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RIGHT OF SELF-DETERMINATION FOR THE KASHMIRI PEOPLE : THE HISTORICAL AND LEGAL ASPECTS

INTRODUCTION

Factors qualifying a nation or a people for the right of self-determination, meaning right to full autonomy of separate statehood, may vary greatly. Movement for the right of self-determination which led to emergence of nation-states in post-renaissance Europe was primarily based on ethnicity and language. Disintegration of the Soviet Union in recent time also led to creation of nation-states based on ethnicity and language. On the other hand, intense urge to be free from the overseas colonial powers was the main determining factor in the struggle for self-determination in post-World War II Asia and Africa. Liquidation of colonial empires led to emergence of many independent states but not necessarily nation-states based on ethnicity or language as in Europe. Post-colonial independent states are largely the former administrative units or divisions of the colonial powers, which were not always created on the basis of ethnic, linguistic or cultural unity of the divisions¹ and which often reflected peculiar methods of colonial administration.

1. M. Rafiqul Islam, 'The Tamil Separatism in Sri Lanka : Some Factors Undermining the Claim', *Netherlands International Law Review*, Vol. XXXIII, Issue - 1, 1986, p. 65.

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When the initial euphoria of overthrowing the colonial powers subsided, ethnic, linguistic and cultural differences amongst the people of the areas hastily left behind by those powers gradually started to surface. Exploitation or discrimination of ethnic or national minorities within newly independent states posed considerable problems. Struggle by various groups and communities for self-determination in these states added a new dimension to modern international system which is based on the principles of sovereignty and territorial integrity of states. Reconciliation of secessionists' right of self-determination with that of state territorial integrity thus became one of the fundamental problems of contemporary international law and relations.² The present struggle of the people of the Indian state of Jammu and Kashmir for independence provides a typical case of the problems of self-determination which has its roots in colonial administration and the way power was handed over to national government or governments.

1. BRIEF HISTORICAL BACKGROUND OF THE KASHMIR ISSUE

Jammu and Kashmir was one of the major princely states in British India. Although the British suzerainty over the princely states was unquestionable, formally these states were not parts of British India. The princely states enjoyed special status within the

2. See for details Korwa Gombe Adar, "The Principles of Self-Determination and Territorial Integrity Make Strange Litigants in International Relations", *Indian Journal of International Law*, Vol. 26, Nos. 3 & 4, July-Dec., 1986, pp. 425-447; Koteswara Rao, "Right to Self-Determination in the Post-Colonial Era : A Survey of Juristic Opinion and State Practice", *Indian Journal of International Law*, Vol. 28, No. 1, Jan-March 1988, pp. 58-71; Patrick Thornberry, "Self-Determination, Minorities, Human Rights : A Review of International Instruments", *International Comperative Law Quarterly*, Vol. 38, Part-4, Oct. 1989, pp. 867-889.

general colonial administration in India. Their relations with the British Crown were determined by treaties. The British guaranteed the rulers of the states full internal autonomy and their rights of succession. The rulers on their part recognised the British Crown as the Paramount Power who was to be responsible for states' defence and external affairs. British India and princely states were thus linked by a sort of personal union, the Viceroy of British India acting also as the Crown's representative towards the princes.³

When by 1946 it became clear that the British would quit India at the earliest opportunity, the question of relinquishing its paramouncy over the princely states was immediately posed. The British Cabinet Mission's Memorandum of May 12, 1946, presented to the Chamber of Princes,⁴ set out the proposals concerning the future of the states. The essence of the proposals was that the princely states would be free to assert their independence or join either of the dominions, should India be partitioned to create two independent states—Pakistan and India.

While the Cabinet Mission's proposal was rejected as a whole, its statements concerning the princely states were retained to form the basis for future settlement of this particular problem. Section 7(b) of the Indian Independence Act of 18 July 1947 declared that "the suzerainty of His Majesty over the Indian states lapses, and with it, all treaties and agreements in force at the date of passing of this Act between His Majesty and the rulers of Indian states. ... " It was thus left to the ruler and the ruler alone to decide which of the two dominions his state should join or remain aloof

3. Joseph Korbel, *Danger in Kashmir*, Princeton University Press, 1966, p. 46.
4. In 1921 the princes constituted in Delhi, a Chamber of Princes, composed of 108 rulers and 12 additional members representing 127 minor states. It was a consultative body dealing with states' problems.

from both.⁵ Implications of the section 7(b) were that even if British India would remain united, the princely states could choose to declare full independence.

Although India was partitioned on religious principle, the princely states, under the provisions of the Indian Independence Act 1947, were to accede to, if they so wished, either India or Pakistan, not on the basis of religion, but on ruler's free choice. In practice, however, accession of the states to either dominions was administered in accordance with the religious composition of their population or geographical contiguity in relation to Pakistan or India. This fairly reflected the wishes of the people of the states on their political future. Only exception was the state of Jammu and Kashmir.

India always upheld the view that in any question of accession of the states, the wishes of the people, not of the ruler, must get absolute priority.⁶ As recorded evidences indicate, the Indian leadership was prepared to apply this principle in Kashmir as in other states. Collected speeches of Lord Mountbatten bear testimony to this fact.⁷ Mahatma Gandhi made emphatic suggestion that people's wishes must be taken into account in deciding Kashmir's political future.⁸ Hodson writes that "not only the Viceroy, but also Pandit Nehru and Sardar Patel openly accepted the possibility that Kashmir might accede to Pakistan, . . . in fact the Viceroy went to great lengths to prevent even an appea-

5. V. B. Kulkarni, *Pakistan : Its Origin and Relations with India*, Academic Publishers, Dhaka, 1988, p. 214.

6. *Ibid.*, p. 207.

7. *Time Only to Look Forward - Speeches of Rear Admiral, the Earl Mountbatten of Burma*, Compiled by Nicholas Kaye, London, 1949, pp. 268-269.

8. Pyare Lal, *Mahatma Gandhi : The Last Phase*, Vol. II, Ahmedabad, 1958, p. 355.

rance of undue political pressure on Kashmir from Congress".⁹ But the reality is that Kashmir became part of India by accession, which was against the general scheme of things that was then emerging in the sub-continent.

