

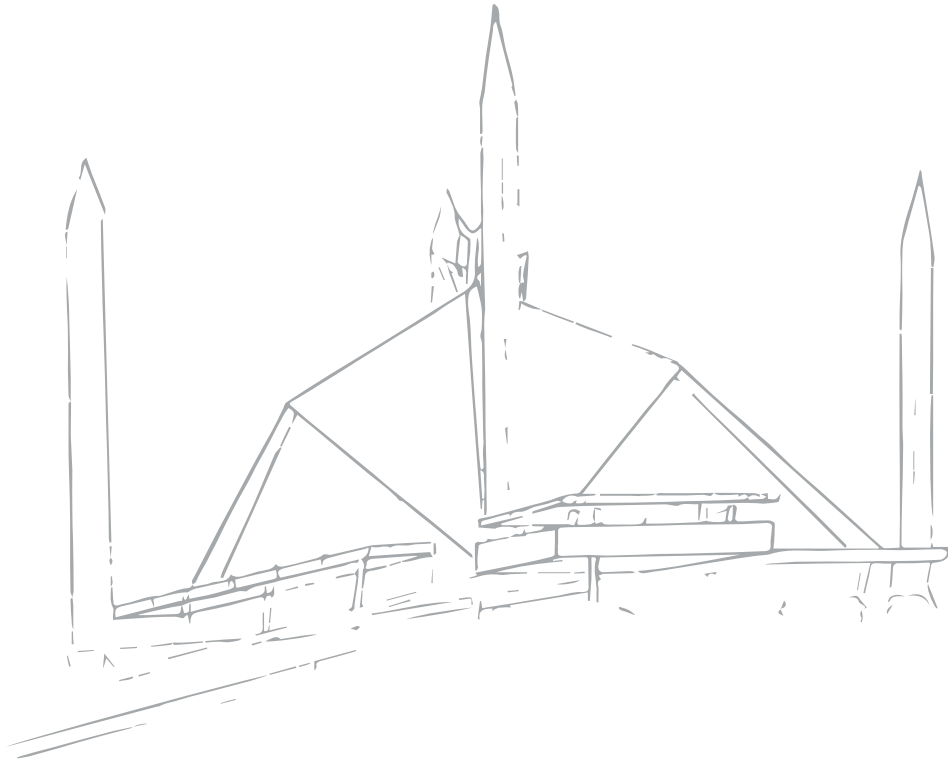


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Accession to Annexation: A coercive legal measure in UN-Recognized Disputed territory of Jammu & Kashmir

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Abstract

With the partition of British India, two independent states came into being by a result of the messy transfer of power from British colonial rule to two newly independent states of India and Pakistan. Both have celebrated over seventy anniversaries. The partition pact allowed the people to decide their future on the basis of Two-Nation theory, i.e. Hindu majority areas were to be a part of India, whereas Muslim majority areas were to be assimilated to newly-born Pakistan. The place of Kashmir, as being a Muslim-majority area, among these new nations, was hotly debated. However, an adequate solution was prevented when India sent her troops to occupy J&K forcibly under the garb of self-concocted temporary instrument of accession. This paper will discuss the partition plan juxtaposed with the Resolutions made by the United Nation on Kashmir, making of Constituent assembly till the abrogation Article 370 of Indian constitution which guaranteed special status to disputed state of Jammu Kashmir

Key words: *Indian Independence Act 1947, Instrument of Accession, United Nation Security Council, Article 370, Article 35-A Constitution of India*

1.1 Introduction:

After British India was created and was controlled and administered by British Government, as a consequence of political developments within British India and urge to share power, the British Parliament enacted Government of India Act, 1935. This Act for the first time made provision for accession of "Indian States" to the "British India". The provisions were so made keeping in view the ground realities, in particular geographical position of the "British India" and the "Indian States". The provisions of the Act intended to provide a sort of Federation where the federating unit i.e. Indian States could accede to British India in accordance with the provisions of the Act. When all of Mountbatten's efforts to keep India united failed, he asked Ismay to chalk out a plan for the transfer of power and the division of the country. It was decided that none of the Indian parties would view it before the plan was finalized. The plan was finalized in the

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Governor's Conference in April 1947, and was then sent to Britain in May where the British Government approved it.

However, before the announcement of the plan, Nehru who was staying with Mountbatten as a guest in his residence at Shimla, had a look at the plan and rejected it. Mountbatten then asked V. P. Menon, the only Indian in his personal staff, to present a new plan for the transfer of power. Nehru edited Menon's formula and then Mountbatten himself took the new plan to London, where he got it approved without any alteration. Attlee and his cabinet gave the approval in a meeting that lasted not more than five minutes. In this way, the plan that was to decide the future of the Indo-Pak Sub-continent was actually authored by a Congress-minded Hindu and was approved by Nehru himself. Mountbatten came back from London on May 31, and on June 2 met seven Indian leaders. These were Nehru, Patel, Kriplalani, Quaid-i-Azam, Liaquat Ali Khan, Nishtar and Baldev Singh. After these leaders approved the plan, Mountbatten discussed it with Gandhi and convinced him that it was the best plan under the circumstances. The plan was made public on June 3, and is thus known as the June 3rd Plan. The following were the main clauses of this Plan:

The Provincial Legislative Assemblies of Punjab and Bengal were to meet in two groups, i.e., Muslim majority districts and non-Muslim majority districts. If any of the two decided in favour of the division of the province, then the Governor General would appoint a boundary commission to demarcate the boundaries of the province on the basis of ascertaining the contiguous majority areas of Muslims and non-Muslims. The Legislative Assembly of Sindh (excluding its European Members) was to decide either to join the existing Constituent Assembly or the New Constituent Assembly. In order to decide the future of the North West Frontier Province, a referendum was proposed. The Electoral College for the referendum was to be the same as the Electoral College for the provincial legislative assembly in 1946. Baluchistan was also to be given the option to express its opinion on the issue. If Bengal decided in favour of partition, a referendum was to be held in the Sylhet District of Assam to decide whether it would continue as a part of Assam, or be merged with the new province of East Bengal.

