

The Right to Self-Determination of the Peoples-The Case of Kashmir

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Submitted to the
Institute of Graduate Studies and Research
in partial fulfilment of the requirements for the degree of

Master of Arts
in
International Relations

Eastern Mediterranean University
December 2019
Gazimağusa, North Cyprus

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ABSTRACT

The purpose of the present research is to examine the concept of self-determination and its applicability in international law. It also examines the applicability of secession as external right of self-determination. Secession is further analysed through the emerging doctrine of remedial secession. According to this doctrine people are entitled to secede under certain conditions that's is when internal self-determination and human rights are violated by the parent state, and no other option is available but secession.

The case of Jammu and Kashmir is the focus of this research where the Kashmiris are demanding their right to self-determination and independence from the Indian state. In this scenario, the applicability of secession is examined in the backdrop of denial of autonomy and gross human rights violations. It is endeavoured through this work to highlight the fact that the right to self –determination is of utmost importance for the people to decide their political, cultural and economic future.

Keywords: Self-determination, Independence, Secession, Remedial secession, International Law, Human rights, United Nations, India, Pakistan, Jammu and Kashmir,

ÖZ

Bu araştırmanın amacı, kendi kaderini tayin kavramını ve bu kavramın uluslararası hukukta uygulanışını incelemektir. Aynı zamanda bu çalışma, dış kendi kaderini tayin hakkı bağlamında ayrılma kavramını da ele almaktadır. Ayrılma kavramı, iyileştirici ayrılma doktrini çerçevesinde ayrıca incelenecektir. Bu doktrine göre, iç kendi kaderini tayin ve insan haklarının ana ülke tarafından ihlal edilmesi ve geriye başka seçenek kalmaması halinde, insanlar ayrılma hakkına sahiptir.

Keşmirlilerin kendi kaderini tayin hakkı ve Hindistan devletinden bağımsızlık hakkı talep ettiği Cemma ve Keşmir davası, bu araştırmanın ana konusunu oluşturmaktadır. Bu durumda, ayrılmanın uygulanabilirliği konusu, özerkliğin reddi ve büyük derecede insan hakları ihlali bağlamında ele alınmaktadır. Bu çalışma ile, kendi kaderini tayin hakkının insanların siyasal, kültürel ve ekonomik anlamda geleceklerini tayin edebilmeleri adına çok büyük önem taşıdığı vurgulanmaktadır.

Anahtar Kelimeler: Kendi kaderini tayin, bağımsızlık, uluslararası hukuk, insan hakları, Hindistan, Pakistan, Cemma ve Keşmir

DEDICATION

To my mother and Aamir

ACKNOWLEDGMENT

First of all, I thank Allah Almighty for His blessings and making me able to put efforts into this work in the best possible manner. I am indebted to my supervisor, Professor Wojciech Forysinski, who provided me with his sincere guidance, instrumental feedback each and every time and with the positivity that kept me doing work enthusiastically.

My sincere thanks also goes to my friend, Asanga Fon, who played a very supportive role during this journey of mine. He is a true example of a friend in indeed is a friend indeed.

I am truly grateful to my mother for always being there, for supporting in every manner, and for providing me solace with her love.

My heartfelt gratitude goes to Aamir, the one person in the entire world who played the most crucial role throughout my work. His faith in me offered me the hope, inspiration and motivation without which it would not have been possible for me to conduct the research and culminating it to its final end. His actions and words enabled me to complete this work with the utmost determination and fortitude.

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LIST OF ABBREVIATIONS

AFSPA	Armed Forces Special Powers Act
AJK	Azad Jammu Kashmir
BCE	Before Common Era
BSF	Border Security Forces
CE	Common Era
CENTO	Central Treaty Organization
CRPF	Central Reserved Police Force
DDA	Disturbed Areas Act
ELF	Eritrean Liberation Front
EPLF	Eritrean People's Liberation Front
FRD	Declaration on Friendly Relations
GB	Gilgit Baltistan
ICCPR	International Covenant on Civil and Political Rights
ICESCR	International Covenant on Economic, Social and Cultural Rights
ICJ	International Court of Justice
IJK	Indian Jammu Kashmir
INC	Indian National Congress
IoA	Instrument of Accession
J&K	Jammu and Kashmir
JKCCS	Jammu and Kashmir Coalition of Civil Society organization
KRG	Kurdish regional government
LoC	Line of Control
MUF	Muslim United Front

NHRC	National Human Rights Commission
NWFP	North West Frontier Province
OHCHR	Office of the United Nations High Commissioner for Human Rights
PSA	Public Safety Act
RSS	Rashtriya Swayam Sevak Sangh
SEATO	Southeast Asia Treaty Organization
UDHR	Universal Declaration of Human Rights
UN	United Nations
UNCIP	United Nations Commission for India and Pakistan
UNESCO	United Nations Educational, Scientific and Cultural Organization)
UNHCR	United Nations Human Rights Office of the High Commissioner
UNSC	United Nations Security Council
WWI	World War One
WWII	World War Two