Kashmir's accession to India can primarily be attributed to the policy of manipulation and distancing from Muslim Pakistan, pursued by the ruler of the state Maharaja Hari Singh who was a devout Hindu. In the critical days preceding final British withdrawal, the Maharaja, in order to maintain *status quo* and balance his position, offered to conclude a Standstill Agreement with both the dominions. Pakistan accepted the offer on August 15, 1947, but India decided to take no action on it. Pakistan considered it a preliminary step to accession of Kashmir to Pakistan.¹⁰ Under the terms of the Agreement, Pakistan assumed the responsibilities to run the communications, postal and telegraphic services of the state.¹¹ But when it became abundantly clear that the Maharaja of Kashmir had no intention to join Pakistan, Pakistan took active part in organising a massive invasion of Kashmir by the Frontier tribesmen in the 3rd week of October, 1947. When the state's capital Srinagar was about to fall to the invaders, the Maharaja sought India's assistance. India took full advantage of the situation and made accession a condition upon which Indian troops could be sent to Kashmir. The Maharaja accepted the condition and sent accession letter to Lord Mountbatten. Thereupon, the Indian troops were immediately rushed to Kashmir and the situation was tackled.

9. H. V. Hodson, *The Great Divide*, London, Hutchinson, 1969, p. 443.

10. Ehsanul Haque, "Revival of the Kashmir Imbroglia : A Threat to the Subsystemic Cohesion" in Emajuddin Ahmed and Abul Kalam (eds.), *Bangladesh, South Asia and the World*, Academic Publishers, Dhaka, 1992, p. 135.

11. Joseph Korbel, *op. cit.*, p. 64.

In accepting accession of Kashmir, India reiterated its view that accession must be in accordance with the wishes of the people and, therefore, its accepting Maharaja's offer of accession was conditional and temporary to be finalised only after law and order has been restored and the people have a genuine chance to express their opinion on accession. Lord Mountbatten in his reply-letter to the Maharaja's letter of accession stated :

... In the special 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.¹²

The Indian Prime Minister, Nehru, in a similar vein wrote to Pakistan's Prime Minister, Liaquat Ali Khan, on November 21, 1947 : "I have repeatedly stated that as soon as the raiders have been driven out of Kashmir or have withdrawn and peace and order have been established, the people of Kashmir should decide the question of accession by plebiscite or referendum under international auspices such as those of the United Nations . . . By this declaration I stand ..." ¹³ As subsequent events showed, India deviated from this position to engender protracted confrontational relations with Pakistan and to sow seeds of an armed struggle for self-determination that has flared up in the Kashmir valley.

12. *Ibid.*, p. 83.

13. *White Paper on Jammu and Kashmir*, New Delhi, March 1948, pp. 61-67.

2. KASHMIR PROBLEM IN THE UNITED NATIONS AND REAFFIRMATION BY INDIA OF ITS PLEDGE OF PLEBISCITE

On January 1, 1948, while fighting still continued in Kashmir, India formally complained to the United Nations Security Council against Pakistan's involvement in the invasion of Kashmir and requested the Security Council to call upon Pakistan to refrain from all its aggressive activities. The Indian complaint described the situation in Kashmir, how the fighting had started, how India had accepted the accession of the state of Jammu and Kashmir and sent in troops. India at the same time reiterated the pledge that "once the soil of the state had been cleared of the invaders and normal conditions restored, its people would be free to decide their future by the democratic method of a plebiscite or referendum which, in order to ensure complete impartiality, might be held under international auspices".¹⁴

Later when discussions on Kashmir started in the Security Council, Indian representative N. Gopaldaswami Ayyanger reaffirming India's earlier pledge of plebiscite stated " . . . whether she (Kashmir) should withdraw from her accession to India, and either accede to Pakistan or remain independent, with a right to claim admission as a Member of the United Nations--all this we have recognised to be a matter for unfettered decision by the people of Kashmir after normal life is restored to them".¹⁵

Thus India added new dimension to its earlier pledge of a plebiscite or referendum before Kashmir's accession issue could be finally decided. While India primarily sought United Nations interference to prevent Pakistan from taking part or assisting in armed activities and invasion of Kashmir, its voluntary declaration

14. Korbelt, *op. cit.*, 98.

15. Security Council Official Records, 3rd year, Nos. 1-15, p. 29.

made in the world body of its intention to fulfil earlier pledge was manifestation of a deep sense of commitment to a principle which India so dearly cherished. India's pledge in accepting the instrument of accession that it would be final only on its being endorsed by the people of Kashmir and reaffirmation of this pledge in the United Nations Security Council, besides themselves having important political-legal implications, had great bearing upon the subsequent resolutions of the Security Council which prescribed plebiscite for a peaceful settlement of the Kashmir dispute.

On the other hand, Pakistan strongly protested against Indian forces being sent to Kashmir without consultation with or even any notice to the Government of Pakistan with which the state had concluded a Standstill Agreement. Pakistan never accepted the accession of Jammu and Kashmir to India. As to the Indian promise of plebiscite, Pakistan expressed strong conviction that plebiscite would be but a farce if it were conducted in the presence of the Indian armed forces and if proper conditions were not established to guarantee to the people of Kashmir complete freedom to express their will.¹⁶

India's later view that Pakistan had never any *locus standi* in Kashmir is not tenable. Since the very beginning Pakistan was a party to the whole affair. Pakistan's being a party is implied in the Indian Independence Act of 1947 where it is expressly stated that the princely states would be free to join either dominion. It also directly follows from India's assurance that Kashmir would be free to join Pakistan if it should so decide. Consequently, when Kashmir became a disputed issue, the fact of disputation being confirmed by the Security Council's pursuit, with the participation of both Pakistan and India, for a peaceful solution, Pakistan's

16. Korbelt, *op. cit.*, pp. 100-101.

stand on Kashmir was also not devoid of legal consequences, so far as it concerned Kashmir's accession to India.

Thus started the long race in the United Nations on Kashmir which ultimately found no destination. India and Pakistan could only agree to the Security Council resolution of 21 April 1948 that Kashmir's fate was to be decided by a plebiscite, but they could never come to an agreement on how and under what circumstances a free and fair plebiscite could take place. The principal cleavage was this : India wished the fighting to stop first and before anything else; Pakistan insisted upon first reaching an agreement on the plebiscite, asserting that the people would stop fighting only if they had guarantees that a fair plebiscite was forthcoming.¹⁷ Pakistan demanded the plebiscite to be held under an impartial administration and with no troops on the territory of the state. Rejecting Pakistan's view India insisted that plebiscite be held under the supervision of Kashmir Government with necessary number of Indian troops there to ensure law and order situation. Sheikh Abdullah also contested with particular bitterness the proposal to change Kashmir's administration in the interest of impartiality of plebiscite.

