



SPECIAL PROVISION TO JAMMU & KASHMIR, WHY?

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Abstract

It can be proved that what is politically feasible is not necessarily legal or just. A political settlement is therefore not a just and valid legal settlement. Particularly when such a settlement is based on a method, device or principle that is unrecognized and unaccepted as a legal prescription in the treatise of the law of nations relating to the territorial divisions between the sovereign states. Thus India can emphatically reject Pakistan's demand for a plebiscite in Kashmir on the ground that the principle as such is unrecognized, unaccepted and unfounded in the law of nations and as such is devoid of any legal validity what so ever.

KEY WORDS: *State autonomy, provincial autonomy, political entity*

INTRODUCTION:

The idealistic approach of the founding fathers of the Constitution underwent a remarkable change and some specific provisions relating to State autonomy or provincial autonomy or autonomous States have been incorporated in the Constitution. This has been done by taking into consideration about the prevailing situation of the country which has given a practical shape to the Constitution.

The need for formulating a comprehensive study of State autonomy or provincial autonomy is a major political, social and economical issues throughout the developing countries of the world today. The insecurity and lack of Status of the actual tiller cannot but have a disastrous effect on the whole system and of the country and it is no wonder that it has been at the root of all social and political up levels in history.

AUTONOMY OF STATE UNDER BRITISH RAJ :

The state of Jammu and Kashmir came into being as a single political entity in

1846 under what is called the treaty of Amritsar. The British government vide this treaty concluded on 16th may of that year, transferred and made over, "forever in independent possession to Maharaja Gulab Singh and the heir male of his body all hilly or mountainous country with its dependencies situated to the eastward of the river Indus and westward of the river Ravi."

In consideration of this transfer Gulab Singh paid to the British government the sum of seventy-five lacs of rupees.

While Jammu and Ladakh were already being ruled by Gulab Singh, the valley of Kashmir which the Lahore Durbar had sold to the British government was transferred by the latter to the Dogra ruler who acquired it after stiff local resistance. The boundaries of the new state were further extended by its rulers through a number of military expeditions, of course, with the concurrence of the British Government, Ranbir Singh son of Gulab Singh added Gilgit in life time of his father to his dominion. He subdued



Yasin in 1863 and Dard valley in 1865. Later during the rule of Maharaja Pratap Singh, grandson of GulabSingh , his forces defeated the rulers of chitral in 1891and of Hunza and Nagar in 1895. Who accepted the suzerainty of the DograDurbar.

While the Treaty transferred the state to Gulab Singh "in independent possession" it unambiguously specified British supremacy over his rule. According to Article -4 of the Treaty of Amritsar Maharaja did not change the limit of his territories without concurrence of the British government. He under took to refer to the arbitration of the British government any dispute in question that may arise between himself and the government of Lahore or any other neighboring state and to abide by the decision of the British government.

According to Article-6, Maharaja engaged for himself and heirs to join with the whole of his military force, the British troops when employed within the hills or in the territories adjoining his possessions. He further engaged in Article-7 never to take or retain in his service by British subject, not the subject of any European or American state with the consent of the British government. Under Article-9 the British government undertook "the responsibility of protecting the territories of Maharaja Gulab Singh from external enemies.

Finally and more specifically according to Article-10 Maharaja Gulab Singh acknowledged the supremacy of the British Government and will in token of such supremacy present annually to British Government , one horse, twelve perfect shawl goats and three pairs of Kashmiri shawls.

NATIONAL VIEW ON KASHMIR The genesis of Kashmir's emotional and political drift away from the national identity can be traced to centrifugal forces within the state caused by tensions between its three principal regions. But development at the national and international levels also contributed to the same process.

The demand of Jammu PrajaParishad for what is called "full accession" of the state to the Indian union by which it meant that the constitutional status of the states of the country evoked sympathetic response among many of Indian nationalist. Hindu leaders like Dr.ShyamaprasadMukerjee and N.C.Chatterjee were vocal supporters of the demand. They were willing to concede a special status for the valley if Jammu and Ladakh could be integrated with India.

In a bid to reconcile popular Kashmiri aspirations with the demands of Indian nationalism, Nehru initiated a dialogue with Abdullah and concluded what was called Delhi Agreement in July 1952. Under it, Abdullah agreed to cede a few more subjects to the centre then were contemplated in the original instrument of Accession. The agreement between the government of the state and India, inter alia, covered the following points:--

(i) The two governments agreed with regard to the extension of provisions of the constitution of India dealing with citizenship to the state, allowing its legislature the right to define and regulate the rights and privileges of the "permanent residents" who used to be called state subjects.