Out of total 565 princely states, 175 were known as suzerainty throne monarchy and were under the central government of British India, and the remaining were dependents known as 'Dominions' of the provincial governments of British

India; Only 17 suzerain states were handed over to Pakistan. However, the division of three larger provinces having both Muslims and non-Muslims was divided by a Boundary Commission i.e. Redcliff Award, partition was affected by the boundary commission because awarding of three Muslim dominated Tehsils of district Pathankot to Indian dominion by Redcliff Commission was manipulated by Mountbatten to safeguard that the Jammu and Kashmir state retained that essential access to India. The awarding of Gurdaspur to India makes it possible for India to access Kashmir which was not possible to reach.

2.1 Indian Independence Act 1947:

India Independence Act 1947 was an Act passed by the Parliament of the United Kingdom (UK) that divided the British India into two new independent dominions of India and Pakistan. The Act received the assent of the royal family on July 18, 1947 after which, India came into existence on August 15 and Pakistan on August 14 in the year 1947. The Act was formulated together by UK Prime Minister Clement Attlee and the Governor General of India Lord Mountbatten after the representatives of the Indian National Congress, the Muslim League, and the Sikh community gave their consent to the Act. This act came to known as 3 June Plan or Mountbatten Plan.

2.1.1 Important provisions under this Act

- Partition of the British India into two new and fully sovereign dominions-India and Pakistan with effect from 15th August 1947;
- Division of the provinces of Bengal & Punjab among the two newly formed countries;
- The offices of Governor-General in both the countries would be set up. These Governor-General would be representing the Crown;
- The complete legislative authority would be conferred in the hands of the Constituent Assemblies of the two new countries;
- The British suzerainty over the princely states would be terminated from August 15, 1947;
- Abolishing the use of title "Emperor of India" by the British monarch;

- The Act includes the division of the armed forces between the two countries.

2.1.2 Salient features of the Act

The two new dominions, India and Pakistan came into existence after the formulation of this Act. Dominion of India will represent the desire of the all people in India for self-government, while the Dominion of Pakistan would express the demand of the Muslims for the self-government. The appointed date for the partition is 15 August 1947.

2.1.3 Territories:

Pakistan-East Bengal, West Punjab, Sind, Northwest Frontier Provinces, Sylhet divisions in Assam, Bahawalpur, Khairpur, and Chief Commissioner's Province of Baluchistan and its eight other princely states Bengal-The province of Bengal ceased to exist. Two new provinces came into existence-East Bengal and West Bengal. Punjab: Two new provinces came into being-West Punjab and East Punjab. Boundaries of new provinces would be determined by a committee headed by Sir Cyril Radcliffe. Constitution of India and Pakistan: The Government of India Act 1935 governed the two dominions until the new constitutions were framed for both the countries. Governor-General of India and Pakistan: For each of the countries, a separate Governor-General was required to be appointed by the Crown subject to the laws of the legislature of either of the new dominions. The Act also provided critical directions on the armed forces of India as well as the steps to be taken in regards to British forces in India. Naval forces were also a critical area that was dealt with by this Act. The Act also created the legislatures of both the new countries formed. It also stated that the British would cease to have any control at all in any affairs of India and Pakistan from August 15, 1947 onwards.

2.1.4 Repeal

The Indian Independence Act of 1947 was repealed in Article 395 of the Constitution of India and in Article 221 of the Constitution of Pakistan of 1956. The Act also created the legislatures of both the new countries to be formed. It also stated that the British would cease to have any control at all in any affairs of India from August 14, 1947, onwards. The same applied for Pakistan as well. It also made provisions for the constituent assemblies of both India and Pakistan. It was decided that the constituent assemblies in both these countries would have all the powers vested in them. They would also create the respective constitutions in any way

that they deemed fit. Indian Independence Act 1947 also decided the governor-generals for the new countries. It also dealt with the results of forming the new dominions. This Act also dealt with the orders that were needed to make sure that it was executed in the way it was supposed to be. It looked into the services that were to be provided by the Secretary of State. The Act also provided critical directions on the armed forces of India as well as the steps to be taken with regards to British forces in India. Naval forces were also a critical area that was dealt with by this Act.

3.1. Kashmir's Accession

After the British Suzerainty lapsed on 15th August 1947 and the complete independence for both dominions were announced, the State of J&K did not accede to any of the two dominions and maintained its independent character. However, on 12th August 1947 a standstill agreement between the rulers was concluded and it was stipulated that pending settlement of details and former execution of fresh agreements, the existing agreements would continue. It's worth to mention here that the area covers the existing arrangements related to communications, supplies, postal and telegraphic arrangements but did not extend to defence and foreign affairs¹. The independent position of Kashmir till 2nd October 1947 until "The trouble" in Kashmir began as confirmed by the pro Indian sheikh Abdullah who made the following statement in Delhi on 21 October 1947;

".... The present troubles in Poonch a territory of Kashmir was caused by the un-wise policy adopted by the state. The people of Poonch had started a people's movement for the redress of their graveness. It was not communal, Kashmir started sending its troop and there was a panic in Poonch. But most of the adult population of Poonch were ex-service men in the Indian army with a close connection with people of Jhelum and Rawalpindi. They evaporated their women and children, crossed frontier and returned with arms supplied to them by willing people. The

¹ S.C.O.R third year, 229th meeting, 1948 page 101 the subject covered under the stands still agreement were specified in section 7. Clause 1 (c of the Indian independence act of 1947 which provides as follow: Not withstanding anything in paragraph(b) ... effect shall, as nearly as maybe continue to be given to the provisions of any such agreement as is there in referred to which related to customs, transit and communications, posts and telegraphs or other like matters until the provisions in question or denounced by the ruler of Indian state or person having authority in the tribal areas on the one hand or by the dominion or province or other part of here of concern on the other hand or are superseded by the subsequent agreements.

present position was that the Kashmir state police were forced to withdraw in certain area.”²