Chapter 1

THE RIGHT TO SELF-DETERMINATION AND KASHMIR ISSUE

1.1 Introduction

The phrase of self-determination has a spell of magic and embodies a powerful appeal. It entrusted peoples with free choice for the purpose to determine their own destiny, and therefore those listed nations and people that claim self-determination is endless. This demand has been heard from many from indigenous people, racial groups and nations such as Palestinians, Kurds, Kashmiris, East Timorese, Tibetans, Eritreans, Quebecois, Zulu, and the people of Chechnya, Kosovo, Burundi, Sudan, Rwanda, Basque, Abkhazia southern Thailand, south Ossetia, Aceh, Bougainville, Western Sahara, West Papua and Hong Kong, among many others. Yet, the right to self-determination is one of the most critical principles of international law that is reflected in both treaty law and customary law. The right to self-determination became a significant human right, and has been integrated with other fundamental rights in human rights law. The effective realization of the right is considered paramount for the existence and realization of other human rights. To recall Hector Gros-Espiell's words, "The effective exercise of a people's right to self-determination is an essential condition... for the genuine existence of the other human rights and freedoms."¹ The

¹ Hector Gros-Espiell, *The Right to Self-Determination: Implementation of United Nations Resolutions* (New York: United Nations, 1980), para. 59.

right to self-determination is thus viewed as a fundamental condition in the protection of those rights be they political, economic, civil, social or cultural.

Typically, the right to self-determination is exercised through internal self-determination, “a people’s pursuit of its political, economic, social and cultural development within the framework of an existing state”.² Nevertheless, exercising right to self-determination externally is a matter that manifests itself only in specific conditions. The right to external self-determination would possibly take the form of secession from an existing state outside the colonial context. Although, secession cannot be easily achieved and most often leads to conflicts, there is, however, an emerging theory of remedial secession, according to which the right to secession ensue under the right to self-determination amidst exceptional circumstances. As a last resort, people could exercise external self-determination as a consequence of violations of human rights and denial of their right to internal self-determination.

The entire movement of freedom of the people of Jammu and Kashmir revolves around the right to self-determination. Since the partition of subcontinent into India and Pakistan, the Kashmiris began to demonstrate their desire of a political future based on their own will. For seven decades the Kashmiris are suffering in order to achieve their goal of independence as a result of a forgone promise that was made to them regarding their decision to choose one of the two dominions: India or Pakistan. Today when they are being deprived of their internal self-determination and autonomy by the Indian government, they are demanding their right to self-determination in the form of independence. The right to self-determination has been an unending source of vain promises for the Kashmiris and at the same it is a source of hope behind the struggle of independence by them which lead them to bear the atrocities of the Indian

² Reference re: Secession of Quebec, [1998] 2 S.C.R. 217, para. 126.

state. Moreover, the abrogation of article 370 and 35 A which provides Kashmir a special autonomous status and privileges and the gross human rights violations which are being carried out by the Indian state make the case of Kashmir even more befitting to the right of self-determination.

As a remedy to their untold sufferings, they have a right to external self-determination as a last resort. Every persecuted group of people is entitled to the right of self-determination and thus the strife for this right is the proof of the fact and it is ingrained deeply into the hearts and minds of the Kashmiris.

1.2 Purpose of study

Firstly, this study aims to make clear understanding of the right to self-determination under international law. This research delves into critical assessment of the principle of self-determination, driving itself as one of the most controversial yet fascinating concept in international law and international relations. Approaching this concept as a human right will not only elaborate the essentiality of this right in human rights law but also provide clear understanding of its important role in conflicts like Kashmir issue.

Secondly, this work keenly delves into other principles related to the right of self-determination such as territorial integrity and secession. Not only the controversies related to right of secession is discussed but secession here is also discussed as a remedial right in the case of the violations of internal self-determination and human rights which is the manifestation of right to external self-determination.

Thirdly, the conflict in Kashmir has been a source of concern for many scholars in international relations. Thus, many diverse interpretations of this issue have come on surface. In this regard this study analyses the case of Kashmir where the crisis are characterized by the demand of independence in response to denial of the right to self-

determination and enormous violations of human rights. Therefore, this research probes into the effectiveness of this right explaining the crisis in Kashmir, critical assessment of the demand for independence and the applicability of secession as a remedial right.

1.3 Research questions

As this study engages to provide the interpretation of the right to self-determination and its relevance in the Kashmir issue and the exercise of secession under international law as the consequence of human rights violations applying the case of Kashmir, the following are the questions in this regard:

1. What is the meaning of the right to self-determination today and why does its applicability in international law remain controversial?
2. How does the principle of self-determination form the basis of Kashmir issue and how does it lead to shape the current crisis in Jammu and Kashmir?
3. Does the abrogation of Articles 370 and 35 A (articles related to Kashmir's status under Indian Union) contradict with the principle of self-determination of the people of Kashmir?
4. Do the human rights violations in Kashmir validate the secession of Kashmir from India?

1.4 Methodology

This research is based on an enhanced, single case study which adopts a qualitative analysis that is it both interprets and analyses all the processes and various events for the better understanding of the concepts involved. The case study is a very useful method in establishing general propositions and subsequently contributes to theory-building. This study, therefore, qualitatively analyses the case of Kashmir by employing the concept of self-determination. Theoretically, this thesis analyses the

applicability of the right to self-determination in case of Kashmir as well as the applicability of right of secession to derive the justification of independence in case of human rights violations (remedial secession).

Historically, various events are analysed to draw a clear understanding of the development of the right to self-determination and the issue of Kashmir. Systematically, the research makes use of the primary sources (the treaties, Resolutions of the UN Security Council and the General Assembly), and the secondary sources (scholarly articles, books, reports of print media, documents/reports of international institutions, surveys and referenda) for the general and overall understanding of both aspects of this work, that is, the right to self-determination and the issue of Kashmir with all its present developments. Finally, it compares the different opinions of the authors and scholars in order to gauge the factors and intricacies involved in the concept of right of self-determination and Kashmir issue.

