 64, at 481.

¹⁰ Ibid.

Another argument stated that this accession must only be legally effected when this was confirmed by a plebiscite. Partition took place during the time where the details of self-determination was still under process of acceptance under international law, and were also added to the United Nations Charter by the year 1945. Most of the pre-partition debate used languages were couched for the self-determination rights which claimed for Kashmir post the accession in turn invoked this rule. A way by which Kashmir ascended into India was hence criticized in the form of violations of the self-determination principle.

However, such arguments had some merit, these were not much persuasive. An accession must be analyzed specially in 2 levels: International and Domestic Law. Under domestic, the Act of India's Independence turned out to be controlling. The act of Indian Independence had no referendum or plebiscite requirement, as ratification of or prior to the accession stated by the ruler of the state.¹¹ This although did help in providing that a dominion must be continued under the governance of 1935 Act under Government of India.¹² This act earlier stated that "an Indian State shall be deemed to have acceded to the Dominion if the Governor-General has signified his acceptance of an Instrument of Accession executed by the Ruler whereby the ruler on behalf of the State declares that he accedes to the Dominion."¹³ Hence, as per the two acts, Kashmir was the part of Indian Dominion after the delivery of Instrument of Accession as well as its statement of formal acceptance by Lord Mountbatten, irrespective of subsequent political statements or personal letters.

In fact, with an accession of nearly 500 instrument of accession princely regions of India and Pakistan were carried out with the signing of instrument of accession by their rulers and was accepted by the dominions respectively. It can be confirmed by a set of Academic writings that as even with clouded conduct of politics and the parties of the day, Kashmir acceded to India and then became an important part of the nation after the acceptance of Instrument of Accession.¹⁴

The number of statements released by the Indian Government about the Kashmiri plebiscite states some unilateral pronouncements which had no such effects on the real

¹¹ See generally Indian Independence Act, 1947. In spite of the clarity of the Act, one author simply concludes that, "though there was no mention of provisional accession in this Instrument of Accession or the formal acceptance, it clearly was part of the instrument." Howley, *supra* note 10, at 95.

¹² Indian Independence Act S 8(2).

¹³ Government of India Act, 1935.

¹⁴ MICHEL BRECHER, *THE STRUGGLE FOR KASHMIR* (1953); Taraknath Das, *The Kashmir Issue and the United Nations*, 65 POL. SCI. Q. 264, 268 (1950);

accession of Kashmir into the already set Dominion under the Act. As per the analysis of international law, an idea of self-determination should also be thoroughly examined. There exist no doubts regarding the concept of self-determination to be a lawful norm under the international law,¹⁵ and are arguable regarding the fact that it became a part of international law. The inter-temporal law doctrine, although with the situation under question should be analyzed under the effect of international law rules and their practice on that time.¹⁶

Hence, the self-determination status of the year 1947 should also be considered. The act of Self-determination was first declared by the Charter of United Nations, 1945 but was mentioned in “limited” terms only. Its significance increased gradually with time. 1960s was the crucial time for the development of this Act. In this time period, many noteworthy instruments of international level went under adoption along with the declaration of the Granting Independence to Colonial Territories and Peoples,¹⁷ 1541 General Assembly Resolution,¹⁸ the International Covenant on Economic, Social and Cultural Rights, the International Covenant on Civil and Political Rights, and the Declaration on Principles of International Law concerning Friendly Relations and Co-operation among States in Accordance with the Charter of the U.N.¹⁹ Later on an adoption of 1970 declaration, was considered for marking a complete evolution of the self-determination norm into number of international law.²⁰

A crucial step in self-determination evolution in terms of International Laws happened after the independence. Hence it can be concluded that, self-determination doctrine was not applicable to the binding law of Kashmir in the year 1947. Hence, an argument stating the legitimately acceding into the country does not rest on the proposition, however the principles of self-determination and its application are also discussed further.²¹

Kashmir comprised of every element which a country must fulfil:

- (a) Kashmir has its own deity, language, and a distinct culture.
- (b) It has its own history of self-governance as well as independence.

¹⁵ JOSHUA CASTELLINO, INTERNATIONAL LAW AND SELF-DETERMINATION 149 (2000).

¹⁶ BROWNLIE, *supra* note 97, at 129 (discussing application of the doctrine of intertemporal law)

¹⁷ G.A. Res. 1514, U.N. GAOR, 15th Sess., Supp. No. 16, U.N. Doc. A/4684 (1960).

