



ANALYSIS OF KASHMIR'S SPECIAL STATUS REVOCAION UNDER INTERNATIONAL LAW

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Abstract

In August of 2019, India repealed Articles 370 and 35A of its Constitution, which essentially removed Kashmir's special protection status that had been in place for a long time. The people of Kashmir enjoyed a higher level of autonomy than the residents of other Indian states thanks to Kashmir's special protection status; but, once it was revoked, Delhi gained a larger degree of authority over Kashmir. Concerns about violations of human rights have been raised by a number of groups in response to the unexpected removal of the region's special protection status and the ensuing lockdown. This essay will take a very specific approach to the question of whether or not Kashmir's loss of its special protection status constituted a breach of international law. This article illustrates that although Kashmiris' internal right to self-determination may serve as a basis for illegality under International law, this right cannot be used as a justification for the current situation in Kashmir.

Keywords: Kashmir, International Law, Constitution, India, Pakistan.



Introduction

India's withdrawal of Kashmir's special protection status may have violated international law if the lengthy and complicated history of Jammu and Kashmir is taken into consideration. On the northern Indian subcontinent, Kashmir is bounded by the Uyghur region of Xinjiang in the northeast; to the east is Tibet and the Chinese-administered sections of Kashmir; in the south are Indian states; and to the southwest are Pakistan and the Pakistani-administered Kashmir. Kashmiris lived in relative peace and harmony before India and Pakistan were divided in 1947. The word *kashmiriyat*, which means "Kashmir amity," was used by local officials to characterise the peaceful and harmonious connections across religions and cultures in the region. (Ali, 2020) Even though Islam, Buddhism, and Hinduism all had their adherents in Kashmir, the commonality of the region's identity was evident in the region's frequent mixing of religious rituals. 72.41% of residents were Muslim, while 25.11% of the population were Hindu, as recorded in the 1941 census. There were 95 percent Muslims in the Kashmir Valley, 67 percent Hindus in Jammu, and 50 percent Tibetan Buddhists in Ladakh, according to a Berkeley Center analysis in 2013. This region was put in a tough situation during partition. Unofficially, each state was expected to choose whether to join India or Pakistan when British authority ended. Maharaja Hari Singh, Kashmir's ruler at the time, initially refused to join either India or Pakistan. In Pakistan's opinion, Singh's standoff was irrational because Kashmir was a Muslim-majority region. India, on the other hand, saw Kashmir as a strategic barrier between Pakistan and India, and sought to acquire it. India was also concerned about Kashmir's Hindu majority areas. (Ali, 2020)

As a result of the ongoing conflict in Jammu and Kashmir, the disputed area has once again drawn worldwide attention. In addition to its political and diplomatic complexities, the Kashmir dispute is largely one of law. Legal implications and unfulfilled international commitments are entailed by all of the actions taken by the United Nations and the Indian state since 5 August 2019. Given how important Jammu and Kashmir is to Pakistan and India, as well as to peace and security in the region, it is a shame that there is so little academic research on the international law parts of the situation there. Because of this, this research was done to add to the discussion about the Jammu and Kashmir issue and to make it clear what international law applies. In this paper, we talk about the legal rules that apply to illegal annexations and the transfer of legal title to territory that is being occupied. We think that the State of India is an Occupying Power in Jammu and Kashmir and that its actions on August 5, 2019, were an attempt to illegally annex this territory without asking the people of Jammu and Kashmir what they wanted. The legal consequences of India's occupation and illegal annexation of Kashmir are laid forth in this paper in broad strokes. (Ali, 2020; Rauf & Asif, 2021)