1.5 Structure of thesis

This thesis consists of introduction (chapter one), the main body, and the general conclusion. The main body is divided into following chapters:

Chapter two deals with the review of literature. In the first part of literature review different perspectives have been presented regarding the right to self-determination. The purpose of literature review is to discover the problems which scholars have come across in defining the nature and meaning of self-determination. The second part of literature review discusses different approaches to Kashmir issue.

Chapter three is the theoretical framework. This chapter discusses the concept of self-determination in international law. It is explored theoretically in order to provide a legal framework beginning with the historical background which proceeds towards contemporary meaning of the concept of self-determination and its development as a

human right. Subsequently other issues relating to self-determination are analyzed, such as territorial integrity, subject and scope of self-determination outside colonialism, its forms (internal and external) and right of secession. Secession as an exercise of external self-determination is discussed as a remedial right as a last option in response to gross human rights violations and tampered autonomy (internal self-determination).

Chapter four examines how the notion of self-determination forms the basis of Kashmir issue. In order to achieve the full understanding of the role of self-determination in Kashmir issue, this chapter focuses on the historical background of the issue and the subsequent developments until the involvement of the United Nations. The history begins with the earliest one until the time of ruler, Maharaja Hari Singh (the period of unrest from where the present issue of Kashmir arose). It is followed by events that took place at different times after partition of subcontinent into India and Pakistan and which resulted into current crisis of Jammu and Kashmir.

Chapter five deals with the current crisis in Jammu and Kashmir. This chapter explores the conditions in Jammu and Kashmir in terms of denial of the right to self-determination and gross human rights violations which are leading to the demand of secession from India by the people of Kashmir. It also discusses the recent developments take took place in J&K which further aggravated the crisis.

Chapter six analyses surveys and various referenda held in disputed areas which explain the choice of the people that hinges on their right to self-determination. It also discusses the political, economic and social dynamics that shape such choices and the results of such surveys and referenda that is either referendum could solve such issues or some other alternatives are required.

1.6 Scope of thesis

The objective of this thesis is twofold: to study the right to self-determination and the ambiguities related to it in International Law, and to analyse Kashmir issue in this regard. Decades have passed, but the Kashmir conflict remains intractable and certainly the most threatening one for South Asian region. This perhaps happens because many complex elements are also involved in Kashmir issue. It involves the states of India and Pakistan (nuclear powers), political parties, militant groups and the Kashmiri civilians.

Notwithstanding the fact, the primary focus of studying this conflict is to present the strides and setbacks of the Kashmir conflict that emerged in the result of not granting the people of Kashmir their right to self-determination. For this purpose, the region of Jammu and Kashmir is the centre of attention of this work due to the ongoing conflict between Kashmiri people and Indian government. The present crisis leads to turmoil in the form of human rights violations against those who want independence from India. Therefore, this study contributes the useful information to scholars and students of international relations and international law about the legality of right of self-determination and in the case of Kashmir.

Chapter 2

LITERATURE REVIEW

2.1 Introduction

This chapter aims to provide a review of literature regarding the right to self-determination in international law and the issue of Kashmir. It is therefore, divided into two parts. Part one deals with some of the different studies which explain the problems concerning the right to self-determination such as the concept and meaning of the right, its application in colonial and post-colonial eras, the people entitled to this right, the contradiction between the right to self-determination of peoples and territorial integrity of the states, the concepts of internal and external self-determination, the applicability of right to secession as well as remedial secession in international law.

The second part deals with the problems which constitute the significant components of the Kashmir issue. These problems include the rule of Hindu maharaja, legality of Instrument of Accession (IoA), claims of India and Pakistan towards Kashmir and clash of ideologies between them over Kashmir, the special status of Kashmir in Indian Union under Article 370, the erosion of autonomy in J&K by Indian government, the issue of plebiscite and the right to self-determination of the Kashmiris.

2.2 The right to self-determination

The concept of self-determination is one of the most controversial principles of international law, and is thus conceptualized in diverse ways by different people.

In the controversy-ridden fields of international law and international relations, the widespread recognition of the existence of national rights to self-determination provides a welcome point of agreement. Needless to say, the core consensus is but the eye of a raging storm concerning the precise definition of the right, its content, its bearers, and the proper means for its implementation.³

Koskenniemi proposes two schools of thought, namely, classical and secessionist models of self-determination. Classical model is based on “Hobbesean” conception of self-determination whereas the secessionist model is built on “Rousseauesque approach” (romantic view) to self-determination.⁴ These two schools are quite opposite in their sense of self determination:

The classical view has a strong preference for the statehood of existing States. It tries to reconcile self-determination claims with statehood by dealing with them as claims for the entitlement of national minorities to participate in public life within the State on an equal footing with others. By contrast, the romantic view sees nationhood as primary. Thus it contains an inbuilt preference for secession and independence within a community that one can identify as properly one’s own.⁵

This variance between these two models of self-determination according to Koskenniemi is the cause of unsuccessful wrestle of present international law of self-determination. As a result, quite different meanings are linked to this concept. As Danspeckgrube utters: “No other concept is as powerful, visceral, emotional, unruly, as steep in creating aspirations and hopes as self-determination.”⁶

³ Avishai Margalit and Joseph Raz, "National Self-Determination," *The Journal of Philosophy* 87, no. 9 (September 1990): 439.