The Muslim population of Jammu and Poonch were ordered to evacuate their homes forthwith but before it could be implemented, an ethnic cleansing of Muslim started and peoples were cold bloodedly massacred and their village were set on fire. Reporting one incident, the *Times of London* observed “...237,000 Muslims were systematically exterminated, unless they escaped to Pakistan along the border by the forces of Dogra state, headed by the maharaja in person.³ The news of heinous atrocities perpetrated by the despotic forces of maharaja who infiltrated from adjoining parts of India inflamed the passion of Muslims of Kashmir and Pakistan. The indigenous guerrillas of Kashmir responded the Maharaja’s force and on 21/22 October, the Pathan tribesmen from the tribal area of Pakistan’s North West frontier province entered the Kashmir to help their co-religionist who were facing the atrocities of forces of maharaja. *Daily Telegraph* of London 12th January 1948 also observe; “it was undoubtedly tales of horrible cruelty against their co-religionist in Jammu, coupled with hurting news of insurrection, which first set them on their course of invade”⁴

Since the maharaja force were unable to contain the disturbance, he sent his deputy prime minister R. L Batra to New Delhi on 24.10,1927 for help in form of men, arms and ammunition. Jawaharlal Nehru and Sardar Patel came to know about the Batra arrival in the same day of evening. The request of maharaja was considered at meeting of Indian defence committee, next morning, which was presided over by Lord Mountbatten, who urged that it would be dangerous to send any troops to Kashmir, unless Kashmir had first offered to accede. The chiefs of army, naval and air force, were however given directions same morning to prepare plans for sending troops to Kashmir. Simultaneously V. P Menon, the civil servant was sent to Kashmir to present the cabinet terms to maharaja while the officer accompanying him studied the military situation. Menon further advised Maharaja to leave Srinagar as according to him the raiders had reached Baramulla. The maharaja along with his wife and son left Srinagar in morning of 26. 10 .1947. After difficult seven hours trip the maharaja caravan reached Jammu the

² Sited by Sir Zafar Ulla khan in Security Council debate on Kashmir. S.C.O.R, 3rd year 228th meeting, 16th January 1948, p. 68.

³ Sarwar Hassan, *Pakistan and United Nation* (New York: Manhattan publishing co, 1961) p.68

⁴ *Ibid.*, p. 98.

exhausted Hari Singh went immediate to his private quarter to retire before going to sleep he called his ADC to issue his last order as ruling maharaja;

“Wake me up only if V. P Menon returns from Delhi he said, because that will mean India has decided to come to my rescue. If he does not come before dawn shoot me in my sleep with my service revolver, because if he hasn’t arrived, it will mean all his lost”⁵

While the frenzied preparations for the operations were under way, Lord Mountbatten ordered V. P Menon to fly to Jammu residence of Hari Singh. V. P Menon reached his bed side before the maharaja could make his wish which he had given his ADC. With him awaiting on the Hari Singh signature which would provide a legal framework for India’s action. V. P Menon came back to his Delhi residence late on the evening of that same Sunday 26th October. He joined Britain’s deputy his commissioner Alexander Symon for a drink a few minutes after the returns. Menon seems jubilant.

“As both sat down and enormous smile spread across his face. He raised his glass to Symon. He pulled a piece of paper from his jacket pocket and waved it gaily towards the English men. Here it is, he said. ‘We have Kashmir. The bastard signed the act of accession and now that we’ve got it, we’ll never let it go”⁶

4.1 Indian Army Intervention:

There are two versions narrated by the historian pursuant to the intervention by the Indian army. As reported by the Joseph korbel, ‘it has been alleged that plans were made for sending Indian forces to Kashmir at some day before 26th October on which day the raid on that state from the direction of Abbottabad began’ the author has provided a time table of events as regard decision taken plans made orders given and movement started in this matter.

- On 24th October the commander in chief, Indian army received information that the tribesmen had seized Muzaffarabad.
- On 25th October the army were directed to examine and prepare plan for sending troops to Kashmir by air and road.

⁵ Larry Collins and Dominique LA Pierre, *Freedom at Midnight* (New York: Harper Collins Publishers 1997, Paperback edition), p. 447.

⁶ *Ibid.*, p. 448.

- On the afternoon of 25th one staff officer of the Indian army and one Royal Indian air force were sent to Srinagar this was the first contact between officers of Indian head quarter and officer of the state Kashmir force.
- On the same afternoon an order came to be issued to an infantry battalion to prepare itself to be flown at the short notes, to Srinagar in the event of government of India decided to accept accession of Kashmir.
- On the early morning of 26th October, the staff officers who were sent to Srinagar returned and reported their meetings with a high official.
- On the afternoon of 26th October India finalized its plan for dispatch by air of troops to Kashmir.
- At first light on the morning of 27th October with Kashmir's instrument of accession, the movement by air of Indian forces to Kashmir began.⁷

The LT General L. P Sen, reported in "*The Slender was the threat; Kashmir confrontations 1947-1948* New Delhi, the first Indian unit to arrive at Srinagar air field was 1/11th. It orders for the operation were issued at 1300 hrs. On 26th October 1947 the airlift was superintended by General Sir Dudley Russell.⁸ The government of Pakistan reacted against the Indian move to send his troops to Kashmir. The governor general of Pakistan, Muhammad Ali Jinnah, at midnight October 27 ordered the acting commander-in-chief general Sir Douglas D. Gracey, to dispatch troops to Kashmir the general was reluctant to follow Jinnah's instruction without the approval of Marshal Sir Claude Auchinleck, who was the supreme commander in charge of administering partition of the Indian army.

5.1 Internationalisation of Kashmir dispute:

Following the intense disturbance in Kashmir state, government of India and government of Pakistan and also British government had intense communication between each other with regard to the hostile situation. There are as many as twenty two correspondences between government of India, government of Pakistan and British government. It is not possible to provide the entire text of correspondence in the instant paper however few correspondences are worth to be reflected here, to provide the actual position;

⁷ Josef Korbel, *Danger in Kashmir*, (Oxford: Oxford University Press 1954), p. 86-87.

⁸ Lt General L. P. Sen, *Kashmir Confrontation 1947-1948* (New Delhi: Bird would, 1969), p. 58.