Background

In the early nineteenth century, the East India Company assumed political powers in India and so began British dominance in that country. India was administered as nine provinces, often referred to as "British India," under the direct rule of the British Crown beginning in 1858. According to the idea of paramountcy, in addition to 584 princely kingdoms, Britain was in charge of the defence and foreign affairs of the United Kingdom and the United Kingdom's allies. India's independence became a certainty with the end of World War II. Independent India's future form, on the other hand, remained a question mark. Multiethnic democracy was called for by the Indian National Congress (INC), which was the largest party in the country. As opposed to this view, the All-India Muslim League held that Hindus and Muslims were two distinct nations. Under Mohammed Ali Jinnah's plan, the former British India would be partitioned into Muslim-dominated Pakistan and a Hindu-dominated India. The Muslim fear of an independent India with a strong Hindu majority manifested itself in the hypothesis of a two-nation state. Jawharlal Nehru and Mahondas Gandhi's Congress party, led by Nehru and based on the vision of an undivided India founded on equality, is not in question. Conflicts between communities and religions, fostered by the Raj to keep his grip on power, could not be reconciled. Because of this, a "oneration" hypothesis, which promoted an Indian confederation, was dropped from the 1946 British Cabinet Mission Plan. (Gershman, 2001)

A more expeditious division of British India was planned based on the two-nation hypothesis. Accordingly, the Indian Independence Act was criticised as lacking in provisions for the distribution of financial and military resources as well as other difficult issues. To make way for India and Pakistan as independent nations, the former British colonies of India and Pakistan were divided into two separate sovereign states on August 15, 1947. The ramifications of the division were far-reaching. Seven million Muslims moved to Pakistan from the nascent Dominion of India, whereas 5.5 million people went the other way. More than one million people died in the immediate aftermath of partition, according to estimates from the United Nations. Because of its effect on both countries' national psyches, the division had an impact on future ties between them. As an illegal state created out of the multiethnic, "traditional" India's landmass, Pakistan was seen as an existential threat to India's national integrity. Similarly, Pakistan viewed India as a threat to its own existence since it was determined to regain the new state and subjugate the Muslim minority. Both India and Pakistan's third-party relationships would be shaped by these beliefs, which would have an influence on more than just bilateral relations. (Akhtar et al., 2021)



Princely states were not included in either dominion, despite the fact that the division had a significant influence on them. According to Indian Independence Act, all powers had been returned to the states and the Crown's paramountcy had dissolved. The Act, as interpreted by the British and Pakistani governments, meant that each state's destiny would be decided by its own rulers, but the Indian perspective was that these states were aberrations and should be reincorporated into the larger nation. The princely nations, many of which were quite small, were unable to pursue independence because of the lack of British armies to protect them. Lord Mountbatten, the then-Viceroy, pushed the states to join one or the other dominion. As of the time of partition, Kashmir was 80 percent Muslim, with Buddhists and Hindus making up a significant majority in two of the state's five areas, respectively. In terms of both geography and economy, Kashmir was seen as a part of Pakistani territory. The Indus River and the Srinagar-Rawalpindi Road were the primary arteries connecting Kashmir with the rest of the globe. Kashmir's annexation to Pakistan is inevitable because of these inherent linkages. Maharaja Hari Singh, a Hindu, was the princely monarch of Kashmir. The Maharaja was equally averse to joining Pakistan as he was to joining India, fearing a loss of political clout. Since the Maharaja wanted Pakistan to run Kashmir's telecommunications and rail networks, they signed a Standstill Agreement with their newly elected government in August 1947. There is evidence to suggest that the Maharaja was still open to the possibility of Kashmir becoming an independent state. The state's independence was short-lived, however, as it began to suffer from civil turmoil. On October 22, 1947, Pakistani Pathan tribesmen invaded Kashmir after a Muslim insurrection in the Poonch district and ensuing inter-communal bloodshed. Kashmir, on the other hand, accused Pakistan of cutting off supplies to Kashmir. The Maharaja sought assistance from India in order to keep his position of authority. (Fareed & Krishnan, 2020)

UN Intervention

India and Pakistan's militaries engaged in combat shortly thereafter. The Indian Cabinet notified the United Nations Security Council about the Kashmir crisis on January 1, 1948. Two weeks later, Pakistan expressed its concern over the situation. United Nations Security Council enacted Resolution 39 on January 20, 1948, creating the United Nations Commission on India and Pakistan in view of the situation (UNCIP). In order to look into the claims levelled against one another by Pakistan and India, this panel was formed. Later, the Security Council passed Resolution 47 on April 21, 1948, recommending the withdrawal of Indian troops and tribesmen, the establishment of an interim government comprised of the major Kashmiri political groups, and the dispatch of a five-member UNCIP to Kashmir to aid in the restoration of peace and to set up a fair plebiscite. Because the Security Council thought that the advice offered in Resolution 46 was insufficient, it was added in Resolution 47. (Minhas et al., 2019) For the plebiscite, Jammu & Kashmir