The members of the Security Council attached great importance to having the plebiscite conducted by the United Nations and under an impartial government. They rejected the Indian contention that the administration and actual conduct of a plebiscite was an internal affair of Kashmir. The question as to whether or not a plebiscite on such an issue and its conduct are actually an internal or international affair was more than once declared by various international bodies or conferences to be of an international nature. The plebiscites over Schleswig, Marienwerder and Allenstein, Upper Silesia, Klagemfurt and

17. *Ibid.*, p. 106.

Sopron were supervised by inter-allied plebiscite commissions in 1920 and 1921.¹⁸ The plebiscite over the Saar territory in 1935 was organised and supervised by the League of Nations Plebiscite Commission while plebiscites over Togo, British North Cameroon and West Samoa were organised by the United Nations.¹⁹

3. THE SECURITY COUNCIL RESOLUTIONS ON KASHMIR

The first Security Council resolution on Kashmir was adopted on 17 January 1948. It called on Pakistan and India to take immediately all measures to improve the situation and also to report immediately any material change in the situation. The second resolution of 20 January 1948 established a three-member Commission on India and Pakistan to proceed to the spot and report to the Security Council. The third resolution of 21 April the same year was of substantial importance. It outlined the Security Council's stand on the Kashmir conflict, recommended methods of its solution and became the principal terms of reference for the Commission and UN representatives who made ceaseless efforts to bring about a peaceful and final settlement in Kashmir. This resolution stipulated holding of a plebiscite and appointment of a plebiscite administrator.

For ensuring free and impartial plebiscite, the above resolution of 21 April 1948 urged the Government of Pakistan to use its best endeavours "to secure the withdrawal from the State of Jammu and Kashmir of tribesmen and Pakistani nationals not normally resident therein who have entered the State for the purpose of fighting, and to prevent any intrusion into the State of such elements and any furnishing of material aid to those fighting in

18. *Ibid.*, p. 108.

19. R. Y. Jennings, *The Acquisition of Territory in International Law*, Manchester University Press, 1963, p. 79.

the State" (Part-A, Clause-1/a). It also asked the Government of India "to put into operation in consultation with the Commission a plan for withdrawing their own forces from Jammu and Kashmir and reducing them progressively to the minimum strength required for the support of the civil power in the maintenance of law and order" (Part-A, Clause-2/a).

All subsequent resolutions of the Security Council were linked with the implementation of the provisions of this resolution and with endorsing findings and reports of the United Nations Commission on India and Pakistan (UNCIP) and of United Nations representatives for India and Pakistan appointed from time to time for facilitating settlement of the dispute over Kashmir. Of them, Resolution no. 98 of 23 December 1952 received the 3rd (22 April 1952) and 4th (16 September, 1952) reports of the UN representative for India and Pakistan and urged the two Governments to carry out demilitarisation —Pakistan to reduce its troops to number between 3000 and 6000 on its side and India to a figure between 12000 to 18000. This resolution also recalled the provisions of UNCIP resolutions of 13 August 1948 and 5 January 1949 which were accepted by the Governments of India and Pakistan and which provided that the question of the accession of the state of Jammu and Kashmir to India or Pakistan would be decided through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations.

Although the Security Council resolutions, reports and works of UNCIP and UN representatives failed to achieve ultimate objective, they represent a substantial body of facts and perhaps laws which have not lost their relevance for to-day's Kashmir. Some of the United Nations efforts came almost near success point. These efforts could not have been made in vain. In this connection, the above two resolutions of UNCIP, one of 13 August

1948 and the other of 5 January 1949, merit special mention, for both Pakistan and India agreed to their provisions. In fact, the cease-fire of 1 January 1949 was enforced in pursuance of 13 August UNCIP resolution. These two resolutions together set forth all the necessary conditions for a free and impartial plebiscite which the parties agreed to fulfil.

In Part II of the 13 August UNCIP Resolution the Governments of India and Pakistan accepted the following principles as a basis for the formulation of a truce agreement :

A

1. As the presence of troops of Pakistan in the territory of the State of Jammu and Kashmir constituted a material change in the situation since it was represented by the Government of Pakistan before the Security Council, the Government of Pakistan agrees to withdraw its troops from that State.

2. The Government of Pakistan will use its best endeavour to secure the withdrawal from the State of Jammu and Kashmir of tribesmen and Pakistani nationals not normally resident therein who have entered the State for the purpose of fighting.

3. Pending a final solution, the territory evacuated by the Pakistani troops will be administered by the local authorities under the surveillance of the Commission.

B

1. When the Commission shall have notified the government of India that the tribesmen and Pakistani nationals referred to in part II, A, 2 thereof have withdrawn, thereby terminating the situation which was represented by the Government of India to the Security Council as having occasioned the presence of Indian forces in the

State of Jammu and Kashmir, and further, that the Pakistani forces are being withdrawn from the State of Jammu and Kashmir, the Government of India agrees to begin to withdraw the bulk of its forces from that State in stages to be agreed upon with the Commission.....

In part-III of the Resolution the Governments of India and Pakistan reaffirmed their wish that the future status of the State of Jammu and Kashmir shall be determined in accordance with the will of the people.

The provisions of the UNCIP Resolution of 5 January 1949 as supplementary to 13 August Resolution were also accepted by India and Pakistan. Under this Resolution the two governments agreed that the question of the accession of the State of Jammu and Kashmir to India or to Pakistan would be decided through the democratic method of a free and impartial plebiscite (Clause-I). Plebiscite was to take place upon Commission's confirmation that the cease-fire and truce agreements as set forth in Parts I and II of the Commission's Resolution of 13 August 1948 had been carried out and arrangements for the plebiscite had been completed (Clause-2). The Resolution also stipulated appointment of a Plebiscite Administrator by the United Nations in agreement with the Commission. Relationship of the Plebiscite Administrator with the Government of Jammu and Kashmir was also determined by the Resolution and his powers and functions as well as *modus operandi* detailed out in it (Clauses 3-5).