(ii) Agreement was reached with regard to the application of fundamental rights



embodied in the constitution of India, subject to suitable modifications, amendments and exceptions so as to protect the land reforms of the state and deal with the cases of infiltration, espionage and sabotage. No decision could be taken on whether the character on fundamental rights in the Indian constitution should be extended as such to the state or should form a part of the Kashmir constitution.

(iii)Settlement was made with regard to the extension to the state of the original jurisdiction of the Supreme Court in regard to the enforcement of the fundamental rights and other provisions of the Indian constitution applied to the state.

(iv) The two Governments agreed to evolve some sort of financial arrangement between the state and the Indian union, the state government felt that a detailed and objective examination of the subject was necessary.

(v) It was agreed that the state would retain its flag but the union flag would have a supremely distinctive place in the state.

(vi) The head of the state would be elected by the state legislature but would hold office subject to the recognition of the president of India during his pleasure.

On some other subjects the discussions remained inconclusive. Explaining the terms of Agreement in parliament, Nehru categorically stated that special constitutional provisions for the state were only in response to the special political conditions obtaining in it at that time and "did not constitute a condition for its accession to India." He said, the accession of the state was complete when it first acceded in 1947.

While Sheikh Abdullah and Jana Sangh leaders debated over the degree of accession, Nehru clearly wanted to make the issue of accession above controversy by delinking it from that centre state relations.

However, the agreement was far from successful in restoring inter-regional harmony. On the eve of its conclusion, the writer warned the prime minister against the consequences of increasing tension among the regions of the state. A written memorandum submitted on the occasion said, "Kashmir leadership has not been able to come out of the orbit of narrow local nationalism of the valley and extend its influence to other parts of the state. We apprehend growing deterioration in the internal relations between different regions, particularly when the policies of the Kashmiri leaders are encouraging communal and reactionary activities of the PrajaParishad in Jammu which also banks upon similar regional nationalism.

In particular it urged that during his talks with Kashmiri leaders, emphasis should be laid on "democratization of the political structure of the state. Safeguarding democratic rights of the people ensuring freedom of judiciary, making administration completely neutral and separate from the National Conference organization, better and more realistic relations between all regions, granting them some sort of autonomy and lastly on economic amelioration of the people through a planned economic policy of the state.

A public campaign to press the demand for regional autonomy followed. It elicited an assurance from Sheikh Abdullah to the effect that the constitution of the state, when complete would give limited regional autonomy,



particularly in cultural sphere to Jammu and Ladakh. Nehru told a press conference in the presence of Abdullah in New Delhi on 24th July 1952 that "the state government was considering regional autonomies within the larger state.

Criticizing the agreement in parliament Dr. Shyam Prasad Mukerjee advocated, "Kashmir's complete integration with India or alternatively self-determination for Jammu and Ladakh."⁷⁸ Abdullah was quick to oblige by saying that, "If any region wished to break away, the government would not attempt to retain it by force."

Delivering the presidential address at the first all India session of the Bharatiyajasangh at Kanpur towards the end of 1952, he said, "we would readily agree to treat the valley with Sheik Abdullah as its head in any special manner and such time as he would like but Jammu and Ladakh must be fully integrated with India according to the wishes of the people.

The Jammu PrajaParishad, which had reacted similarly, started a powerful agitation from 17th November 1952 when the state constituent Assembly started implementing the agreement and passed provisions in its regarding termination of the institution of Monarchy. The state government must have deliberately chosen to start the implementation of the agreement with this provision. It was a popular measure in the valley though not so in Jammu.

The PrajaParishad and the National Conference by polarizing the politics of the state helped each other in consolidating their hold on their respective communities. In fact the Parishad agitation seemed to be an real

instrument for the fulfillment of the objectives of Muslim communalists, Kashmiri Nationalists and communists who had one common interest in isolating Kashmir valley from the rest of India.

SPECIAL STATUS:--However, a distinct feature of the state's relations with the paramount power was absence of any provision for sectioning British Resident in the state which was the practice in other princely states of the country.

The residents were representative of the central government in the states under British Raj as the governors are in independent India, except that they had far greater powers undefined and arbitrary than the latter now have which bound by the letter of the constitution, albeit without a similar ceremonial status. The state thus enjoyed a sort of special status within the British India Empire.