would be asked to choose between India and Pakistan. This demilitarisation was never implemented because of the conflicts between the two governments. This view stemmed from Pakistan's belief that any retreat should take place simultaneously, and from Pakistan's worry that Indian aggression would arise from India's recent absorption of two princely states (Junagadh and Hyderabad) that Pakistan had joined during the partition. India always insisted that Pakistan should pull back first before it would pull its own soldiers back, but Pakistan never did. Since 1949, India has always maintained that it will not participate in any effort to demilitarise the region in order to make way for a vote that is both free and fair. Even to this day, it maintains its initial resistance to demilitarisation in any shape or sequence, despite the fact that this refusal takes many different forms and is motivated by a wide range of factors. (Shah & Shah, 2020)

Right to Self-Determination for Kashmir

The people of Jammu and Kashmir are considered indigenous because of the region's long and illustrious history. One definition of Indigenous peoples holds that they belong to pre-colonial cultures that developed on their land and have a history of continuity with those cultures. Indigenous peoples believe that they are distinct from the cultures currently existing on or within their homelands, as well as from other groups and segments of society. Non-dominant elements of society, however, are strongly devoted to maintaining, strengthening, and passing to future generations their ancestral lands and ethnic identity as the cornerstone of the continued existence of their peoples," they write. The idea of self-determination implicitly includes the right of indigenous people to participate in democratic processes and make decisions about their political future. As a result, indigenous people enjoy the right to self-determination, which means they may make their own political decisions and pursue economic, cultural, and social improvements without interference from outsiders. Self-determination is a fundamental human right in Jammu and Kashmir and the conflict between India and Pakistan is more than just a territorial issue. This right to self-determination has already been recognised by several international agreements and treaties. (Ashraf, 2020) You have the right to self-determination if you're a citizen of Jammu & Kashmir. International law guarantees the right to self-determination to all people of a nation state. There is no other way to describe the state of Jammu & Kashmir except as a nation state. Jammu and Kashmir, a state with a long history of self-rule, is home to more than 14 million people. East Timor and Crimea are instances of successful self-determination implementations that may be used as additional support for Kashmiris' right to self-determination. Those living in Jammu and Kashmir can exercise their right to self-determination in accordance with international law. The Kashmir conflict revolves around the primary topic of self-determination, which has been well recorded.



The United Nations Charter established the right to self-determination in international law. The UN charter specifically states, "to promote peaceful relations between States based on respect for the principle of equality of rights and self-determination of people." In 1948, the United Nations General Assembly ratified the Universal Declaration of Human Rights (UDHR). According to the Declaration of Independence, all people have equal rights and freedoms. Individuals rather than governments have the right to self-determination, according to the International Covenant on Civil and Political Rights (ICCPR) and the International Criminal Court (ICC). On September 13, 2007, the United Nations General Assembly adopted the UNDRIP, which outlines the rights of indigenous people on an individual and communal level. People have the right to self-determination, according to Article 3. Because of this right, they are empowered to make their own judgments regarding their political position." (Rauf & Asif, 2021)

Jammu & Kashmir Territory Under International Law

Land is included in the concept of territory, as is any adjacent sea or air territory. The size of these territories is irrelevant for this definition. A region can be occupied even though its legal status is in question. This is relevant to the current situation in Kashmir. In 2004, the Eritrea-Ethiopia Claims Commission came at this conclusion. In the Wall Advisory Opinion, the International Court of Justice stated the same. Consequently, a territory's status as occupied does not depend on whether or not there are conflicting sovereign claims to it. Pakistan claims that India has no legal claim to Jammu and Kashmir, and so any attempt to incorporate it into its own territory constitutes unlawful annexation and occupation. Numerous UN Security Council decisions have acknowledged Pakistan's claim to Jammu and Kashmir as disputed territory and the subsequent lack of legal title to it by India. In the absence of a legal title, India is unable to unilaterally change Jammu & Kashmir's status from disputed territory to an integral part of India. Security Council Resolutions 91 of 1951 and 122 of 1957 unequivocally rejected Indian attempts to unilaterally alter the status of Jammu and Kashmir. (Idrees et al., 2021)

The Simla Agreement of 1972 underlined the illegality of unilateral action, modifying the status of Jammu and Kashmir, by either state:

"Until all outstanding issues between the two nations have been resolved, neither country should move unilaterally to change the status quo, and both should work to prevent any actions that may jeopardise the continuation of good will and harmony between the two countries."