The resolutions of the United Nations Commission for India and Pakistan undoubtedly provided a solid basis for a final settlement on Kashmir. But implementation of the resolutions was defeated once more by the lack of mutual trust on the part of the two nations, and especially, in the words of Joseph Korbel, member of UNCIP, "by a lack of good will on the part of India".²⁰

20. Korbel, *op. cit.*, p. 158.

Korbel's view perhaps contains grains of truth, for Pakistan fulfilled one of its primary obligations to "use its best endeavour to secure the withdrawal from the State of Jammu and Kashmir of tribesmen and Pakistani nationals not normally resident therein". Tribesmen did in fact withdraw.²¹ The withdrawal of Pakistani troops from Pakistan-held Kashmir would also not have posed much problem, had India not engaged in deliberate and arbitrary interpretation of the term 'bulk of its forces' which it was obliged to withdraw (under UNCIP Resolution of 13 August, Part II, Sec. B/1) from the area it held.

4. INDIA'S REFUSAL TO RECOGNISE ITS EARLIER PLEBISCITE PLEDGE

At this stage perhaps India decided never to withdraw from Jammu and Kashmir and with this end in view started its own game of politics and uneasy delaying tactics in pursuing a settlement predicting that every delay would take the possibility of plebiscite further away. India's perennial fear that once its bulk of the forces had been withdrawn Kashmir would instantly fall prey to invasion by Pakistani forces became a nightmarish obsession with it.

'The cease-fire which came into force on 1 January 1949 left more than two-thirds of Jammu and Kashmir in India. When the situation stabilised, it became hard for India to resist the temptation of taking advantage of a peculiar historical situation which meant taking permanent control of a territory which had its strategic importance, besides its being a land of enchanting nature and a land of Nehru's forebears which be loved 'like a woman'.²²

21. *Weekly Sananda* (in Bengali), Ananda Bazar Publication, Calcutta, June 25, 1993, p. 80, c. 3.

22. *The Times*, London, 6 September, 1950.

India now started laying more emphasis on the legality of accession of Kashmir to India. Although India did not stop referring to the wishes of the people which it was committed to take into consideration before conditional accession could be finalised, it also resorted to all sorts of arguments which put the fate of plebiscite under question. India grumbled how difficult it would be to hold a fair and free plebiscite, that any plebiscite would lead to religious frenzy further disturbing communal situation of the sub-continent, that international situation had changed which warranted more cautious step taking.

In territorial disputes legal and political arguments are often used side by side—so much so that it is sometimes difficult to distinguish one from the other. It is because a state which relied solely on legal arguments might be suspected of having a weak case politically, and a state which relied solely on political arguments might be suspected of having a weak case legally.²³ In the words of Jennings, "if a political argument can be made to possess legal overtones, and the legal distinction between *meum* and *tuum* blurred, the claimant may be enabled to convey the impression to others and, perhaps more importantly, to himself that he already possesses a claim in the sense of a legal title"²⁴.

Indian statesmen, meritorious as they were by all accounts, now started displaying their merit by using all possible political and legal arguments that Kashmir was a *fait accompli*, that from the very outset, the Security Council did not view the Kashmir question in the light of the Indian complaint, that the Council did not condemn Pakistan as aggressor in Kashmir, that the Council treated India and Pakistan, the aggressor state, in the same way and

23. Michael Akehurst, *A Modern Introduction to International Law*, 5th edition, London, 1985, p. 152.

24. Jennings, *op. cit.*, p. 75.

also complained that the Security Council treated Pakistan as a legitimate claimant to Kashmir which it was not. Later recalling Indian contention and supporting it, Indian Journalist Kulkarni wrote sarcastically, "the policy of equating the aggressor with aggrieved party frightened justice so much that it spread its wings and flew away from the world forum".²⁵

India considered the United States and other Western powers as Pakistan's allies and argued that under changing international realities which did not favour India and with US decision in 1954 to extend military assistance to Pakistan and to enter into various security arrangements with it, to which other powers of the Security Council, specially Britain had full approval, an impartial plebiscite in Kashmir under UN supervision was no longer conceivable.²⁶

Earlier Nehru declared in the Indian Parliament :

The Republic of India inherited the position left behind by the British Government. Apart from accession, it has to be remembered that India today is a continuing entity, taking over all the rights and liabilities of the old India These rights and responsibilities included the protection of not only the Indian States that have acceded to us, but also other states that had not acceded to Pakistan. Thus, irrespective of accession, we would have had the obligation to protect the people of Kashmir against aggression. Kashmir has at no time been recognized as a state under international law, but has been an integral part of India. Partition made no difference to our responsibilities in regard to Kashmir as long as it did not deliberately accede to Pakistan.²⁷

25. Kulkarni, *op. cit.*, p. 225.

26. Ehsanul Haque, *op. cit.*, p. 137.

27. Korbelt, *op. cit.*, pp. 182-183.

5. DEVELOPMENTS INSIDE KASHMIR AFTER PARTITION

It may be remembered that India regarded Sheikh Abdullah and his National Conference party as truly representing the Kashmiri people and considered his policies as the manifestation of the wishes of the people. Sheikh Abdullah planned to convene a Constituent Assembly for Jammu and Kashmir and with that end in view took necessary steps for elections to Constituent Assembly, which was to adopt a Constitution that would guarantee his state autonomy and representative government. The Constituent Assembly was also to endorse Kashmir's accession to India.²⁸ These were the broad issues of the elections to the Assembly. But Abdullah had other things in mind which unfolded later to generate India's displeasure.

The Constituent Assembly met on 31 October 1951. Its Chairman declared that the National Conference had gone to the people of the State with a programme of accession to India and this programme had obtained peoples' support. On November 20, the Constituent Assembly passed 'The Jammu and Kashmir Constitution Act, 1951' which turned the Maharaja to a figure head, allowing him to act only on advice of the government, responsible to the Assembly. The law reaffirmed Kashmir's autonomy in all affairs with exception of defence, foreign affairs and communication.