⁴ Martti Koskenniemi, "National Self-Determination Today: Problems of Legal Theory and Practice," *International and Comparative Law Quarterly* 43, no. 2 (April 1994): 249-250, doi:10.1093/iclqaj/43.2.241.

⁵ Ibid.

⁶ "Self-determination," UNPO, accessed May 9, 2018, <https://unpo.org/article/4957>.

Castellino and Gilbert assert with dejection that regardless of the presence of a considerable literature on self-determination, “a precise definition remains elusive.”⁷ Hehir argues that despite the high level of dependence on the idea of self-determination by different groups, its concept and application tends to be ‘problematic’.⁸ Similarly, Barelli contends that the idea of self-determination is troublesome due to two reasons; first, the ambiguity related to the concept referred from international legal institutions; and second, the political and moral concerns, that have relevance with the application of this concept.⁹

Titanji on the other hand, claims that in the historical backdrop of the idea of 'self-determination', its meaning and application was not questionable throughout the period of decolonization and the idea was taken to be as a concept of independence from colonialism.¹⁰ This position was supported in the Namibia case by the international court of Justice, and there is almost a consistent state practice with its applicability towards colonial territory.¹¹ While the colonial states during that period of time, may have resisted the role of self-determination as an impact, as per current

⁷ Joshua Castellino and Jeremy Gilbert, “Self-determination, Indigenous Peoples and Minorities,” *Macquarie Law Journal* 3:155-156, accessed May 12, 2018, <https://ssrn.com/abstract=1727284>.

⁸ Aidan Hehir, “Independence, Intervention and Great Power Patronage: Kosovo, Georgia and the Contemporary Self- Determination Penumbra,” *Amsterdam Law Forum* 1, no. 2 (January 26, 2009): 88, <https://ssrn.com/abstract=1509318>.

⁹ Mauro Barelli, "Shaping Indigenous Self-Determination: Promising or Unsatisfactory Solutions?" *International Community Law Review* 13, no. 4 (January 01, 2011): 413, doi: 10.1163/187197311x599450.

¹⁰ Ernest Duga Titanji, "The Right of Indigenous Peoples to Self-determination versus Secession: One Coin, Two Faces?," *African Human Rights Law Journal* 9, no. 1 (2009): 52-59, <http://www.scielo.org.za/pdf/ahrlj/v9n1/04.pdf>.

¹¹ Christopher J. Fromherz, "Indigenous Peoples' Courts: Egalitarian Juridical Pluralism, Self-Determination, and the United Nations Declaration on the Rights of Indigenous Peoples," *University of Pennsylvania Law Review* 156 (2008): 1341-1359, https://scholarship.law.upenn.edu/penn_law_review/vol156/iss5/4.

scenario it is firmly accepted by the international community that decolonization was put into effect as rightful act in the context of self –determination.

Hannum notes that to recognize the idea of self-determination in the era of post-colonization is one of the questions that give rise to a debate among scholars.¹² Liss claims that the courts and the states are reluctant to acknowledge the practice of self-determination outside of decolonization.¹³ Oeter, however, claims that the inclusion of the right to self-determination in the ICCPR and the ICESCR is the evidence that the principle of self-determination is even relevant beyond decolonization.¹⁴ Common Article 1 of both these Covenants lays down that “All peoples have the right of self-determination. By virtue of that right they freely determine their political status and freely pursue their economic, social and cultural development.”¹⁵

McCorquodale advocates that the right to self-determination can be exercised outside the context of decolonization. He adds that the practice of states is also consistent over the application of the right of self-determination outside colonial boundaries. There has been a great spread over the acceptable right for Palestinians; to the blacks in South Africa and in former Southern Rhodesia; and to other territories such as Tibet. In the case of unification of Germany, it was acknowledged that the

¹² Hurst Hannum, "Rethinking Self-Determination. Self-Determination in International Law," *Virginia Journal of International Law* 34, no. 1 (1993): 131, <https://ssrn.com/abstract=1940662>.

¹³ Ryan Liss, "Responsibility Determined: Assessing the Relationship Between the Doctrine of the Responsibility to Protect and the Right of Self-Determination," *University College London Human Rights Review* 4 (2011): 52-55, <https://ssrn.com/abstract=2028782>.

¹⁴ Oeter “Self-Determination” in *The Charter of the United Nations: A Commentary*, ed. Simma et al (Oxford University Press, 2012), 322.

¹⁵“International Covenant on Civil and Political Rights” and "International Covenant on Economic, Social and Cultural Rights". Available at <https://www.ohchr.org/EN/Pages/Home.aspx>.

people used their right to self-determination by expressing their desire for unified Germany despite the fact that neither the East nor the West Germany were a colony.

