

Dilemma of Jammu and Kashmir: Problems and the Solution

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Abstract

The valley of Jammu and Kashmir (J&K) termed the piece of heaven on earth is facing serious problems for the last seven decades. The inhabitants of the valley are experiencing the repercussions for no wrong in the form of serious human rights violations such as extra-judicial killing, massive military attacks, rape of women, and lockdowns. The United Nations Security Council (UNSC) passed numerous resolutions in favor of the populace of J&K but no feasible results have occurred. Many treaties are signed by India and Pakistan but still went fruitless. There have been three full-fledged wars and a number of military collisions between both states and if the matters are unresolved, the peace of not only the region but the whole world could be at stake as both nations are nuclear powers. The only solution is the exercise of the right to self-determination by conducting a free and impartial plebiscite under the United Nations charter and International Human Rights Law.

Keywords: Kashmir Issue, Right to Self-determination, India-Pakistan ties, Human Rights, United Nations

Introduction and the Background

The Jammu and Kashmir valley (J & K) is a beautiful piece of land that is rich in natural artistic sceneries, mineral resources, fruits, and great biodiversity. It is situated in the Northern part of the sub-continent at 1524 meters altitude. J & K shares its borders with China, Afghanistan, India, and Pakistan as neighbors. The strategic importance of J & K cannot be overlooked because of its wonderful location and powerful neighbors. J & K encompasses an area of almost 84471 sq. miles as decided under the Amritsar Accord in 1846. The J & K valley is covered by mesmerizing peaks of the Himalayas and Peer Panjal mountains. Unfortunately, the land which is a piece of heaven on earth is struggling for its autonomy for more than the last seven decades. The J & K valley is currently separated into two parts; Indian-occupied Kashmir (IOK), which is under the control of India, and Azad Jammu Kashmir (AJK), which is administered by Pakistan. The AJK is only administered by the Pakistani government but it has a completely separate and free judicial and governmental system. The Indian government is directly controlling IOK and after the repeal of article 370 of the Indian constitution, India has illegally occupied the J & K territory. The suspension of article 370 itself depicts the transparent violation of article 15 of the Indian constitution which emphasizes on the discrimination among the people, as, it is the clear discrimination of the people of J & K. This paper is based on the deductive research methodology in which the data is gathered regarding the case study of J & K and then the solutions are deduced as per the current situations and circumstances.

It is a well-known proverb that, one cannot drive without back mirrors. The problems of the J & K cannot be properly understood without having background knowledge. Pakistan and India (sub-continent) were under the dominion of England before 1947. At the time of the separation of Indo-Pak, there were around five hundred states in the sub-continent which were governed by a monarch system. These states were ruled by their own princes and J & K was also one of them. The separation of India and Pakistan involved a lot of reasons but the basic reason was the two-nation theory based on religions. In simple words, Pakistan evolved as an Islamic state and thus, the Muslims of sub-continent got the chance to live in their own state where they can practice their religion without any problem (Wilcock, 1993).

So, during the partition, the monarch states were given the chance to choose Pakistan or India. The states which had Muslim dominancy joined Pakistan and the Hindu/Sikh majority states joined India. The J & K had a Muslim majority population but the prince of J & K of that time; *Maha Raja Harri Singh*, was a Hindu. The people wanted to join Pakistan but the ruler was reluctant to do so due to which a prevailing situation was created in the region the peace was totally disturbed. In such a situation, the prince sought help

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from the Indian government. They provided him a way out for saving life and in return he signed a controversial letter of accession with India. Lord Mount baton was the governor-general of India at that time and he signed the letter with a reservation that as soon as the situation of peace is restored in the region, the inhabitants of J & K will be given the chance to ask about their will regarding their future destiny by a fair plebiscite. Since 1947, that condition is not still fulfilled (Gattini, 2014).

Post-Partition Situation and Problems

After the partition, India filed a complaint against Pakistan on Jan 01, 1948, before the UNSC. India emphasized and relied upon Article 35 of the UN charter (Chapter VI) which deals with the “Pacific Settlement of Dispute” and took a stance that J & K being the internal matter of the state, Pakistan should not interfere in the matter. Moreover, for proving the *locus standi* on the complained filed, India claimed J & K as its essential part. In the counterargument, Pakistan affirmed that the matter of J & K does not fall under the ambit of chapter VI but of chapter VII, which deals with “Act of Aggression”, thus, the complaint has neither the *locus standi* nor the substance. In continuation of the arguments, Pakistan brought a counter-claim and charged India that there is genocide against J & K Muslims and they have acceded the area of J & K by fraud and military influence (Benvenisti, 2012).