¹⁸ G.A. Res. 1541, U.N. GAOR, 15th Sess., Supp. No. 16 at 29, U.N. Doc. A/4684 (1960)

¹⁹ G.A. Res. 2625, U.N. GAOR, 25th Sess., Supp. No. 28, U.N. Doc. A/8018 (1970).

²⁰ Joshua Castellino, International Law And Self-Determination 149 (2000).

²¹ Part V.A (considering the role of self-determination in resolution of the conflict)

(c) Its is a home to nearly 13.7 million of population.

(d) Natural resources are found in abundance

(e) Territory of Kashmir is bigger than many states of Asia, Europe and Africa.

Article 370 and Integration of Kashmir into India

In India, a debate over Article 370 of the Indian Constitution, is underway, which provides Indian held Kashmir, a special prominence. Considered it as an election promise by the Indian leaders, especially leaders from BJP, irritant effect of Article 370, leaders seem to stay away from this agenda. However, in Indian occupation, people of IHK face real problems due to brutalities, daily crackdowns, and human rights violations. Still under the usual situations, even Article 370 is a mark of external occupation for them, until they accomplish their right of autonomy, Kashmiri from IHK will similar to protect it. Indian efforts to conflict the repealing article 370, in the first instance human rights violation by its security forces, the people of occupied Kashmir would like India to rest up all this. Through UN supported referendum then they would support the application of UN resolutions (right of self-determination). Due to the fixed approach of India towards both, it seems to have a quick involvement of United Nations and international community to implore India. Though, ever since 1947 Kashmiri people have been struggling against, it is the Indian law over occupied Jammu and Kashmir in specific, anyhow it is continuation of the Article 370 or Indian occupation.

Presidential order of 2019 in relation to Jammu and Kashmir

As per an announcement declared by the Indian Parliament: *Rajya Sabha* by Indian Home Minister Amit Shah, On 5th August'2019 that the Indian President had sanctioned it under Article 370, overriding the Constitution Order of 1954, the constitution Order, 2019 (C.O. 272) both applicable to the state of Jammu and Kashmir. This declaration specified that entire Indian Constitutional provisions are functionalized to Jammu and Kashmir. A recent declaration removed all restrictions specified through the 1954 order. Results in a split Constitution of Jammu and Kashmir erected repudiate. Union government appointed the Governor after the President sanctioned the order with the "agreement of the Government of State of Jammu and Kashmir". Clause (4) with four sub-clauses to Article 367 under "interpretations" added through the Presidential Order 2019. The saying "Sadar-i-Riyasat substitute on the service and recommendation of the Council of Ministers" should be

interpreted as "Governor of Jammu and Kashmir". The Governor included in saying "State government"

Recited "Legislative Assembly of the State", in the statement "Constituent Assembly of the State referred to in clause (2)" is in proviso to clause (3) of Article 370 of the Constitution, Of the period since 1954 under same conditions of the state under the ruler of presidents as per Jill Cottrell, a few of the Presidential orders underneath Article 370 were sanctioned. To mean the Governor, the Union governments under these conditions understood the "agreement of the state government". Home Minister Amit Shah enthused a resolution reference, directly post the declaration of Presidential Order 2019 in front of Rajya Sabha, that the president issues an order under Article 370(3) interpreting all sections of Article 370 out of order.

The president sanctioned on 6 August 2019, the Constitutional Order 273 substituting a present content of Article 370 under the phrase: After the resolution was approved and accepted by both parliament houses.

Most provisions of described Constitution, revised from moment to moment, not having any exclusions or alterations, shall affect the State of Kashmir and Jammu notwithstanding whatever conflicts present in report 152 or article 308 or other rule under the Constitution or other provision of the Constitution of Jammu and Kashmir or maybe any law, booklet, opinion, ordinance, purchase, by law, principle, notification, regulation, customized or maybe consumption getting the strength of Indian territory law or maybe another tool, understanding or treaty as predicted within article 363.