¹⁶ Similarly, the right to self-determination has been applied to the cases of the break of Soviet Union and Yugoslavia. “In fact, the substantial increase in membership of the United Nations in the 1991-1992 period is a reflection of this broader application- or at least acceptance- of the right of self-determination to non-colonial situations.”¹⁷ Yet, Rupert Emerson, quoted by Freeman opposes this view. He asserts that, “what emerges beyond dispute is that all peoples do not have the right of self-determination. They have never had it, and they will never have it.”¹⁸

Therefore, where does the right fit in, for which type of individuals, this is a question that has a history of explanations since the beginning of 1950 as Pomerance says, quoted by McCorquodale “there is nothing within the confines of the self-determination formula itself to give guidance on the definition and concretization of the self.”¹⁹

However, many answers have been put forward. According to Raic, whole population within a state is entitled to self-determination including minority groups.²⁰ While Cassese on the contrary asserts that on the basis of practice of the UN, minority

¹⁶ Robert McCorquodale, "Self-Determination: A Human Rights Approach," *International and Comparative Law Quarterly* 43, no. 4 (1994): 861, doi:10.1093/iclqaj/43.4.857.

¹⁷ Ibid.

¹⁸ 16. Michael Freeman, "The Right to Self-determination in International Politics: Six Theories in Search of a Policy." *Review of International Studies* 25, no. 3 (1999): 356. doi:10.1017/s0260210599003551.

¹⁹ Robert McCorquodale, "Self-Determination: A Human Rights Approach," *International and Comparative Law Quarterly* 43, no. 4 (1994): 866, doi:10.1093/iclqaj/43.4.857.

²⁰ David Raic, *Statehood & the Law of Self-Determination*, vol. 43 (Kluwer Law International, 2002), 272.

groups do not possess such right.²¹ McCorquodale describes that based on the individuals' conditions and characteristics, they can be defined as "peoples" and are entitled to self-determination: "common historical tradition; racial or ethnic identity; cultural homogeneity; linguistic unity; religious or ideological affinity; territorial connection; common economic life; and being a certain number."²²

Another "peoples" approach according to Higgins quoted by McCorquodale has limited the entitlement of this right to only "the peoples of a State in their entirety" and shuns any other potential element.²³ Bossuyt describes that article 1 of the two International Human Rights Covenants made the use of word "peoples" to represent "nations" because it was deemed to be more all-inclusive term as:

the word 'peoples' was understood to mean peoples in all countries and territories, whether independent, trust or non-self-governing ... It was thought ... that the term 'peoples' should be understood in its most general sense and that no definition was necessary.²⁴

Yet very few states would accept such general criteria for determining the peoples. India's reservation to Article 1 related to self-determination while becoming a party to the two covenants of human rights is noteworthy:

With reference to Article 1 of the ... [Covenants] ... the Government of the Republic of India declares that the words 'the right of self-determination' appearing in [this article] apply only to the peoples under foreign domination and that these words do not apply to sovereign independent States or to a section of a people or nation – which is the essence of national integrity.²⁵

²¹ Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), 108.

²² Robert McCorquodale, "Self-Determination: A Human Rights Approach," *International and Comparative Law Quarterly* 43, no. 4 (1994): 866, doi:10.1093/iclqaj/43.4.857.

²³ Ibid.

²⁴ Marc Bossuyt, *Guide to the "travaux Préparatoires" of the International Covenant on Civil and Political Rights* (Dordrecht: Nijhoff, 1987), 32-35.

²⁵ "UN, United Nations, UN Treaties, Treaties," United Nations, accessed June 12, 2018, https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=IV-3&chapter=4&lang=en#EndDec.

Notwithstanding the fact, McCorquodale contends that “State practice is not conclusive as recognition of a people as a "people" is ultimately a political decision, which may not accord with the legal position, and those entitled to the benefit of the protection of a right should not depend on the whims of governments.”²⁶

This is followed by another major debate between the right to self-determination of the peoples and territorial integrity of states. Self-determination and territorial integrity may be considered as two sides of a coin. Various international instruments incorporate the right to self-determination at the same time strongly emphasize on the territorial integrity of sovereign and free states. Territorial integrity is widely emphasized in the FRD, according to which the violation of territorial integrity, is referred as partial or complete suspension of national unity. Hannum states that as per the “safeguard clause”²⁷ of this declaration gives superior place to territorial integrity over self-determination and prevents self-determination and deems it unlawful act when it comes to violate territorial integrity.²⁸ According to Kohen,

²⁶ Robert McCorquodale, "Self-Determination: A Human Rights Approach," *International and Comparative Law Quarterly* 43, no. 4 (1994): 868, doi:10.1093/iclqaj/43.4.857.

²⁷ “Nothing in the foregoing paragraphs shall be construed as authorizing or encouraging any action which would dismember or impair, totally or in part, the territorial integrity or political unity of sovereign and independent States conducting themselves in compliance with the principle of equal rights and self-determination of peoples as described above and thus possessed of a government representing the whole people belonging to the territory without distinction as to race, creed or color.” United Nations, "Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in Accordance with the Charter of the United Nations," Refworld, <https://www.refworld.org/docid/3dda1f104.html>.

²⁸ Hurst Hannum, "Rethinking Self-Determination. Self-Determination in International Law," *Virginia Journal of International Law* 34, no. 1 (1993): 16, <https://ssrn.com/abstract=1940662>.

territorial integrity is described as a “guarantee against the dismemberment of one territory”.²⁹ As such Cassese observes that:

(...) if in a sovereign state the government is ‘representative’ of the whole population, in that it grants equal access to the political decision-making process and political institutions to any group and in particular does not deny access to government to groups on the ground of race, creed and color, then that government respects the principle of self-determination; consequently, groups are entitled to claim right to self-determination only where the government of a sovereign State denies access on such grounds.³⁰

Scholars such as Blanke and Abdelrehim espouse that the international law supports the concept of territorial integrity. Territorial integrity can be viewed as an obstacle to self-determination as the former tends to preserve the boundaries and the latter tends to change them. Notwithstanding, territorial integrity applies to states which behave on the bases of equal rights as well as self-determination and thus human rights hold importance over territorial integrity.³¹

As two forms of self-determination are recognized in international law which are internal and external self-determination, hence, a new concept of self-determination as El Ouali proposes, builds up on maintaining the territorial integrity of states by endorsing democracy and giving autonomy to people within a state.³² Cole

²⁹ Marcelo Kohen, *Secession International Law Perspectives* (Cambridge University Press, 2006), 6.