In addition, the Simla Accord states:



“Both parties will meet to discuss how to achieve a lasting peace and normalise relations, including how to deal with the problems of war prisoners and civilian internees as well as how to resolve the conflict in Jammu and Kashmir definitively and how diplomatic contacts may be resumed.”

According to India's claim that it has a legal right to Jammu and Kashmir, the Instrument of Accession also denies India the capacity to intervene unilaterally in the region. Which, in its fifth clause, states:

“5. There will be no amendments to the Indian Independence Act, 1947 or this my Instrument of Accession, unless I approve such amendments by an Instrument additional to this Instrument.”

Also written in the Instrument of Accession are:

“7. Nothing in this instrument should be taken as a promise to accept any future Indian constitution or to stop me from making arrangements with the Indian governments under any future Indian constitution.

8. Nothing in this document changes the fact that I am still the ruler of this state, or my ability to use the powers, authority, and rights I already have as the ruler of this state, or the fact that any law currently in effect in this state is still valid.”

As was just said, Article 370 enumerated the one-of-a-kind conditions that were stipulated in the Instrument of Accession for Jammu and Kashmir's putative incorporation into India. This was covered in the previous section. To further undermine India's claim to legal title to Jammu and Kashmir, it has substantially broken the instrument by unilaterally abrogating Article 370 without consulting the people of Kashmir or their elected representatives in the region. (Awan, 2020)

Jammu & Kashmir before revocation of Article 360 & 35A

- Jammu & Kashmir had a special autonomy and powers.
- Kashmiris had dual citizenship.
- A separate flag was used for Jammu & Kashmir.
- Article 360 was not applicable.
- There weren't any reservations for minorities such as Hindus and Sikhs.
- Indians from other citizens were not able to purchase land or property in Jammu & Kashmir.
- Duration of Legislative Assembly was 6 years.



Jammu & Kashmir before revocation of Article 360 & 35A

- The territory of Jammu & Kashmir to be divided into 3 parts: Jammu, Kashmir and Ladakh.
- Jammu & Kashmir has lost its special autonomy and powers.
- Kashmiris has single citizenship now.
- No separate flag for Jammu & Kashmir now and only Indian flag to be used.
- Article 360 applicable now.
- There are now reservations for minorities such as Hindus and Sikhs.
- Indians from other citizens are now able to purchase land or property in Jammu & Kashmir.
- Duration of Legislative Assembly will be 5 years.

India's Annexation is Illegal Under International Law

On the Golan Heights and in Jerusalem, India's efforts are equivalent to Israel's. Israel seized control of the West Bank, including East Jerusalem and Gaza, during the 1967 Six-Day War. East Jerusalem and parts of the West Bank were legally annexed by the Israeli government in June 1967. In a statement, the UN General Assembly urged Israel to "rescind all measures previously taken and to abstain forthwith from adopting any action which would alter the status of Jerusalem." However, in 1980, Israel enacted the Jerusalem Basic Jurisdiction, which extended Israeli law to Jerusalem. Reaffirming that "all legislative and administrative measures and actions taken by Israel, the occupying Power, which purport to alter Jerusalem's character and status have no legal validity," the Security Council in Resolution 476 (1980) stated that "all legislative and administrative measures and actions taken by Israel that purport to alter Jerusalem's character and status have no legal validity." It further claimed that all countries that have established diplomatic missions in Jerusalem should leave. (Wani, 2020)