On Jan 17, 1948, the UNSC passed its first resolution over the issue of J & K after analyzing the arguments from both sides. As per the resolution, both countries were directed to stop aggravating the situation. In order to resolve the issue, UNSC established a commission of India and Pakistan (UNCIP) under another resolution passed four days after the prior one. The UNCIP was directed to analyze and solve the matter peacefully as per the UN charter (Idrees, Imran & Jamil, 2021).

The UNCIP conducted a meeting with the representatives of both countries for the negotiations. As a result of the meeting, two more resolutions were passed on Aug 13, 1948, and Jan 05, 1949. The first resolution was quite brief and was consisting of three parts: Part I dealt with the ceasefire across the border by both sides, Part II dealt with the truce agreement and Part III was about the exercise of the right to self-determination (S-D right) by the populace of J & K was clearly emphasized (Hofmann, 2020).

The resolution of Jan 05, 1949, which was passed as per the result of the meeting of UNCIP, where both countries’ representatives explained the procedure and terms for the exercising of S-D right as prescribed in the first resolution of Aug 14, 1948. The crux of the second resolution was that there should be an impartial and free referendum in J & K in which the populace of J & K are to be asked what they want to choose for their fate. Moreover, besides these resolutions, UNSC passed many other resolutions emphasizing the S-D right of the populace of J & K and directing both the countries to take out the army across the area of J & K until the constituent assembly of India is formed. A draft for the protection of the rights of J & K people was also sent to India and India added article 370 to the constitution which gave special powers to the state of J & K. After the framing of the constitution, the UNSC passed another resolution on March 13, 1952, which reassured the S-D right of the populace of J & K and directed India to conduct a referendum.

Pakistan and India had three wars over the J & K issue. The 1965-war lasted for more than six months and there was a great loss for both parties. This war was settled by an agreement called Tashkent agreement (Jan 1966), which is considered the master piece of international law. It is given the title of “the bible for UNSC” by the great primer of the Soviet Union, Mr. Kosygin. UNSC resolutions were stood for a few years but another war was started in 1971, which settled by the pact of Shimla. Subsequently, after the pact, no efforts were made for the resolution of the J & K issue (Hussain, 2019).

India, later on, held the Shimla pact invalid by contending that Pakistan has nothing to do with the J & K issue. The state of J & K has no sovereign existence and it does not come within the ambit of a legal person in international law as it is an immanent part of India. The state of J & K cannot claim its supremacy and cannot act as a separate international entity. Thus, the UNSC resolutions and agreements of India with Pakistan are invalid and have no standing (Hussain, 2019).

The populace of J & K, after such a critical situation, decided to start a struggle against the Indian military in 1989. As a result of this, the situation of peace became more disturbed. As per the published

reports of one of the international organizations working for J & K, a coalition of civil society, more than ten thousand innocent lives have been lost and over eight thousand people are extra-judicially killed. Moreover, more than one hundred and fifty thousand civilian people are arrested and over ten thousand houses are destroyed. The number of business assets, shops, and other buildings destroyed is countless. Surprisingly it is just the report of three decades. Besides these happenings, the children and the women have also suffered badly. Numerous girls have been reported molested by the Indian militants and over ten thousand children were orphaned (Hussain, Faheem, & Islam, 2021).

Military attacks on civilians, illegal arrests, and lockdowns became common in IOK during the 1990s. The situation was at its worst at that time as a lot of breathtaking massacres happened. During that time, about eleven big massacres are reported and unfortunately, not a single incident was prosecuted (Zulfqar, 2016). Some of them are listed below.

- I. On Jan 21, 1990, there was a protest by the populace of IOK, and the Indian military killed more than a hundred civilians on the bridge of *Gawakadal* near Srinagar (IOK).
- II. In the same year, the people all over IOK were approaching the office of the UN for submitting their collective memorandum in order to conduct a referendum as per UNSC resolutions. About more than fifty civilians were killed (including women) and numerous were injured at the places of *Zakoora and Tengpora* by the army of India.
- III. In Feb 1991, the Indian military conducted a search operation in the adjacent villages named Kunan and Poshpora in IOK, during the operation, they raped more than a hundred women. The case was registered but after even more than twenty-five years, the petition is still pending in the Supreme Court of India with no result.

The UN office of the High Commission for human rights (OHCHR) issued the report on the abuse of human rights in IOK after three decades. In the reports, India was clearly held responsible for the serious crimes by their army in IOK. Further reports were also issued and India was directed to control the situation of peace in the IOK. In the reports, the abuse of power and human rights which included the extra-judicial killing, illegal arrests and abduction of civilians, rape of women, and use of military force against unarmed civilians were reported. In the reports, India was directed again to exercise the S-D right for the populace of IOK (Hussain, Faheem, & Islam, 2021). In reaction to these reports, India submitted that the facts reported by OHCHR reports are baseless and they denied the reports. Surprisingly, the UN did not take any action against the denial of the Indian government.