Sheikh Abdullah in a bid to consolidate his position on Kashmir's autonomy opened an aggressive dialogue with Indian Union which led to Nehru-Abdullah Agreement on 24 July 1952, conferring upon Kashmir special rights which no other constituent

28. The Security Council affirmed in its resolution of March 30, 1951 that the convening of Constituent Assembly in Kashmir and any action concerning the future of the state would not be in accordance with the previous agreement on plebiscite.

unit of India enjoyed. Fundamental rights enumerated in the Indian Constitution were to apply to Kashmir subject to the provisions that they would not encroach upon the programme of land reforms in Kashmir. Acquisition of landed property in Kashmir was also to be subjected to special regime. The jurisdiction of the Supreme Court of India was to be limited to inter-state disputes, fundamental rights which were applied in the state and matters of defence, foreign affairs and communication. Emergency power of the Indian President was to be applied in Kashmir only at the request or with the concurrence of the Government of the State.²⁹ Article 370 of the Indian Constitution confirmed Kashmir's special status within Indian Union.

The inclusion of Article 370 in the Indian Constitution is clear acknowledgement by India of the fact that Kashmir is different from other component parts of India. It is thus evident that inclusion of Kashmir in the Indian Union defied logical order of things, which necessitated granting it special rights to compensate for the abnormalcy. But the 'wound' proved too profound to be healed by way of granting special status or rights. The present uprisings in Kashmir and movement of self-determination confirm this fact.

In the meantime, Sheikh Abdullah embarked on a policy of drifting from India and put on the agenda an independent Kashmir. He started manoeuvring in a way so that Kashmir's autonomy could develop into full independence. He was no more interested in those clauses of his agreement with Nehru which stipulated closer ties with Indian Union. Abdullah characterised the agreement as transitory and temporary. He also went so far as to claim that Kashmir's initial accession to India was forced on it

29. Korbelt, *op. cit.*, pp. 224-225.

because of India's refusal to give any help without state's accession.³⁰ India was alarmed by such utterings and apprehended that a forthcoming session of the Constituent Assembly which was supposed to ratify the accession to India might instead declare independence of Kashmir.

India always and consistently focused Sheikh Abdullah as the champion of his people and any plan of independence, if he really conceived of and worked out, definitely reflected people's wishes on it. But Abdullah had his opponents in the National Conference, Bakshi Gulam Mohammad as their leader. India with the help of Bakshi Gulam enforced ouster of Abdullah from power. On 9 August, 1953, Kashmir's Head of State Karan Singh dismissed Abdullah and appointed Bakshi Gulam as the Prime Minister. Abdullah was arrested and taken to custody.

This was a dramatic turn of events. It unveiled India's true intention and provoked general indignation in Pakistan and Kashmir. Relations between India and Pakistan and communal situation abruptly took an adverse turn. It was under these circumstances that Pakistan's Prime Minister Mohammad Ali rushed to Delhi. On 20 August, 1953, Prime Ministers of Pakistan and India signed a Joint Communique in which they reaffirmed the previous agreement to have a plebiscite in Kashmir. Amidst progressively distancing from plebiscite-pledge attitude of India, this agreement raised some new hope for settlement of the Kashmir issue. But as subsequent developments proved, this was only a typical political manoeuvre by India to ease tension created in the wake of Abdullah's ouster.

Under the new circumstances, the Constituent Assembly readily ratified Kashmir's accession to India. On 14 May, 1954,

30. *The Hindu Weekly Review*, Madras, 10 August, 1953 as quoted in Korbel, *op. cit.*, p. 239.

the Indian President under Article 370 of the Constitution of India issued an order endorsing the relationship between the Republic of India and Kashmir as it had been formulated in the Delhi Agreement between Nehru and Abdullah and later adopted by the Constituent Assembly in Srinagar.

The act of ratification of the instrument of accession to India was clearly against the spirit and letter of the Security Council Resolution of 30 March, 1951³¹ and also against the spirit of Nehru-Mohammad Ali Agreement of 20 August, 1953. The Indian Prime Minister, however, confirmed that the ratification "did not come -- it cannot come -- in the way of our observing our international commitments in regard to a plebiscite".³²

6. THREE DECADES OF LULL

With the passage of time, Indian position on plebiscite in Kashmir hardened. Possibility of a plebiscite faded. The Government of India publicly repudiated its commitment to plebiscite. Indian representative to the United Nations, V.K. Krishna Menon, declared in the Security Council (1957) that Kashmir's accession to India was valid and final, that the Kashmiri people had expressed their desires in the elections of October 1951³³ and that these elections ended India's obligations in the matter of a plebiscite -- a plebiscite to which India had never actually been committed by a binding treaty.³⁴

With further change in international politics and Indo-Pak war in 1965 and again in 1971, any solution to Kashmir problem in

31. *Supra* fn. 28.

32. *Indiagram*, Embassy of India, Washington, D. C., No. 399, Feb, 25, 1954 as quoted in Korbelt, *op. cit.*, p. 248.

33. *Ibid.*

34. Korbelt, *op. cit.*, p. 312.

the light of the original Indian pledge of a plebiscite and numerous Security Council resolutions, appeared unlikely. At various international forums and at bilateral meetings between India and Pakistan, if Kashmir issue was at all raised, the question of plebiscite did not figure prominently.³⁵ Nevertheless, Pakistan never reconciled with the fact of Kashmir merging with India. Kashmir remained to be the main stumbling block in the way of establishing normal relations between Pakistan and India and main obstacle to peace in the sub-continent.

During this period, however, situation in Jammu and Kashmir showed relative signs of stability. There was honest speculation that time would work in India's favour to validate Kashmir's integration with India which was otherwise founded on uneasy Indian interpretations of historical facts. While India's unilateral repudiation of its commitments to plebiscite did never relieve it of legal and moral obligations in the matter, developments in the sixties and seventies in Kashmir gave some indications that India would 'win over Kashmir in practice'. But this proved wrong.

7. PRESENT ARMED UPRISINGS IN KASHMIR AND THEIR POLITICAL-LEGAL VALIDITY

Situation in Kashmir started changing radically after mid-eighties, with different groups demanding right of self-determination for the Kashmiri people. Towards the end of eighties and at the beginning of nineties, struggle for national self-determination bloomed in its full fury and intensity. The urge of the Kashmiri people finding outlets through numerous national liberation and self-determination groups militantly active in Kashmir descended like nemesis to avenge what has happened with the fate of Kashmir at the dawn of Indian independence. The

35. *Weekly Sananda*, *op. cit.*, p. 81, c. 2.

reasons for which the voice of Sheikh Abdullah was silenced and the man jailed for quite a long time lay dormant in Kashmir for years. They now found strong expression in mass movement for genuine self-determination.