Similarly, Israeli soldiers conquered and occupied the Golan Heights at the conclusion of the 1967 Middle East conflict. It was decided by Israel's parliament, the Knesset, to include the Golan Heights under Israel's legal authority and administration with the passage of Law 5742-1981. The Security Council strongly criticised Israel's actions, stating in Resolution 497 (1981) that "the Israeli decision to impose its laws, jurisdiction, and administration on the occupied Syrian Golan Heights is null and illegitimate and without international legal effect." The International Court of Justice (ICJ) said in its Wall Advisory Opinion that the construction of the wall and its associated regime produced a "fait accompli" that may very well become permanent, resulting in a de facto annexation of the land. By annexing and



incorporating Jammu & Kashmir as a Union Territory, India has broken international law. Due to Israel's illegal *de jure* annexations of the Golan Heights and Jerusalem, as described in Security Council Resolutions, this act is unconstitutional and without legal authority. (Wenning, 2003)

Consequences of Repealing Articles 35A & 370

Following are the consequences of India's undemocratic and unethical seizure of Kashmiri autonomy and their identity. First and foremost, the battle for liberation would be more brutal. Article 370 and 35-A have been violated more than 100 times in Indian-occupied Kashmir since January 2020, according to the "Rights Group report of July" (Dawn, 2020). Violence in Kashmir is possible, but it is unlikely to rise significantly. As a result, Kashmir's economy would be severely impacted. "The economy of Kashmir lost INR 178.78 billion" as a result of the "communications embargo, curfews, and terrorist threats." Since the internet was shut down and Article 370 and 35-A were abrogated by the Indian government, almost 90,000 individuals in Kashmir have lost their employment (Wani, 2020). Since the beginning of the Second World War, Kashmir has had its worst economic downturn in more than 70 years (Wani, 2020). Fourth, the Indian government has denied educational opportunities to Kashmiri youngsters as a result of the prolonged curfew, leaving their futures in the dark. Students in Kashmir have been forced to stay at home and are unable to use the internet, preventing them from furthering their studies or advocating for the cause of Kashmir throughout the world. At Indian offices, students must pay up to INR 200 for each online submission they make (Wani, 2020). In the first half of 2020, IOK had 55 outages due to equipment failures (Dawn, 2020).

In order to quell the uprising, India will resort to genocide (Minhas et al., 2019). Sixth, India is enforcing demographic change in Kashmir by granting citizenship to non-Kashmiris, therefore reducing Kashmir's Muslim population to a minority. "India has awarded tens of thousands of individuals from outside the area the same rights as Kashmiris," according to a study by the Rights Group. For the first time, they are able to purchase real estate. This Indian effort is aimed at reshaping Kashmir's demographics (Dawn, 2020). Seventh, India accuses Pakistan of backing the Kashmiri independence movement (Minhas et al., 2019). There will be war between India and Pakistan if Indian accusations and efforts to tarnish Pakistan's image continue. 957 ceasefire breaches and attacks on civilians in Azad Jammu and Kashmir were recorded in the first five months of 2020, compared to 3000 in 2019. (Ashraf, 2020).



Conclusion

International law prohibits the elimination of Kashmir's special protected status. Because of Kashmir's exceptional status, Kashmiris were allowed a form of self-rule. Despite international law's development of rights to autonomy, this article contends that they are not strong enough to guarantee Kashmir's special protection status. A probable violation of Kashmiri internal self-determination might come from India's actions, even though it appears that India did not violate Kashmiris' right to external self-determination. India has a tremendous deal of discretion when it comes to enforcing its duty to protect, thus it's doubtful that this claim would prevail under international law. The conflict in Kashmir has been a thorn in the side of the UN Security Council for decades. India's recent measures have ratcheted up tensions in the disputed region, which has serious consequences for world peace and security, as well. If international law is to survive, it must be reaffirmed at a time when populist governments and non-state actors are challenging the rule-based international system. An attempt was made in this study to show how the difficult Kashmir issue has evolved in terms of its legal elements. The State of India's activities in Jammu & Kashmir are contrary to international law, bilateral treaties, and even its own domestic law, according to a review of relevant legislation. International law's purity and morality are at stake in Kashmir, according to our evaluation of Kashmir as a test case for the viability of international rules-based order.



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