Crime Intelligence Agency (CIA) is a US intelligence organization. CIA issues reports regarding global issues such as the World Factbook, according to which the J & K issue has become a dilemma now as it is getting intense with time. It held the IOK area as the world's most militarized zone, as 0.7 million troops are deployed in such a small piece of area. On average, in IOK, there is one soldier deployed on every eight civilians. The people are mentally and physically traumatized. Another world-famous agency, WikiLeaks claimed that there is a serious abuse of human rights in IOK. They also claimed that some of the US diplomats have direct pieces of evidence of the use of military force on innocent civilians in IOK. According to that, there are more than eight thousand missing persons, around ten million people are killed and over six thousand human graves are unmarked (Abid & Ashfaq, 2016).

The government of India on Aug 05, 2019, held a complete lockdown in the IOK. It was a social lockdown and a complete curfew. All communication systems were cut off, the movement of civilians was restricted, all business and offices were closed, and even religious gatherings like Friday prayer and eid prayer were also suspended. The Supreme Court of India in its own decision held that internet service is a basic human right, it was suspended in IOK without any reason (Rao, 2019).

In 2019, the Indian Government without the accent of the concerned constituent assembly of IOK evoked article 370, which was the only so-called hope for the populace of IOK to guarantee their special status. After the suspension of article 370, India occupied the IOK illegally making its owned part (Ansar, 2019).

Bharati Janta Party (BJP) is the current ruling political party of India. BJP is a pro-Hindu party whose manifesto is totally against the Muslim community. The situation got more worst since the government of Prime Minister *Narendra Modi*. The IOK was locked down and all the communication linkages were suspended. The leaders and the pro-freedom activists were arrested and prosecuted illegally.

The inhabitants of IOK tried to protest since Aug 05, 2019, as per the reports received but they are stopped forcefully. The use of pallet guns on civilians is also reported in IOK. The guns injure the body completely where the fire hits. Because of it, many people have lost their body organs including vital body parts and even deaths occurred. The use of this kind of arms in a public crowd is prohibited internationally but the Indian government took the shameful stance that it was necessary for the maintenance of peace. These situations are highly condemned by Pakistan and even the local organizations of India are now condemning it. Pakistan again took the matter before UNSC, demanding the implementation of all resolutions passed by the UNSC and declaring the suspension of article 370 null and void under the head of the UN charter and international law (Goldston, & Gossman, 1991).

The Solution to the Problem

The suppression of the people and the alarming peace situation of IOK is evident from the fact that there are more than five hundred thousand military troops deployed in a single state for seven decades. A man is free by nature and even the presence of troops without any lawful justification and continuous military actions on innocents are against the basic right to life. The sole solution for this problem is the S-D right. According to this, people have the right to live their lives freely in terms of practicing their own culture, enjoying political and social freedom, and, having complete access to their economic resources. International law recognizes this right as a basic human right and it is evident from the fact almost every international document stating human rights confers the S-D right at the beginning. As such, UN charter article 2(1), article 1 of ICCPR, and ICSECR both guarantee the S-D right. These laws address the right as being vested to, "All the people" which means that it is a non-derogable and absolute right. UN has accepted that the populace of J & K are applicable to exercise the S-D right through its UNSC resolutions (Bouchet-Saulnier, 2013).

India since 1947, is trying to suppress the IOK people by not giving them the opportunity to exercise S-D right which is their basic right as per the UN charter. If this basic right is not given to the populace of the IOK and the UN does not take any serious action (like sanctions), it would be a failure of international law (Ali, 2020).

The present condition can only be figured out by implementing the already passed UNSC resolutions. At first, the people must be given a free environment, as they cannot decide impartially in the presence of hundreds and thousands of armed men. The smell of biasness can be felt by the fact that in spite of the open illegal activities, ignorance of international law, and illegal occupation of IOK by India, the international community and organizations are still silent. Pakistan is struggling and questioning the international world at each and every forum regarding this issue but after all these serious happenings all the world's five veto powers of the UN are silent on the issue. So, from the above situation, the only solution which can be inferred is the exercise of the S-D right by conducting a fair and free/impartial plebiscite (Singh, 2019).

Conclusion

The above discussion is strong enough to describe the scenario of the Kashmir Dilemma. Now, the UN has the power to take serious action against all these illegalities. Otherwise, it would be a question of the impartiality and autonomy of UN and International law. Global organizations and the international community have to put pressure on India to take the issue seriously. The example of justice should be set by the international world and the UN in this case instead of any biased and unjust precedent. UNSC should use its power in order to put legal sanctions on India for the breach of international law.

References

- Abid, M., & Ashfaq, A. (2016). Atrocities on women committed by Indian armed forces in the Indian-held Kashmir. *Pakistan Vision*, 17(1), 247.