The situation in Kashmir is tense. Massive armed uprisings have shaken the entire Valley. Quite a number of organised groups are fighting for full autonomy, of which Jammu and Kashmir Liberation Front (JKLF) and Hizb-ul Mujahideen are the two most dominant.³⁶ It is evident that they enjoy support of the bulk of the population of Kashmir Valley. Beside armed struggle, these groups frequently organise strikes, demonstrations and meetings in support of their demand for full autonomy, which are joined by people in large number.³⁷

There are indications that uprisings in Kashmir have matured to take shape of a viable peoples' movement for self-determination with strong organisational foundation. Although there are diverging group, besides JKLF and Hizb-ul Mujahideen, they all together convincingly represent the wishes of the people for full autonomy in Kashmir.³⁸ Clashes between Kashmiri militants and Indian security forces resulting in more than ten thousand deaths and many more injured in the last few years,³⁹ many areas such as Sapur, Anantanag coming under virtual control of the militants,⁴⁰ manifold increase of the Indian forces in a bid to contain the struggle, frequent paralysis of normal life in the Valley as a result

36. JKLF is for reunification and independence of Kashmir while Hizb-ul Mujahideen wants that India-held part of Kashmir join Pakistan.

37. Gowher Rizvi, "Case for Self-Determination—Kashmir Remains Unique", *Dialogue*, Vol. 02, No. 17, Dhaka, April 27, 1990, p. 1; Mushahid Hussain, "Kashmir Politics Has Its Own Dynamics", *Dialogue*, Dhaka, Feb. 28, 1992, p. 9; *The Bangladesh Observer*, Dhaka, Feb. 6, 1992; *Ibid.*, June 1, 1992; *Ibid.*, July 28, 1993.

38. *The Bangladesh Observer*, Dhaka, December 19, 1991,

39. *Ibid.*, July 28, 1993.

40. *Bhorer Kagjo* (Bengali Daily), Dhaka, 3 July, 1993.

of strikes called by the liberation groups abundantly prove the seriousness of the situation in Kashmir. Commenting on today's Kashmir Gowher Rizvi writes :

It is now quite clear the Kashmiri 'Intifada' is not the work of Pakistani-inspired agitators (that is not to deny Pakistan's involvement in supplying weapons or providing safe sanctuaries from which to carry out their operations) but a genuine mass uprising resulting both from socioeconomic neglect and more importantly, it is the result of an ideological commitment among the youth to secure an autonomous Kashmir, independent of both India and Pakistan. The government in New Delhi, as is the wont of most governments, has chosen to view the crisis as a question of law and order: police and military action has been stepped up, much of Kashmir placed under curfew, and the state assembly and the elected ministry replaced by direct rule from the metropolis. But the popular movement has shown no sign of abatement; instead each new 'martyr' has further steeled the resolve and the unity of the people. As was to be expected the virtual abandonment of the state paramilitary forces has not only destroyed the civil society but also undermined the very legitimacy of the rulers in Delhi. The rule of law has collapsed, human rights and civil liberties are eroded; and the notion of citizenship with rights and duties has completely vanished from the embattled state. The singular failure of repressive policies to curb the uprising shows both the inefficacy of repression and also a complete misunderstanding of the nature of this popular movement which is capable of being sustained over a prolonged period . . . ⁴¹

41. Gowher Rizvi, "South Asia After the Cold War", paper presented at the *International Seminar on South Asia's Security in the 1990s : Primacy of its Internal Dimension*, organized by Bangladesh Institute of International and Strategic Studies (BISS), Dhaka, January 5-7, 1992, pp. 16-17.

That there is at present a serious problem boiling in Kashmir is not denied by India either.⁴² While India has called upon the militants to come for negotiations,⁴³ its means to contain the crisis so far has been largely repressive. Different human rights groups have been denied access to the Valley.⁴⁴ Nonetheless, various sources confirm massive violations of human rights in Kashmir.⁴⁵ There are reports of excesses both on the part of the Indian security forces and Kashmiri militants.⁴⁶ The situation urgently demands making realistic attempt for a peaceful settlement of the problem.

It appears from the long history of the trouble in Kashmir that the genuine wishes of the people were always promised to be heard, but were never heard. This sense of suppressed feelings always accompanied the entire people, even when they took part in a democratic polity, within Indian Union, under Sheikh Abdullah in the sixties and seventies.⁴⁷ The fact that people's wishes were never actually taken into consideration for a final decision on Kashmir's political fate gives validity to its present movement for self-determination. The basic human quality of wanting to be heard has provided the necessary sustenance to this movement. The present movement in Kashmir, seen in the context of eventful years it experienced soon after partition of India, makes it remarkably different from any other movement for self-determination elsewhere in the world. The present uprisings can be characterised as a natural continuation, by other means and

42. Subrahmanyam, *op. cit.*, p. 136.

43. *The Bangladesh Observer*, 29 September, 1991; *Ibid.*, 30 September, 1991.

44. *Ibid.*, August 24, 1993.

45. *Ibid.*, 6 November, 1991; *Ibid.*, 11 November, 1991; *Ibid.*, 21 May, 1993.

46. *Bhorer Kagoj*, *op. cit.*

47. Released from custody in 1963, Sheikh Abdullah again became the leader of the National Conference and headed the state government of Kashmir until his death.

with a break-period of more than three decades, of what Sheikh Abdullah as mouthpiece of his people had in his mind and for which he was thrown behind bars and which the circumstances did not permit him to pursue when he was free again to be at the helm of affairs in Kashmir in the mid-sixties. This is the most unique feature of the movement for self-determination of the Kashmiri people. Long sustained human will expressed *en masse* has definite legal consequences.