Change of status of Jammu and Kashmir

On 5 August 2019, with an announcement of Rajya Sabha by the Home Minister Amit Shah presented the Jammu and Kashmir, 2019 Redeployment Bill. This converts present status of Jammu and Kashmir's to two different union territories known by Union Territory of Ladakh and Union Territory of Jammu and Kashmir. Both have different proposals to apply on, a legislature beneath the bill is proposed to the union territory of Jammu and Kashmir where this is not to have one to the union territory of Ladakh. At the end of the day session, in the Rajya Sabha, the bill with the favor of 125 votes was passed whereas 61 votes (67%) contradict the bill resolutions. By the following day, in Lok Sabha the resolution bill with the favor of 370 votes was passed whereas 70 votes (84%) contradict the bill resolutions. After

the president signed the bill it regulates as an act. On 31 October 2019, the two union territories are arranged to come into actuality.

Review of Literature

With a large concern for the Indian Democracy, Behera (2000) transmits the subject of Kashmir. Certain modern state structural characteristics are divisive as per the author and stay discontent in its polity and at the roots to appropriate the certainty of Indian condition, the western ideal of country state has showed inadequate happens to be multi-religious. To pluralities of persons and publics author proposes two ways to contribute appearance. First one works on bracing customs and second one seems to be postmodern that purposes for public actions. As according to author review, the basic reason of secessionist actions in the country have been acknowledged as sub national assembly individualities where that Indian national incorporation scheme has left away. Advocates for the opinions from civil society Bhabani Sen Gupta (2014), plays a crucial role for associating Indo-Pak enmity. As per his assurance solving of the Kashmir argument is a must for real progress. India for keeping this issue of Kashmir intact will lead to an impossible counterfeit to the connections of friendship along with cooperation with Pakistan as well as keeping war like scenarios at the same time in Kashmir will disrupt the amity process and jeopardize. To be succeeded in the area, he is expectant of the peace. The requirement is to count even the small progress along with the time allotted for blooming creativities

Objectives

1. To study the Kashmir's Status and the Accession
2. To review the Legality of Accession
3. To analyze the Article 370 and Integration of Kashmir into India
4. To study the Presidential order of 2019 in relation to Jammu and Kashmir
5. To discuss the change of status of Jammu and Kashmir

Research Methodology

A doctrinal strategy to carry out this research is used which outlines the technique in which the research work is carried out as well as other things that methods used here. This research was completed using the secondary source of information like websites, newspapers, magazines, etc.

Conclusion:

Disputes in Kashmir is considered the biggest concern for Indian Democracy. Some of the modern state features of structure are divisive in nature and exists as the source of unrest and tension in their polity. A western model of this state of the country is proving to be not much adequate for fitting in the reality of Indian situations, that consists of people from multi-racial society, are multi-lingual, multi-ethnic, and multi-religious. Article 370 added in the constitution of India provided a dignified status to the state of Jammu and Kashmir in India, geographically located on the top of the Indian subcontinent, where the larger part is covered by Kashmir, which is home to one of the major dispute of the world, regarding the neighboring countries of China and Pakistan since the independence, demanding to have a power of following a differently set constitution, different flag for the state and autonomy on an internal state administration. The Indian government revoked this status enjoyed by them in August 2019, as per a Presidential Order following a series of resolution stated in the Parliament.

References

Pitman B. Potter, The Principal Legal and Political Problems Involved in the Kashmir Case, 44 AM. J. Int'l L. 361 (1950).

Shahid Javed Burki, Pakistan: The Continuing Search For Nationhood 191 (1991). Kashmir was ceded by the British to Gulab Singh and his heirs under the 1846 Treaty of Amritsar in exchange for a sum of money. Riyaz Punjabi, Kashmir: The Bruised Identity, in Perspectives on Kashmir.

James Howley, Alive and Kicking: The Kashmir Dispute Forty Years Later, 9 Dick. J. Int'l L. 87, 87 (1991).

Pervaiz Iqbal Cheema, Pakistan, India, and Kashmir: A Historical Review, in Perspectives On Kashmir, supra note 4, at 96-97.

Howley, supra note 10, at 89-90. The violence resulted in the massacres of over 200,000 Muslims

James Howley, Alive and Kicking: The Kashmir Dispute Forty Years Later, 9 DICK. J. INT'L L. 94 (1991).

Michel Brecher, The Struggle for Kashmir (1953); Taraknath Das, The Kashmir Issue and the United Nations, 65 POL. SCI. Q. 264, 268 (1950); Joshua Castellino, International Law And Self-Determination 149 (2000).