³⁰ Antonio Cassese, *Self-determination of Peoples: A Legal Reappraisal* (Cambridge: Cambridge University Press, 1995), 112.

³¹ Herman Josef Blanke and Yasser Abdelrehim, "Catalonia and the Right to Self-Determination from the Perspective of International Law," *Max Planck Yearbook of United Nations Law Online* 18, no. 1, 559, January 1, 2014, accessed May 13, 2018, doi:<https://doi.org/10.1163/18757413-00180018>.

³² Abdelhamid El. Ouali, *Territorial Integrity in a Globalizing World International Law and States Quest for Survival* (Berlin: Springer Berlin, 2012), 305.

relates internal self-determination to democratic governance³³ whereas Dickinson suggests it to be self-rule or autonomy.³⁴

External self- determination, however is widely prevented today as Borgan asserts.³⁵ In contrast to this Valasco describes that external self-determination is possible, but the support is all given to internal self-determination as a new conception.³⁶ Self-determination, as confirmed by Crawford can be put into practice internally by people if they could participate politically on the basis of equality. However, he also contends that the FRD in concurrence with Vienna Declaration is implicitly expressing that if people are being denied their participation in political life then remedial secession is applicable as a possible solution for the people.³⁷

Knoll throws light on the theory of remedial self-determination that people may secede if a state does not provide them right to internal self-determination.³⁸ In the same vein Grant explains if people are subjected to gross violations of human rights and prevent them to attain their right to internal self-determination, the people thus

³³ Rowland Cole, "Revolutions in the Maghreb – Resisting Authoritarianism and Accessing the Right to Self-Determination and Democratic Governance" *Comparative and International Law Journal of Southern Africa* (2012), 389-390.

³⁴ Dickinson, "The Global Reach and Limitations of Self-Determination", *Cardozo Journal of International and Comparative Law* (2012) 367-384.

³⁵ Borgen "The Language of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia" *Chicago Journal of International Law* (2009), 18.

³⁶ Zoilo A. Velasco, "Self-determination and Secession: Human Rights-based Conflict Resolution," *International Community Law Review* 16, no. 1 (2014): 75-83, doi:10.1163/18719732-12341271.

³⁷ James Crawford, *The creation of new states in international law* (Oxford University Press 2007), 119.

³⁸ Bernhard Knoll, "Fuzzy Statehood: An International Legal Perspective on Kosovo's Declaration of Independence," *Review of Central and East European Law* 34, no. 4 (2009): 361-387, accessed June 14, 2018, doi: 10.1163/092598809x12474728805813.

may secede from that state.³⁹ In the opinion of the former Secretary General Boutros-Ghali,

“the sovereignty, territorial integrity and independence of States within the established international system, and the principle of self-determination for peoples, both of great value and importance, must not be permitted to work against each other in the period ahead.”⁴⁰

He emphasized that democratic principles are greatly important and they must be followed so that there would not be any clash between territorial integrity and right to self-determination of the people and peace will prevail.⁴¹

2.3 Kashmir conflict

The Kashmir issue being one of the intractable and unsettled conflicts in the world, has drawn the attention of numerous analysts, researchers, scholars and authors. Various books and articles have been written on the Kashmir conflict dealing with historical, political, strategic causes of the Kashmir conflict. A recent literature has however been characterized by a new theme that places emphasis on the diversity of the people of Kashmir and the part they play amidst the two major powers in the region—India and Pakistan. A snapshot of some of the major and relevant works has been presented in the review of literature.

Josef Korbel conveys his first hand experiences in *Danger in Kashmir*- a phenomenal introduction of the numerous intricate factors which originate from the Kashmir question between India and Pakistan. The Czech member of the United Nations Commission for India and Pakistan, as narratives. He states that real

³⁹ Grant, “Regulating the Creation of States from Decolonization to Secession” 2009 *Journal of International Law and International Relations*, 11-29.

⁴⁰ "United Nations: Report of the Secretary-General on an Agenda for Peace - Preventive Diplomacy, Peace-making and Peace-Keeping," *International Legal Materials* 31, no. 4 (1992), accessed June 14, 2018, doi: 10.1017/s0020782900014820.

⁴¹ *Ibid.*

responsible behind the fateful situation in Kashmir and its undetermined future was the ruler Hari Singh.