Degree of inconsistency of accession of Kashmir to India with the logic of the partition of India was so overwhelming that in spite of all its good will and sincere attempts, India failed to integrate Kashmir with the Indian Union politically and psychologically. Article 370 of the Indian Constitution stipulating special rights for the state of Jammu and Kashmir proved insufficient for the purpose. It is remarkable that India, notwithstanding its complex and heterogeneous character as a state, has been able to create a national consensus and accommodate particular demands of different groups in building up a cohesive national ideology. Significantly, Kashmir is the only exception to India's otherwise largely successful record of national integration.⁴⁸

8. QUEST FOR A JUST SETTLEMENT

The massive uprisings in Kashmir for the realisation of the right to self-determination and the popular character they have acquired, have revived the memories of what had happened in Kashmir and with Kashmir forty years ago. The uprisings have also made relevant a close look at the progress towards a possible settlement in Kashmir that was achieved during those turbulent years. It is only in the context of the historical facts that it has

48. Gowher Rizvi, "South Asia After the Cold War". *op. cit.*, p. 24.

been possible on the part of today's international community to rediscover and recognise the dispute over Kashmir. Western countries, including the USA and the UK which were deeply involved in the United Nations efforts to find a solution in Kashmir in the fifties, have reconfirmed that Kashmir is a disputed issue and should be settled amicably.⁴⁹ UN Secretary General, Boutros-Boutros Ghali, mentioned Kashmir issue in his 1993 annual report to the General Assembly and expressed hope for a negotiated settlement of the issue.⁵⁰

The resolutions of the Security Council on Kashmir have not lost their relevance. While the resolutions were not binding decisions of the Council non-compliance with which could result in UN sanctions against the defaulters, their legal significance cannot be undermined. They have the effect of creating obligations for the parties.⁵¹ These resolutions of the Council on plebiscite become more relevant when they are considered in the context of an earlier Indian commitment for the same. It is also to be remembered that the world body expressed reservations⁵² on the convening of the Constituent Assembly in Kashmir in the early fifties and on subsequent ratification by it of the instrument of accession of the state to India.

India blames Pakistan for the rebirth of the Kashmir issue.⁵³ But the truth is that the issue never became dead. It simply remained dormant. Facts are abundant to confirm that the uprisings of

49. *The Bangladesh Observer*, 7 November, 1991; *Ibid.*, 7 December, 1991; *Ibid.*, 21 May, 1993; *Ibid.*, 4 August, 1993.

50. *Ibid.*, 24 September, 1993.

51. Jennings, *op. cit.*, p. 84.

52. *Ibid.*

53. Venkat Narayan, "Rao Denies Kashmir Dispute", *Dialogue*, 7 February, 1992, p. 5. *The Bangladesh Observer*, 1 October, 1992; *Ibid.*, 16 August, 1993.

late eighties in Kashmir started from within.⁵⁴ Pakistan's political, diplomatic and moral support for the militants in Kashmir are understandable. Indian allegations of Pakistan providing the militants sanctuaries, training facilities and arms are not without foundations,⁵⁵ although they are denied by Pakistan. To that extent Pakistan perhaps bears responsibility. But again determining international responsibility in the case of providing material support to a genuine struggle for self-determination is a complicated question under international law which has no single answer and will depend on mass of factors. However, Pakistani support, moral or material, is not the sustaining force of the present movement of the Kashmiri people. It is the people's indomitable will which has become the determining factor. On the other hand, in any search for solution to the Kashmir problem, Pakistan factor cannot be ignored. Pakistan as a legitimate party to the dispute over Kashmir from the very beginning has not accepted the accession of Kashmir to India as valid. She has constantly drawn the attention of the international community to this fact and kept the issue live on agenda.

In the short run, it might be possible for India to contain the crisis in Kashmir within reasonable proportions. But in the long run, things could go beyond its control with graver consequences which may not remain limited only in Kashmir. Even if India decides that it has sufficient physical power and can use it in a way that would hold Kashmir for a long period, it is not advisable for India to sail on such a course. First, that India could not integrate Kashmir to Indian Union psychologically during the long period

54. Gowher Rizvi, "Case for Self-Determination—Kashmir Remains Unique", *op. cit.*

55. Dilip Mukherjee, "India-Pakistan Relations - Likelihood of Using War Option Diminishes", *Dialogue*, 22 May, 1992, p. 5; V. Longer, "India's Security Concerns", *United News of India, Independence Day Special-IV*, NO. 5390, 1 June, 1990, p. 8.

between the fifties and eighties has stripped India of any moral right to hold on to Kashmir any further. To hold Kashmir by force would be against the democratic and moral values which India so firmly upholds, propagates and, more importantly, are so necessary to preserve for its own existence. Secondly, the use of continuous coercion has a corrosive effect and will eventually begin to have an impact on other parts of India and probably India's own civil society. The erosion of human rights in Kashmir is bound to spill over into India itself.⁵⁶

India's argument that any concession, if it may be so called, to the demands of self-determination would seriously undermine the secular character of the state of India,⁵⁷ does not hold ground. Dominant groups amongst the militants are for independence and a secular character of the state they would want to build. The present movement in Kashmir is based more on the consciousness of separate ethnic, cultural and linguistic identity of the people and an acute sense of historical injustice they have experienced, then on any religious affiliation or factors.⁵⁸ Even if it is again a question of choice of the Kashmiris between joining either Pakistan or India, it is difficult to see reason in Indian contention of secularism. At partition, princely states acceded either to India or to Pakistan on religious principle. That did not prevent India to grow to be a secular state as it is now.

Time has added a new dimension to Kashmir issue. It is no longer predominantly a matter between India and Pakistan centering on a plebiscite to decide whether Kashmir would join the former or the latter. Present movement in Kashmir is inclined

56. Gowher Rizvi, "South Asia After the Cold War", *op. cit.*, p. 24.

57. Kuldip Nayar, "Kashmir : Politics of Weakness or Principle"? *Dialogue*, 11 May, 1990, p. 7.

58. Ludwina A. Joseph, "International Conference on Kashmir - No Longer Only an Indo-Pak Issue", *Dialogue*, 2 August, 1991.

towards achieving reunification of Kashmir which would be free and independent of both India and Pakistan.⁵⁹ It is, therefore, essential that any negotiation for peaceful settlement of Kashmir issue ought to involve three parties, the third being the representatives of rebellious groups whose legitimate existence and effectiveness has a *de facto* recognition by the international community.