5.1.1 The Nehru's cable to Attlee Dated October 26. 1947

“We have received urgent appeal from assistance from Kashmir government. We would be disposed to consider such a request from any friendly state. Kashmir north frontier as you are aware, runs in commonly with those of three countries, Afghanistan, the union of soviet socialist republic and china. Security of Kashmir, which must depend upon control of internal tranquillity and existence of stable government since part of southern boundaries of Kashmir and India are common. It should be clarified that question of aiding Kashmir is not designed in any way to influence the state to exceed India.⁹

5.1.2 Pundit Jawaharlal Nehru telegram to Liaqat Ali khan

Pundit Nehru sent a telegram to Liaqat Ali khan prime minister of Pakistan in which he said “I wish to assure you that government of India has been forced upon them by circumstances and improvement and grave danger to Srinagar. They have no desire to intervene in affairs of Kashmir state after raiders have been driven away and law and order established. In regard to accession also, it has been made clear that that this is subject to reference to people of the state and their decision, government of India have no desire to impose any decision and will abide by peoples wishes but those cannot be ascertained till peace and law and order prevail. Protection of Kashmir of armed raids thus becomes first objective and in this we trust, we shall have your co-operation.¹⁰”

5.1.3 India's Prime minister sent telegram, to prime minister of Pakistan

“our assurance that we shall withdraw our troops from Kashmir as soon as peace restores peace and order are restored and leave the decision regarding the future of the state to people of state, is not nearly a pledge to your government, but also to the people of Kashmir and to the world.¹¹”

5.1.4 Nehru's telegram to Liaqat Ali khan dated 04,11,1947

“We are anxious to restore peaceful conditions in Kashmir and we invite your cooperation again to this end. This can only be done after withdrawal of raiders from state territory. As soon as raiders

⁹ Text of telegram dated October 26th, 1947 from Jawaharlal Nehru to the British by Prime Minister, Clement Attlee.

¹⁰ K. Sarwar Hassan, *Documents on the Foreign Relations of Pakistan: The Kashmir Question* (Karachi: IIA. 1996) p. 71.

¹¹ Ibid.

are withdrawn, there would be no necessity for our keeping our troops there. I wish to draw your attention to broadcast on Kashmir, which I made last evening. I have stated our government policy and make it clear that we have no desire to impose our will on Kashmir, but to leave final decision to people of Kashmir. I future stated that we have agreed on impartial international agency like united nation supervising any referendum.¹²”

5.1.6 Nehru’s telegram to Prime minister of Pakistan 08.11,1947

“It will thus be seen that our proposal, which we repeatedly stated are:

1. That government of Pakistan should publically undertake to do their utmost to compel the raiders to withdraw from Kashmir;
2. That government of India should repeat their declaration that they will withdraw their troops from Kashmir soil as soon as raiders have withdrawn and law and order restored;
3. That government of India and Pakistan should make a joint request to UNO to undertake a plebiscite in Kashmir at the earliest possible date¹³”

5.1.7 Nehru’s telegram to Prime minister of Pakistan 21.11,1947

Prime minister of Pakistan stating;

“... I have repeatedly stated as soon as raiders have been driven out of Kashmir or have withdrawn and peace and order have been established, Kashmir should decide question of accession by plebiscite or referendum under international auspices such as those of United Nations. It is very clear that no such reference to the people can be made when large bodies of raiders are despoiling country and military operations against them are being carried out. By this declaration I standi.¹⁴”

The written promises regarding the plebiscite made by the prime minister of India Pandit Jawaharlal Nehru, however, proved hallow as instead of adhering those commitments, he directed his representative at UN P. P Pillai, who sent a letter to president of Security Council on 1st January, 1948, and lodged complained

¹² Ibid.

¹³ Ibid.

¹⁴ Ibid.

against the Pakistan in Security Council.¹⁵ It is worth to mention that the Indian complained was based on Article 35 of chapter IV of the UN charter which lays to the “Pacific settlements of the dispute”. The complained made by the representative of India by UN was not only replied by Pakistan but it lodged a counter complained against India stating there in, besides other things that India has obtained the accession of J&K by fraud and violence and large-scale massacre and atrocities on Muslim of J&K have been perpetrated by the armed force of maharaja and Indian union and by the non-Muslim subject of the maharaja. At the conclusion of lengthy debate in the matter the Security Council adopted two resolutions by virtue of the first resolution of 17th January, 1948.¹⁶ The UNSC asked the two governments to refrain from aggravating the situation and to do everything within their power to improve the situation. It also requested them to immediately apprise the council of any material change in the situation by virtue of second resolution adopted on 20th January it established¹⁷ the United Nation commission for the India and Pakistan (UNCIP). On 28 January 1948 the head of the council presented the draft resolutions submitted by both India and Pakistan delegations. The Pakistani draft called upon the commission to arrange for:

- A) The withdrawal of Indian armed forces and the tribes men as well as all tress passers weather belonging to Pakistan or India;
- B) The repatriation of all residence of Kashmir who left on their own or who were compelled to leave as a result of the tragic events.
- C) The establishment in Kashmir of an impartial interim administration; and
- D) The holding of plebiscite to certain the free fair and UN fettered will of the Kashmiri’s as to whether the state wished to accede to India or Pakistan.¹⁸

The Indian draft contrary to the promises repeatedly made by India for holding of plebiscite in Kashmir focused on “promoting the cessation of acts of hostility and violence”. It envisaged a

¹⁵ Letter of representative of India addressed to the president of Security Council, 1 Jan 1948, pp. 107-13.

¹⁶ Resolution adopted by Security Council, 17th January, 1948 S/651 p.164.

¹⁷ Resolution adopted by Security Council, 20th January, 1948(S/654 P.160-162).