- Ali, C. M. (1967). *The emergence of Pakistan*. New York: Columbia University Press.
- Ali, S. A. (2020). Demographic changes: a challenge to the Decolonization of Kashmir. *People. International Journal of Social Sciences*, 6(1).
- Ansar, A. (2019). The Global Rise of Right Wing Extremists and Indian Annexation of Kashmir. *Defense Journal*, 23(2), 61.
- Arai, Y. (2009). *The law of occupation: continuity and change of international humanitarian law, and its interaction with international human rights law*. Brill.
- Behera, N. C. (2007). *Demystifying Kashmir*. Brookings Institution Press.
- Benvenisti, E. (2012). *The international law of occupation*. Oxford University Press
- Bose, S. (2009). *Kashmir: Roots of conflict, paths to peace*. Harvard University Press.
- Bouchet-Saulnier, F. (2013). *The practical guide to humanitarian law*. Rowman & Littlefield Publishers.
- Brill. Balagopal, K. (1996). Kashmir: Self-determination, communalism and democratic rights. *Economic and Political Weekly*, 2916-2921.
- Gattini, A. (2014). Breach of international obligations. Principles of shared responsibility in international law: an appraisal of the state of the art. Cambridge University Press, Cambridge, 25-59.
- Geman, D., & Horowitz, J. (1980). Occupation densities. *The Annals of Probability*, 1-67.
- Goldston, J., & Gossman, P. (1991). *Human rights in India: Kashmir under siege*. Human Rights Watch.
- Gordon, N. (2008). *Israel's occupation*. Univ of California Press
- Goldston, J., & Gossman, P. (1991). *Human rights in India: Kashmir under siege*. Human Watch. Right.
- Hilali, A. Z. (1997). Kashmir dispute and UN mediation efforts: An historical perspective. *Small Wars & Insurgencies*, 8(2), 61-86.
- Hussain, M. (2019). The Kashmir Issue: Its New International Dimensions. In *Perspectives on Kashmir* (pp. 341-349). Routledge.
- Hofmann, K. (2020). The Case of Kashmir: Ethnic Mobilization and Insurgency. *Politics Honors Papers*. 12. https://digitalcommons.ursinus.edu/pol_hon/12
- Hussain, M. (2019). The Kashmir Issue: Its New International Dimensions. In *Perspectives on Kashmir* (pp. 341-349). Routledge.
- Hussain, S., Faheem, F., & Islam, S. U. (2021). Impact of Hydro-Politics and Kashmir issue on bilateral relations of India and Pakistan. *Journal of Humanities, Social and Management Sciences (JHSMS)*, 2(1), 200-213.
- Idrees, R. Q., Imran, M., & Jamil, T. (2021). The Indian occupied Kashmir dispute: A legal analysis in purview of United Nations Resolutions. *Pakistan Journal of International Affairs*, 4(1).
- Khan, R. M. (2015). Kashmir Dispute: A Legal Perspective. *NDU journal*, 29(1).
- Masood, D, Sultana M Muzaffar D. (2020). No Modus Operandi for Seeking Solution to Liberate Kashmiri Muslims. *Pakistan social sciences review* ,4(1),167-178, doi:10.35484/pssr.2020(4-I)14
- Mayfield, R. C. (1955). A geographic study of the Kashmir issue. *Geographical Review*, 45(2), 181-196.
- Meron, T. (2001). Defining Aggression for the International Criminal Court. *Suffolk Transnat'l L. Rev.*, 25, 1.
- Minhas, A. S., Ahmad, B., & Khan, M. A. (2019). Seizing Kashmir's identity: Implications for the global peace and stability. *NDU Journal*, 69.
- Qadeer, M. A. (2017). United Nations resolutions on Kashmir and their relevance. *Journal of Strategic Affairs*, 2.
- Rao, S. S. (2019). The Kashmir Issue and the United Nations. *Academic Discourse*, 8(2), 84-92.
- Sharma, S. (2016). Kashmir and the Mughal Fad of Persian Pastoral Poetry. *Borders. Itineraries on the Edges of Iran. Eurasistica. Quaderni di studi su Balcani, Anatolia, Iran, Caucaso e Asia Centrale. Venezia*, 5, 183-202.
- Singh, M. L. M. R. (2019). Legal Perspective of Kashmir Issue. *Think India Journal*, 22(14), 5115-5124.
- Tabassum, M. T. (2012). Political situation in Kashmir and role of United Nations. *SCS Journal*, 1(2), 4-28.
- Wilcock, A. (1993). A S of the human need for occupation. *Journal of occupational science*, 1(1),

Zulfqar, S. (2016). Kashmir: nature and dimensions of the conflict. *Journal of Current Affairs*, 1(1–2), 51-65.