India, and even Pakistan, ought to reassess the Kashmir problem. They must ask themselves the question what they have achieved over Kashmir in the last forty or more years. Kashmir has never allowed the relations between India and Pakistan to grow normal. Three wars have already been fought between them. Continuous tension and confrontation and the resulting arms build-up have seriously impeded their capacity to fight against poverty of the people which is a perennial problem in both the countries. India in particular must seek answer to the question whether over-all situation in India, its international prestige and moral standing could have been better or not, had it not artificially integrated Kashmir with India. India must now hypothetically compare two situations—one real, as it is to-day, with Kashmir in India, and the other imaginary, as it could be, without Kashmir in India. It must realistically assess its gains and losses over Kashmir and decide whether it is not time yet to get rid of the legacy of mistakes in Kashmir.⁶⁰

59. *Ibid.*; Gowher Rizvi, "Case for Self-Determination - Kashmir Remains Unique", *op. cit.*

60. It may be recalled that the former Soviet Union mishandled the Baltic Republics' demand for independence which preceded complete disintegration of the USSR. These republics were forcibly and artificially integrated with the USSR during World War II. Unrealistic policy pursued by the Soviets in Baltic issue even after *Perestroika and glasnost* protracted the crisis which was often accompanied by force and violence used by the authorities. This undoubtedly had an adverse impact on other Soviet republics, ties amongst whom were longer and closer. Baltic may not be the main reason for the Soviet disintegration, but it played its disintegrating role. A parallel here with Kashmir in India is not out of place.

It is unfortunate that when the Security Council failed to resolve the Kashmir problem in the fifties, the issue was never transferred to the General Assembly for deliberations. Any resolution adopted by the General Assembly in the light of the resolution of the Security Council could have exerted further pressure on the parties for a settlement. It is also unfortunate that the opinion of the International Court of Justice on the legal interpretation of the instrument of accession of Kashmir to India and India's pledge of plebiscite was never sought. Resolutions of the Security Council and any probable resolution of the General Assembly on Kashmir together with any advisory opinion of the ICJ which, if we can so assume, would not have differed in substance from the resolutions of the Council and the Assembly, could substantially contribute to the solution of the Kashmir problem.

But the chances for a UN initiated settlement have not withered away. Institutional facilities for peaceful settlement of the disputes which the international community had in the fifties are still existing and have matured further. Notwithstanding instances of failures of the United Nations, Bosnia being the most glaring and recent example, records of the world body in defusing crisis situations around the world and championing the cause of self-determination through peaceful means are impressive. The role played by the United Nations in Soviet withdrawal from Afghanistan, peaceful transition of power and independence of Namibia, settlement of the Kampuchea problem have greatly strengthened hope and faith of the world community in the United Nations which seeks to achieve dispute resolution both by political and legal means, using them separately or in combination.

Bilateral talks between India and Pakistan, or between India and the militants, or a tripartite arrangement for talks including in

them the Kashmiri militants have inherent weaknesses in an issue like Kashmir and seem at this stage improbable to produce any fruitful results.⁶¹ Potentials of the role of the United Nations or any other third party have never been explored to the full to resolve the Kashmir issue, and its time now to make sincere efforts to revive UN role in the issue. Qualitative change in superpower politics accompanied by an encouraging trend of democratisation of the world order is likely to make UN role more effective. Central issue would definitely be to give an opportunity to the Kashmiri people to decide whether they would become independent or remain with India or join Pakistan. If this is accepted, again as it was once so accepted in the fifties that only free and fair polls would create such an opportunity, the United Nations can take fresh move to work out the modalities of a plebiscite it once failed to provide for. Recent records of elections conducted under UN supervision, notably in Namibia and Kampuchea, are encouraging. It can work in Kashmir as well. If India's old fear of religious frenzy overtaking the situation of Pakistan taking advantage of a demilitarised Kashmir tend to disrupt any negotiations for a settlement, special arrangements can be made to involve the big powers as guarantors, desirable within the framework of the United Nations.

CONCLUSIONS

1. To understand the urge of the Kashmiri people for self-determination, the historical circumstances of accession of the

61. India does recognise the Kashmir dispute. The 1972 Simla Pact pursued an objective of 'a final settlement of Jammu and Kashmir'. But under Simla Pact, all issues between India and Pakistan were agreed to be resolved on bilateral basis. The problem is, so far as Kashmir is concerned, bilateralism places India at an advantageous position, for it physically controls most of the territory of Jammu and Kashmir. Pakistan was obliged to accept bilateralism as the principle of dispute resolution in 1972 under adverse circumstances. This is unlikely to work in Kashmir, unless India makes a major shift in its policy.

State of Jammu and Kashmir to India need to be accurately evaluated. Whatever were the preceding circumstances, accession to and subsequent integration of the state with the Indian Union was against the logic of the partition of India. It must be underscored that endowing the princely states with special status in British India was the result of a peculiar colonial policy of the British in India. Notwithstanding their notion of independence, the princely states were very much the part of British India and hence the religious composition of their population was relevant in any question of their joining India or Pakistan. Joining either of the dominions was, in fact, administered on religious line. Only exception was Kashmir.

2. Since Indian independence, the wishes of the people of Kashmir were always promised to be heard, but were never heard in taking final decision on Kashmir's political future. This gives validity to the present movement in Kashmir for separate statehood.

3. Under the circumstances of armed intervention from outside in October 1947, India accepted Maharaja's offer of accession of Jammu and Kashmir subject to the condition that when situation permitted accession issue would be finally decided by a reference to the wishes of the people of the state. India reiterated this pledge in the United Nations.

4. The UN Security Council resolutions on Kashmir, which reflected Indian pledge of a plebiscite, to decide Kashmir's future, are still relevant and put the disputant parties, India in particular, under obligation to honour them.

5. If in the fifties, Kashmir was predominantly an issue between India and Pakistan, present movement in the Valley of Kashmir has shifted the focus to its independence.

6. Bilateralism seems at this stage improbable to produce any tangible results. Keeping in mind earlier United Nations efforts to resolve the crisis, its role ought to be revived for a final settlement of Jammu and Kashmir.

7. Dimilitarisation of Jammu and Kashmir, if it is considered necessary, under UN supervision, with big powers as guarantors of peace, and the UN monitored polls can provide a real and long promised opportunity to the Kashmiri people to express their wishes on the state's political future.