The Anglo-Afghan war of 1878 and the gradual extension of the Russian empire almost up to the borders of the state increased its strategic value for the British empire through loyal princes and in particular, entrenching their administration in the neighboring Punjab the British were now anxious to extend their sway over Jammu and Kashmir state as well.

While Maharaja Gulab Singh and his son and successor Maharaja Ranbir Singh resisted proposals to station a British resident in the state, the British Government succeeded in doing so after the latter's death in 1885.

Lord Kimberley, British secretary of state for India in a communication to lord Rippon, the viceroy of India, dated 23 may 1884 confirmed that no resident was appointed in the state in 1846, nor was



suggestion of his appointment pressed in 1873, because it did not justify "disregarding objections which were expressed by authorities entitled to respect (referring to Kashmir Durbar)." But he added that in the interval circumstances had greatly changed, inter alia, due to the course of events beyond the border, which have materially increased the political importance of Kashmir. Accordingly, he advised the viceroy, to proceed in the matter at any time after the death of Maharaja Ranbir Singh.

ACCESSION OF KASHMIR WITH INDIAN UNION

Jammu And Kashmir State was one of those Indian princely states which did not join the constituent Assembly of India set-up under the cabinet mission plan announced on 16th May 1946. Addressing the session of the AISPC which met at Gwalior on 17th, 18th April 1946. Jawaharlal Nehru warned the princes that "all those who do not join the constituent Assembly now would be regarded as hostile states and they will have to bear the consequences of being so regarded."

Liaqat Ali Khan, the leader of the Muslim League in the central Executive declared, on the other hand, that the states were perfectly entitled to refuse to have anything to do with the constituent Assembly. In August 1946, the Muslim League finally decided against joining the Assembly. This encouraged a group of princes led by Nawab of Bhopal to sit on the fence. The relations of the Indian National Congress with the government of Jammu And Kashmir State were particularly strained following the arrest of its leader Jawaharlal Nehru at Kohala in June 1946 when he refused to obey the order to leave the state. He had gone there to arrange for the defence of

Abdullah who had been arrested earlier in connection with the Quit Kashmir Movement. The congress working committee decided on 23rd September 1946 to send a deputation "to enquire into the reports of repression, suppression of civil liberties and tempering with votes" in the state Assembly election.

CONSTITUTIONAL STATUS RELATING TO JAMMU AND KASHMIR:

Constitutional relations of Jammu And Kashmir State with the centre have never been a good measure for the success of the process of India federalization. There has been a school of thought who has attached more importance to constitutional and legal bonds than satisfaction of political aspirations of the people. The movement for full application of the Indian constitution to the state gained momentum in Jammu and powerful support from many sections of population in the rest of the country despite enough warning about its advance effect on the minds of the people in Kashmir valley.

A major political party like the Jana Sangh and many eminent jurists like the late Supreme Court chief justice Mehr Chand Mahajan used to believe in a unitary form of government as the best guarantee for the unity of the country. Even at the time of the present survey (1975-76) a little less than half of Hindu respondents favoured a unitary constitution for India, whereas the Muslim opinion over 93% supported a federal constitution for India.

While studying evolution of the constitutional status of the state, the divergent views of its two major communities on the concept of the centre



state relations must be kept in view. The divergence was obviously much wider in the past than is the case now.

The constitutional status of the state was almost similar to that of 544 princely states that acceded to the Indian union after independence of the country in 1947. But political compulsions created divergent expectations about the future of this status among people belonging to different regions and communities of the state.

Under section-7 of the Indian Independence Act, passed by the British parliament in 1947, the suzerainty of the British crown over the Indian states including the state of Jammu and Kashmir lapsed and "His Highness became as uncontrolled and absolute sovereign." In exercise of this sovereign right to ruler of the state signed the instrument of Accession on 26th October 1947 which made it constitutionally a part of India.

In course of time when India's commitment to hold a plebiscite to determine future of Kashmir started fading out and she shifted her stand on Kashmir from moral and political to constitutional grounds, the Maharaja's sovereign position in 1947 gained importance in India's official arguments. Interestingly while only 39% of Muslim respondents in the valley believed in the moral validity of the state's accession to India. 80% of them believed that the accession was constitutionally valid.

The Instrument of Accession signed by the ruler of Jammu and Kashmir state was also of the standard form used by all the states, provided under section-6 of the Government of India Act 1935, as adapted by the Indian (provisional constitution) Order 1947. It

vested with the dominion of the India the authority to deal with three subjects namely, Defence, External Affairs and communications as also ancillary matters.