¹⁸ Resolution adopted by the Security Council 20 January 1948 (S/654).

period of six month for the restoration of normalcy following the end of fighting sheikh Abdullah was to head the Interim government under the Maharaja instead of an impartial administration and the plebiscite was to be held at some remote date in the presence of Indian troops. The draft made by the India foresaw the convocation of national assembly based on adult suffrage and the establishment of the national government. The reaction of the members of the security council was quite unfavourable to the draft prepare by the India e.g. commenting on it the United Kingdom representative, Mr Noel-Baker observed¹⁹ "that a settlement arrived at quickly in the security council is real way to stop fighting he viewed the whole episode starting from the preliminary measures as to the fighting, write up to the eventual plebiscite, as one problem." Mr Austin from the United States²⁰ was of the opinion that "machinery that was free from suspicion and was actually impartial administration for plebiscite would have backing of all." Mr Tsiang from china²¹ favoured the principle of free and impartial plebiscite for deciding the question of accession he opines "Much of the incentive to violence and the use of force would be removed." The Argentinian delegate Mr Arce minced no words when he made the following observation on the Indian draft "Both the maharaja as absolute monarch of Kashmir, and the government or government established by him, have already shown themselves biased in favour of one of the parties and cannot therefore preside over a free plebiscite. Even if they could, they should not do so, because the opposing party would not recognise the fairness of his plebiscite, even if it had been fairly conducted.

It is worthwhile remembering the Latin proverb, which says *sublata causa tollitur effectus* or in other words remove the cause and the effects will disappear. In this case, the cause of all disturbances, whether from India or Pakistan, or from the tribes, lies in the rebellion of the people of Kashmir against the absolute monarch who rules them as if he were running a farm and the 4 million inhabitants were so many heads of cattle and not human beings." On 6th February 1948 general McNaughton of Canada who was president of the council for the month following consultation with other members, presented a draft resolution it envisaged "the withdrawal of all irregular outside forces from Kashmir; the establishment of law and order followed by the withdrawal of regular armed forces; the return of all Kashmiri

¹⁹ S.C.O.R Third Year 236th Meeting, 28 January 1948 p. 283.

²⁰ Ibid., p. 287.

²¹ Ibid., p. 288.

refuges to the state; the establishment of an interim administration acceptable to the people of Kashmir; and finally the organisation of plebiscite under the authorities of security council.²²

Resolution of 13th august 1948 and 5th January 1949 on the basis of negotiation conducted with leaders of both countries, the united nation commission for India and Pakistan came to the sub-continent it adopted two resolutions on 13th august 1948 and 5th January 1949. The first resolution²³, consisted of three parts. According to the part I) the government of Pakistan and India were to observe cease fire in the state of Jammu and Kashmir and according to part II), they reaffirmed their wish that that the future status of the state would be determined by the will of people of Kashmir. As far as part iii) was concerned, it stipulated the following principles as the basis for truce agreement. The part ii is of the utmost importance in light of the later controversy about the withdrawal of Pakistani troops. It reads as follow;

“When the commission shall have notified the government of India that the tribes men and Pakistani nationals referred to in part ii hereof have withdrawn there by terminating the situation which was represented by the government of the India has having occasioned the presence of India forces in the state and further that the Pakistani forces are being withdrawn from the state of Jammu and Kashmir the government of India agreed to begin to withdraw the bulk of their forces from that state in stages to be agreed upon with a permission²⁴”

India accepted this resolution the government of Pakistan also accepted with subject to condition that, “The government of India accept the condition lay down part b paragraph 6-15 both inclusive of the security council resolution of 21th April 1948, as explained by the spencer’s, for a free and impartial plebiscite to decide whether the state of Jammu and Kashmir is to exceed to India or Pakistan²⁵. The resolutions of 13th august and 5th January 1949 together spell out the terms and conditions for the settlement of the Kashmir dispute. The immediate positive result was the coming into the force of cease fire agreement which came effective on 1st January 1949. It is obvious from the foregoing that the commission failed in its efforts aimed at demilitarization, the

²² Draft resolution submitted to Security Council 6 February 1948(S/667) p. 162-63. This draft was not voted upon.

²³ Resolution adopted by the UNCIP, 13th august 1948 (S/1100, para75 P.182-83).

²⁴ A. G Noorani, *The Kashmir Dispute 1947-2012* (India: Oxford University Press, 2012), p.159.

²⁵ Ibid.

commission proposed the submission of all questions pertaining to part ii of the resolution of 13th august 1948 to arbitration. The commission proposal was strongly supported by Prime Minister Attlee and President Truman it was accepted by Pakistan but rejected by India.

Following the failure of the commission to get its arbitration proposal accepted the Security Council asked its president of the month, general McNaughton of Canada to undertake the task. Mr McNaughton proposed:

“The reduction of armed forces of both Pakistan and India be made in stage so that it does not cost to the fair of the people and on either sides of the cease fire line Pakistan accepted these proposals and were as India rejected them²⁶.”

Following these developments finally on 14th march 1950 the security council adopted a resolution by virtue of which it wound up united nation commission for India and Pakistan and its place created the office of united nation representative for the purpose of de militarization of the state the first person to occupy that office was Sir Owen Dixon a judge of Australia high court and subsequently the chief justice of Australia. He also made strenuous efforts to get two countries to agree to his program of de militarization but failed to do so because of India's refusal to cooperate. Sir Owen felt extremely frustrated in his mission and eventually resigned.

6.1 Making of the constitution of India:

While the Security Council was ceased of the problem, Indian constituent assembly was busy for making the constitution for India. No one represented Kashmir state in the assembly till May 1949. On October 17, 1949 article 306-A was taken up for the consideration. This article later became Article 370 with the posture taken by at home and abroad and more particularly before the world body. The constituent assembly for making of constitution of India was convened a draft of article 306-A was handed over to interim prime minister sheikh Abdullah by Sh. N. Gopala Swami Ayyanger the then minister of Railway and transport. Sheikh Abdullah placed the said draft before the working committee of national conference, who arrived at conclusion that the draft is unacceptable. The Sh. N. Gopala Swami Ayyanger informed sheikh Abdullah on 15th October 1949 that “in no case it is possible to for us to go beyond our new draft and in

²⁶ Resolution adopted by the UNCIP, 13th august 1948 (S/1100, para75 P.182-83).

case even this draft is not acceptable to the drafting committee, then take step to insure the postponement of the consideration by the constituent assembly of the proposed article 306-A to some other date.”