Through all the mists of uncertainty that shroud the negotiations concerning the future of Kashmir, one fact alone is clear. That is the irresponsible behavior of the Maharaja. It was this that brought this nation uncommitted, his people's wishes unascertained, past the fatal day of partition, August 15, 1947. It was his stubbornness, his coy manoeuvring, including his "attacks of colic", that brought upon his people unparalleled suffering and pain.⁴²

A well-known British author, Victoria Schofield examines relatively every part of the Kashmir Conflict. She writes about the cruel and unjust rule of the Hindu Maharaja. Schofield quoted many instances of the renowned people who visited Kashmir in those days. According to William Moorcroft- a doctor, "Everywhere the people were in the most abject condition, exorbitantly taxed by the Sikh Government and subjected to every kind of extortion and oppression by its officers. The consequences of this system are the gradual depopulation of the country."⁴³ Another person Victor Jacquemont, a French botanist said that Kashmir was the 'most miserable in the world . . . nowhere else in India are the masses as poor and denuded as they are in Kashmir.⁴⁴ The whole picture in Kashmir was one of starvation, depravity and cruelty during the rule of Hindu Maharaja.

Schofield doubts the authenticity of the Instrument of Accession (IoA).⁴⁵ Schofield writes, "In the years to come, Hari Singh's flight from Srinagar was used by his critics as a reason for stating that he had no right to take the decision to accede to India because he was no longer in control of his state."⁴⁶ Schofield infers that the entire

⁴² Josef Korbel, *Danger in Kashmir* (Princeton University Press, 1966), 63.

⁴³ Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (London: Tauris, 2010), 5.

⁴⁴ Ibid.

⁴⁵ See Appendix A.

⁴⁶ Ibid, 53.

event of signing of IoA is dubious. She writes that Mountbatten the then Governor General of India accepted the accession of Kashmir to India on the perquisite that the IoA would be placed before the people and they would decide the final destiny of Kashmir through a plebiscite.⁴⁷ “The precedent was Junagadh, which was Kashmir in reverse: a Muslim ruler, whose accession to Pakistan the Indians were disputing on the grounds that the majority of the people were Hindu.”⁴⁸

A British historian Alastair Lamb argues about Kashmir’s accession to India and the authenticity of the IoA. He asserts that:

The logic behind the partition of the Indian Empire into Muslim and non-Muslim portions suggested that Kashmir ought to go to Pakistan. In the event, the Maharaja decided to accede to India. His decision was supported overtly by Indian arms and challenged, somewhat less overtly at first, by the arms of Pakistan. All this took place against the background of the British retreat from Empire in 1947; and there can be no doubt that had the British made different decisions as to policy and course of action at that time the Kashmir problem might never have arisen, at least in its acutely virulent form.⁴⁹

He writes further that the IoA, was not signed by Maharaja Hari Singh of Kashmir on 26th of October 1947, a day prior to the Indian troops touched base in the Kashmir Valley as claimed by India to defend Kashmir against the tribal men from the Northwest region of Pakistan. Lamb contends that not just India’s legitimate claim to the state of Jammu and Kashmir is fake but the accession was the result of a conspiracy amongst leaders of INC, government of maharaja and senior officers of Indian armed force including some British.

It has always been argued both by Indian apologists and by British officials that this was the result of a triumph of improvisation. The provision of air support on this scale, however, so common sense would suggest, took more than twenty-four hours to arrange and was the result of considerable staff work which could hardly have escaped the notice

⁴⁷ Ibid, 56. See also Appendix B.

⁴⁸ Ibid.

⁴⁹ Alastair Lamb, *Kashmir: A Disputed Legacy, 1846-1990* (Hertingfordbury: Roxford Books, 1991), 2.

of some senior British officers. If so, most of them certainly chose to keep their eyes and mouths closed.⁵⁰

Robert C. Mayfield analyses the issue of Kashmir through the spectrum of geographical congruity as well as strategic and economic compulsions. He quotes former foreign minister of Pakistan:

It is well known that... every factor on the basis of which the question of accession should be determined-population, cultural and religious bonds, the flow of trade, the economic situation, communications, the geographical position, strategic consideration-points insistently in the direction of the accession of Kashmir to Pakistan.⁵¹

According to him the accession of Kashmir to either India or Pakistan had to be made upon the aforementioned factors and as such Kashmir would be undoubtedly incorporated into Pakistan.⁵²

According to another author, Raghwan, the Kashmir conflict is an ideological clash between India and Pakistan where both of these states consider Kashmir an integral element of their statehood. For India, Kashmir is their integral part (atoot ang), and for Pakistan, it's their jugular vein (shah rag).⁵³ He cites renowned write Prem Nath Bazaz, "it is primarily an ideological war, in which the elites of both countries have perceived foundational, non-negotiable principles of statehood to be at stake." He writes that Pakistan's claims of accession of Kashmir to India rest on the arguments that in cases of Hyderabad and Junagadh (the Hindu majority principalities-), India disregarded the will of the rulers (Nizam of Hyderabad wanted to join Pakistan, and the ruler of Junagadh wished to remain independent), and invaded both of these states on the basis of Hindu population and geographical congruity). In the case of Kashmir,

⁵⁰ Ibid, 140.

⁵¹ Robert C. Mayfield, "A Geographic Study of the Kashmir Issue," *Geographical Review* 45, no. 2 (1955): 186, doi: 10.2307/212229.

⁵² Ibid, 186-189

⁵³ V. R. Raghavan, *Conflict in Jammu and Kashmir Impact on Polity, Society, and Economy* (New Delhi: Vij Books India, 2012), 77.