Retaining the residual sovereignty with the state, the accession document specifically noted, "Nothing in this Instrument affects the continuance of ruler's sovereignty in and over this state as provided under the Instrument. The exercise of any powers, authority and rights now enjoyed by the ruler of this state."

The instrument also made the following two provisions:--

- (1) The terms of this my instrument of accession shall not be varied by any amendment of the Act of the Indian Independence Act 1947 unless such amendment is accepted by me by an instrument supplementary to this instrument.
- (2) Nothing in this instrument shall be deemed to commit me in any way to acceptance of any future constitution of India or to fetter my discretion to enter into arrangement with the government of India any such future constitution.

SCOPE OF ARTICLE-370 IN THE CONSTITUTION:

This article was included in the constitution as a special provision in view to the problems arising in respect of the state of Jammu and Kashmir and also the fact that government of India had given their assurance to the people of the state that their political future would be finally determined by themselves.

The policy of the constitution which appears from this article is that the constitution was framed for the



entire union of India but the provisions of the constitution should not apply to the territories of the state of Jammu and Kashmir until and unless the president made an order that they shall apply.

The effect of the article was to give jurisdiction to the union parliament to make laws for the state on matters specified either in the instrument of accession or by later additions made with the concurrence of the state government. It is no way altered the basis of relationship between the state and the union government and left the state to be governed by its own laws and constitution in the residuary field.

This article was inserted as a temporary provision until the constituent assembly of the state met and decided the political future of the state. The president was empowered by the article itself to decide at the appropriate moment whether the article should be abrogated or be retained subject to exceptions and modification. Now the constituent Assembly of the state has decided that Jammu and Kashmir is and shall be an integral part of the "Union of India". How it would come into reality.

PAKISTAN'S CLAIM TOWARDS KASHMIR:

Pakistan claims Kashmir because of a Muslim Majority. Well, if Kashmir has a Muslim Majority, then Jammu has a Hindu Majority and Ladakh has Buddhist preponderance. Is not then the demand counter-balanced when Jammu and Ladakh are combined with Kashmir? Again Kashmir cannot be excluded or separated from either Jammu or Ladakh. Because the princely state of Kashmir comprised of both Jammu as well as Ladakh. At the time of accession the Maharaja had signed as

the ruler of a state whose territory comprised of all these three taken together as one unit or whole. Hence Kashmir minus Jammu and Ladakh is not the state. So Pakistan's demand because of this Muslim majority in Kashmir must be rejected as untenable.

With regard to the people of Kashmir when the constitution of India grants, guarantees and protects all the fundamental rights and treats the people of Kashmir on absolute parity with the rest of the Indians what more is left there for them to determine for which Pakistan has been wasting her crocodile's tears all these 18 years and till now.

CONCLUSION: Thus having made a through survey of the political and legal aspect of the Indo-Pakistani dispute over Kashmir the conclusion is that International Law is always a very serious handicap for the weaker powers. Whereas the mighty powers always twist and turn it as they will for their own selfish interests. They impose their actions and decisions upon the weaker powers and try to pass them off as International Law by their force. International law is always subjected to and dominated by the power-politics. It is because of all these that it is said and believed that the so called International Law is not truly a law. If at all it is a law then it must be admitted that it is merely a law by courtesy. Observance of which primarily and most heavily rests upon the conduct of the mighty powers of the world. The future, importance, validity, affectivity, sanctity and the binding force of International law as a means and as an instrument for settling and adjusting the various interests and issues of and between the sovereign states in a world community of nations all depends upon the big powers.



It can be proved that what is politically feasible is not necessarily legal or just. A political settlement is therefore not a just and valid legal settlement. Particularly when such a settlement is based on a method, device or principle that is unrecognized and unaccepted as a legal prescription in the treatise of the law of nations relating to the territorial divisions between the sovereign states. Thus India can emphatically reject Pakistan's demand for a plebiscite in Kashmir on the ground that the principle as such is unrecognized, unaccepted and unfounded in the law of nations and as such is devoid of any legal validity what so ever.

Thus the present so called "Azad Kashmir" which has come to stay as the de -facto boundary in Kashmir between India and Pakistan all these years is without any legal validity behind it. It is

the result of Pakistan's outright aggression against the former princely state of Jammu and Kashmir which subsequently became a part of the territory of the Indian union through the Instrument of Accession. Thus the so called "Azad Kashmir" has no legal recognition behind it. Legally India's sovereignty and right extends to this part of the state as well even though it is now under Pakistan's illegal occupation.

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