The DO letter forwarded by Mr. Gopal was responded by sheikh with following words,

“We have arrived in the conclusion that it is not possible for us to let the matter rest here. As i am genuinely anxious that no unpleasant situation should arise, I would request you to see even if now something could be done to rectify the position. In case I fail to hear from you from reasonable time I regret to say that no course is left open for us to forward our resignation from the constituent assembly.²⁷”

The issue of article 306-A was finally taken up for the consideration on 17th October, 1949 and some legal issues pertaining to Interim arrangement were thoroughly debated in the constituent assembly. As a consequence of such developments and circumstances article 370 was incorporated in the constitution. While the Constitution of India was being made and the United Nations had already passed Resolutions, issue arose as to how, pending settlement of the State, Dominion of India, could make constitutional provisions for the State of Jammu and Kashmir. This issue was addressed by the Government of India, in communication dated 21.11.1949. It responded in following terms:

“While the Constitution of India, which, inter alia provides for the relations of existing states to the Government of India was under consideration, it would have been unfair to the Government and the People of the State of Jammu and Kashmir to deny them the opportunity of participating in the discussions of that Constitution. Such participation was not intended and does not, in fact, alter the Government of India’s determination to abide, in the matter of accession, by the freely declared will of the people of the Jammu and Kashmir. Should that will be against the State continuing to be part of India, if and when it comes to express in a constitutional way under conditions to peace and impartiality, the representation of the State in the Indian Parliament would automatically cease and provisions of the Constitution of India that govern the relations of the State of

²⁷ Jammu Kashmir High Court Bar Association, Bar Book Article 35A P10 (HCBA submitted rejoinder before Supreme court of India in a petition filed by RSS think Tank “We The citizen” later the rejoinder was published as Bar Book 2018).

Jammu and Kashmir with the Union of India will also cease to operate.²⁸

In the meantime, Indian delegate Sir Banegal Rau in a statement made on 1st march, 1951 assured the council that action by Kashmir's constituent assembly was not intended;

“To prejudice the issue before the Security Council²⁹. A few days later on 9th march the Indian representative stated his government view that though the constituent assembly was free to express its opinion on the question of the future of the state “it can take no decision on it”³⁰ a similar assurance was given by pundit Jawaharlal Nehru in the Indian parliament on 28th march 1951 and in course of press conference on 11th June 1951.³¹

Even after the constitutional frame work was debated and arrived at, the united nation Security Council (UNSC) continued to deal with “Kashmir issue” and from 26.1.1950 when constitution of India came into force till 21.12.1971, as many as 13 resolutions were passed. On 13th April 1951 the council appointed former American senator Frank Graham as a new UN representative he submitted six courses on demilitarization of the state. The Security Council also adopted a resolution on 23rd December 1951 which urged the government of India and Pakistan to enter the negotiation, which Graham proposed. The government of Pakistan accepted this proposal as expected, India rejected it too.

6.1.1 Making of constitution of Jammu and Kashmir:

During the making of the Constitution of India and, having regard to indefinite and uncertain position of the State in the matter of accession, coupled with ground reality and the Resolutions of United Nations, special provision was incorporated in the Constitution of India under Article 370. The founding fathers of the Indian Constitution, in view of the peculiar position of the State accepted the position that the Constitution which was being made cannot be made applicable to the State of Jammu and Kashmir. But a mechanism can be provided to enable the Government of the State to run its affairs till the issues are finally decided and settled. Therefore, none of the provisions of the Constitution of India dealt with the State of Jammu and Kashmir,

²⁸ Ibid., p. 10-11.

²⁹ Statement of Permanent Representative of India Sir Bangal Rau in the Security Council 1st March, 1951 p. 281.

³⁰ S.C.O.R 6th year 536th meeting 9th march 1951 P.3.

³¹ S.M Burke, *Pakistan's Foreign Policy: An Historical Analysis* (Karachi: Oxford University Press, 1973) p.149.

except Article 370. Under this provision President was given the power to apply provisions of the Constitution of India with “exceptions” and “modifications” in view of the conditions prevailing in the State. (c) After the entire Constitution of India was made applicable to all the territories comprised in Union of India, the President of India exercising his powers under Article 370 passed the 1st Constitutional Application Order i.e. “The Constitution (Application to Jammu and Kashmir) Order, 1950”

The prime minister made a statement in the Lok Sabha on 24th July 1952, which was outcome of the talks which government of India had with the leading members of Jammu and Kashmir government at the time to define the states relationship with the union the statement is referred to as ‘Delhi agreement’, although no formal agreement was as such made. It was followed by the constitution (Application of Jammu and Kashmir) order, 1954 it is under the same order that the article 35-A came to be incorporated in the application for the state. In the Lok Sabha on the Delhi agreement Pandit Jawaharlal Nehru said:

“The question of citizenship arose obviously. Full citizenship applies there. But our friends from Kashmir were very apprehensive about one or two matters. For a long time, past, in the Maharaja's time, there had been laws there preventing any outsider, which is, any person from outside Kashmir, from acquiring or holding land in Kashmir. If I mention it, in the old days the Maharaja was very much afraid of a large number of Englishmen coming and settling down there, because the climate is delectable, and acquiring property. So, although most of their rights were taken away from the Maharaja under the British rule, the Maharaja stuck to this that nobody from outside should acquire land there. And that continues, the present Government of Kashmir is very anxious to preserve that right because they are afraid, and I think rightly afraid, that Kashmir would be overrun by people whose sole qualification might be the possession of too much money and nothing else, who might buy up, and get the delectable places. Now they want to vary the old Maharaja's laws to liberalize it, but nevertheless to have checks on the acquisition of lands by persons from outside. However, we agree that this should be cleared up. The old state's subject's definition gave certain privileges regarding this acquisition of land, the services, and other minor things, I think, State scholarships and the rest. So, we agreed and noted this down: 'The State legislature shall have power to define and regulate the rights and privileges of the permanent residents of the State, more especially in regard to the acquisition of immovable

property, appointments to services and like matters. Till then the existing State law should apply.”³²

7. Article 370 & 35-A of Indian Constitution

Article 370 and Article 35A were key constitutional provisions confirming the special autonomy of J&K and provided safeguards from demographic change. According to Article 370 (1)(b)(i) the Indian Parliament can only legislate in matters limited to the areas specified in the Instrument of Accession and any new laws would be subject to the concurrent consent of J&K Constituent Assembly. The terms of the Instrument of Accession stipulate three areas where the Indian legislature may create laws for J&K. Firstly, defense which include naval, military, air force works, administration of cantonment areas, arms, firearms, ammunition and explosives; secondly, external affairs that cover international treaties and agreements with other countries, extradition, including the surrender of criminals and accused persons to parts outside India, etc.; and lastly communications, meaning post and telegraph, including telephones, wireless, broadcasting, and other like forms of communication, federal railways, maritime shipping and navigation.¹¹ It is an arrangement comparable to the ‘special status’ enjoyed by Quebec in Canada, by Scotland, Wales and Northern Ireland in Britain¹² and by Åland Islands with Finland.³³ Accordingly, Article 35A is contiguous with Article 370 enacted by the 3rd Presidential Order on 14th May 1954 which allowed J&K legislature to define their own ‘permanent residence’ an extension to the similar legal notion of ‘State subjects’ which now stood replaced.¹⁴ It made it forbidden for outsiders, except for Kashmiris, from permanently settling, buying land, holding local government jobs, as well as winning education scholarships in the region.

However, according to renowned Indian jurist A.G. Noorani and others, the Indian government over the past 70 years has played a part in the systematic covert erosion of J&K’s aforementioned protections with 47 presidential orders that extended the Indian constitution over the region without any concurrent consent of the State of J&K. This is affirmed by Sumantra Bose who describes the 1954 Presidential Order and the

³² A. G Noorani, “Article 35-A is beyond challenge,” *Greater Kashmir* 23rd March 2017).

³³ Eve Hepburn, “Forging autonomy in a unitary state: The Åland Islands in Finland,” May 5, 2015, https://www.researchgate.net/publication/263511707_Forging_autonomy_in_a_unitary_state_The_Aland_Islands_in_Finland.

ones that followed as “the end for the Article 370” deeming it “effectively... dead in letter and in spirit since that time”.

7.1.2 Erosion of special status under Article 370:

The autonomy of the state under article 370 was proclaimed in 1950 by a constitution order formally issued in the name of president of India, only after four years in 1954 the formal order was rescinded by the proclamation of another dictum that legalized the write of central government to legislate in the state on the various issues like;

- A) The Indian Supreme Court was given the authority to be the undisputed arbiter in Jammu and Kashmir.
- B) The part third of the Indian constitution which provide many fundamental rights to Indian citizens were applied to the populace of Jammu and Kashmir as well, but with this stipulation.

When the constituent assembly validated the draft constitution in 1956 for the state of Jammu and Kashmir, the constituent assembly dissolved itself and sort the organization of midterm election at the time the jurisdiction of the election commission of India did not extend to Jammu and Kashmir. The monopolies of both houses of the assembly by sponsored by New Delhi legitimize a full-scale intervention of the central government, allowing the incorporation of Non-Kashmiri official in important, administrative positions. In December 1964 union of India declared the two-high statue of the Indian constitution would be in acted in Jammu and Kashmir: Articles 356 and 357. These articles enable the center government to dismiss any elected government if it perceived a dismantling of the law and order missionary. Moreover, the extension of direct election to the Parliament (1966), extension of Article 249 (Power of Parliament to legislate on State subject in national interest), Article 312 (All India Services e.g. IAS, IPS) included by union are directly destroying the special status provision under Article 370.

The 6th amendment in Jammu and Kashmir constitution not only changes the nomenclature but the eligibility, mode and method of appointment of head of state. The constitution of Jammu and Kashmir (6th amendment) at 1965 amended the state constitution and replaced ‘Sadri-Reysat’ by governor which was complete violation of the basic structure of the Jammu and Kashmir constitution. Similarly, many other orders were passed which eroded the special status of state. The presidential orders made after the dissolution of state constituent assembly except

1986 order extending article 249 (Article 249 deals with the power of the parliament to legislate with respect to a matter in the state list in national interest) except a 1986 order extending Article 249, and the present 2019 order – can be seen as the first level of dilution. This is so because for all these orders, while the concurrence of an elected State government was obtained, the State Constituent Assembly did not exist and, therefore, could not give its ratification.

When J&K was under Governor's rule as per Section 92 of the J&K Constitution, in absence of an elected council of ministers, the Governor could not have validly given the requisite concurrence to the presidential order. Even if the Governor acting without a popularly elected government can be considered as a "state government" for the purposes of concurrence, the Governor must at least have had some nexus with the State and some independence from the Centre. However, this is not the case in practice, since the Governor is not only an unelected nominee of the Central Government but also holds office during the latter's pleasure. Not surprisingly, the 1986 order was challenged in the J&K High Court; it is still pending. The Government of India is leaving no stone unturned to make the Special status of Jammu & Kashmir hallow, there are other numerous instances by which the Union of India have gone for modification or amendment to the extent of defeating the basic structure of J&K constitution. The amendment/modifications in Reservation Rules, SARFESI Act, Inclusion of General sales Tax (GST), Powers to National Investigating agency (NIA) and many other acts have violated the basic structure of State Constitution.

7.1.3 Revocation of Articles 370 and 35A

The legal mechanisms employed for abrogation of Articles 370 and 35A were through the sub-provision contained in Article 370 (3) which, as mentioned previously, required concurrent consent by the State's Constituent Assembly and Presidential Order from the central government for it to cease being operational. However, the State's Constituent Assembly stood dissolved in 1957 and before that date it never recommended abolition of the provision or its amendment. Despite this, it was still made possible through Presidential Order C.O.272. How the Indian government achieved this is noteworthy. They interpreted 'J&K Constituent Assembly' to mean 'J&K Legislative Assembly', however the Legislative Assembly itself was dissolved in 2018 and no consent was obtained. Alternatively, J&K was under governor's rule appointed by the Indian government to act as substitute for the dissolved

assembly. Within this framework, the upper chamber of the Indian Parliament passed a resolution 'recommending' to use the power in Article 370(3) to revoke Article 370 in its entirety. The resolution progressed to the lower chamber on 6th August followed by Presidential Order 273 which applied to the entire Indian constitution without any modifications or exemptions to Jammu & Kashmir. Subsequently, the Indian parliament passed the Jammu & Kashmir Reorganization Bill of 2019 which abolished the State of Jammu & Kashmir, further dividing the region into two 'union territories' of Ladakh and Jammu & Kashmir.³⁴ Since Article 35A emanates from Article 370 it also got revoked pursuant to the Jammu & Kashmir Reorganization Bill

7.1.4 Contempt of Indian Constitution and Judicial Precedents

The mechanisms employed have been criticized as unilateral annexation and in contravention of Article 3 of the Indian constitution which requires bills changing the name or area of any state in reference to the said state's consent³⁵ This is an open contempt of India's own constitution and has been confirmed as such by the Indian Congress Party as 'ultra vires' and against constitutional procedure.³⁶ This has been confirmed by the lawyers of the Indian Bar Association and petitions have been filed before the Supreme Court of India which challenge that this issue as to whether the president of India can make a new Article, so far as the State of J&K is concerned, a principal has already been established by the court in various decisions that the president cannot amend any provision in the application order and the word 'modification' has to be given, in the constitutional context, a wide interpretation.³⁷ There are at least five Indian Supreme Court judgments that point towards the finality and permanence of Article 370 and accordingly Article 35A namely, *Prem Nath Kaul v. J&K* (1959)³⁸, *Sampat Prakash v. J&K* (1968)³⁹, *Mohd. Maqbool Damnoo v. J&K* (1972)⁴⁰, *SBI v. Santosh Gupta*

³⁴ Laya Maheshwari, "How the Indian Government Changed the Legal Status of Jammu and Kashmir," *Lawfare*, August 12, 2019, Research Society of International Law.

³⁵ The Constitution of India, November 9, 2015, <https://www.iitk.ac.in/wc/data/coi-4March2016.pdf>.

³⁶ "Redrawn map may set off more change in Indian-ruled Kashmir," *The Washington Post*, August 7, 2019.

³⁷ Petitions in SC on J&K move," *The Hindu*, August 10, 2019.

³⁸ 1959 AIR 749, 1959 SCR Supl. (2) 270.

³⁹ 1970 AIR 1118, 1970 SCR (2) 365.

⁴⁰ 1972 AIR 963, 1972 SCR (2) 1014.

(2016)⁴¹ and *Dr. Charu Wali Khanna v. UOI*.⁴² A Kashmiri lawyer says Kashmir's transformation into a Union Territory reflected:

“a political holocaust inflicted on the people. It is the day of political betrayal and beginning of an era where violence as an argument will have justification and takers, which is very unfortunate.”⁴³

Hence, by repealing the special protections provided by Articles 35A and 370, India has clearly signaled its intention to abandon its decade's long commitment to the Kashmiri people and defy the law and procedure laid down by their own constitution and case law as well as their international commitments via UNSC Resolutions on Kashmir.

Conclusion

The Kashmiris in J&K have been struggling for the right of self-determination since the partition of British India and have been denied such right till date. Firstly, the Maharaja did not take Kashmiris' will into consideration when accession was signed to India. This has been recognized by the UNSC Resolution 47. Secondly, even if the Maharaja did accede, the accession was conditional upon the will of the peoples of Kashmir. Thirdly, when the Indian government proposed convening the J&K Constituent Assembly, the UNSC declared the elections as not reflective of the exercise of the right of self-determination in Resolutions 97 and 122. Despite this, the elections, which were reported to be rigged, created an avenue for negotiations of the Kashmiri peoples with the Indian government based on the conditions set out in the Instrument of Accession, Delhi Agreement 1957 and Hereditary State Subjects definition 1927 which gave birth to the so-called 'temporary provision' within the Indian constitution under Article 370 which crystalized the special autonomous status of the region. Moreover, Article 35A, which emanates from Article 370, provided an additional unequivocal protection from demographic change. However, on 5th August 2019, the Indian government revoked Articles 370 and 35A without any recourse to the Kashmiri people making material breach of the Instrument of Accession, the negotiations conducted in the Delhi Agreement, the J&K Constituent Assembly, the UNSC

⁴¹ Hannah Ellis-Petersen, “India strips Kashmir of special status and divides it in two,” *The Guardian*, October 31, 2019.

Resolutions as well as their own constitution and judicial precedents. The Indian government's siege of the region can be classified as a military occupation by the Indian occupying forces via unilateral annexation which stand in violation of International Humanitarian Law in armed conflict. Firstly, India fulfils the definition of occupation under Article 42 of The Hague Regulations 1907. Secondly, India stands in violation of the fundamental rights of civilians under The Hague Regulations and Geneva Convention IV Articles 47-48, Additional Protocol 1, Article 75 because of the infliction of serious abuses of human rights - torture, murder and detentions are all violations of fundamental rights of international law, amounting to crimes against humanity. Thirdly, India stands liable for committing the crime of aggression via unilateral annexation in contravention of Article 8 bis2 (b) of the Rome Statute. Fourthly, India has violated all four Geneva Conventions. The twin human rights covenants of ICCPR and ICESCR also showcase the human rights abuses perpetuated by the Indian occupying forces in terms of curtailment of religious rights, economic development, freedom of communications via the internet and telephone lines, journalism, education, freedom of movement, along with the imposition of curfews, infliction of torture and arbitrary detentions. In addition, India's denial of the right of self-determination is against both the colonial understanding of the right and the post-colonial interpretation which places India Kashmir's Statehood Abrogated in violation of peremptory norm which also has an *erga omnes* nature.