India favored the will of the Hindu Maharaja and sidelined the principles of majority and geographical proximity. Raghwan basically treats Pakistan's claims as baseless because according to him the Maharaja desired for independence but certain circumstances were created that he later joined Kashmir to India.⁵⁴ He also speaks about the erosion of autonomy guaranteed to the people of J&K under Article 370 of the Indian constitution. He asserts, "Although India accommodated the Kashmiri nationalist sentiments by providing political autonomy through the instrument of special status under Article 370 but the process of its erosion was also set in motion simultaneously. Kashmiris resent the theft of the autonomy that was guaranteed to them."⁵⁵

Parashar writes that Article 370, was introduced as a political manoeuvre to integrate Kashmir into India one and for all.⁵⁶ For this purpose Nehru won over the support of Kashmiri leader Shaikh Abdullah. Nehru committed the accession of Kashmir to India would be decided by the people of Kashmir and meanwhile introduced Article 370 in 1949 despite of the opposition by those parties who thought giving special status to Kashmir would lead to secessionist mind set.⁵⁷ Thus, even after the Article was passed, there were and still are demands to abrogate it. Parashar himself writes that Article 370 being a temporary provision doesn't hold any justification now because the accession of Kashmir to India was approved by the then constituent assembly of the state, hence it has become null and void.⁵⁸

⁵⁴ Ibid, 77-78.

⁵⁵ Ibid, 80.

⁵⁶ Parmanand Parashar, *Kashmir and the Freedom Movement* (New Delhi: Sarup & Sons, 2004), 1.

⁵⁷ Ibid, 2-3.

⁵⁸ Ibid, 10.

The Kashmir issue is usually modelled as a territorial dispute and an ideological war between two aggressive neighbours: India and Pakistan. In any case, there is substantially more to the story than that as Kashmir-home to a remarkable variety of tribal groups, races, languages, and religions- stands out as one of the most diversified regions in south Asia. Thus, Navnita Chadha Behera contends that perceiving the rich, complex, and multi-faceted character of Kashmir is vital not just to understand the auxiliary reasons for this contention yet in addition for giving chances to set up a simple, feasible, and enduring solution. She writes that “there are sharp divisions between those demanding that Jammu and Kashmir become an independent state, those seeking to merge with Pakistan, and those wanting to reconcile their differences with India through constitutional mechanisms guaranteeing their political rights.”⁵⁹

And therefore, Behera connotes the contention as a political clash of state-making between India and Pakistan as oppose to strict ideological Hindu-Muslim clash. She claims that “Kashmir’s fate in 1947, including its accession to India and eventual division into two parts, was decided not on ideological grounds but on the outcome of the political battle between the indian national congress and the Muslim League”.⁶⁰

Sumantra Bose writes that despite the fact that the roots of contention lie toward the termination of British imperialism and the partition of the subcontinent in 1947, the contemporary issue owes more to resulting developments, especially the extreme authoritarianism of Indian rule. Dangerous dimensions have come into play since 1990 with the ascent of Kashmiris’ movement of freedom and guerrilla war

⁵⁹ Navnita Chadha. Behera, *Demystifying Kashmir* (Washington D.C.: Brookings Institution Press, 2007), 2.

⁶⁰ *Ibid.*

pursued by Islamist groups. Bose clarifies the complex blend of regional, ethnic, semantic, religious, and caste groups that populate Kashmir who have different customs, languages and traditions, and underlines that a reasonable structure for peace must consider the concerns for sovereignty of India and Pakistan and popular desire to self-rule and also clashing loyalties inside Kashmir.⁶¹

He likes Behera says that in J&K three types of allegiance exist- some are pro-independence, some are pro-Pakistan and some are pro-India. But he unlike Behera claims these orientations as ideological ones and not as a political clash between India and Pakistan.⁶² He appeals for the establishment of political structures in Indian Kashmir that are inclusive. Bose likewise conjures convincing comparisons with different cases, especially the peace-building system in Northern Ireland, which offers significant lessons for a resolution of Kashmir conflict.⁶³

Mohammad Abdullah throws light on various solutions proposed so far for the Kashmir issue. These include plebiscite in the whole region of J&K, independence of the entire region, and the Dixon formula (Hindu dominated areas to go to India, Muslim areas to Pakistan and the plebiscite in the valley of Kashmir).⁶⁴ However, he focuses on the numerous speeches given by Nehru in which he repeatedly uttered that the final resolution of Kashmir conflict should be decided by the people of Kashmir that through their right to self- determination. In one of his speeches as quoted by Abdullah, he said:

It is an international problem. It would be an international problem anyhow if it concerned any other nation besides India, and it does. It

⁶¹ Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* (Cambridge, MA: Harvard University Press, 2005), 9.

⁶² Ibid, 8.

⁶³ Ibid, 208-216.

⁶⁴ Mohammad Abdullah, "Kashmir, India and Pakistan," *Foreign Affairs* 43, no. 3 (April 1965): 533-534, accessed May 14, 2018, <http://www.jstor.org/stable/20039117>.

became further an international problem because a large number of other countries also took an interest and gave advice. ... So while the accession was complete in law and in fact, the other fact which has nothing to do with the law also remains, namely, our pledge to the people of Kashmir- if you like, to the people of the world- that this matter can be reaffirmed or cancelled or cut out by the people of Kashmir if they so wish. We do not want to win people against their will and with the help of armed force, and if the people of Jammu and Kashmir State so wish it, to part company from us, they can go their way and we shall go our way. We want no forced marriages, no forced unions like this. . . . So, we accept this basic proposition that this question is going to be decided finally by the good will and pleasure of the people of Kashmir, not, I say, by the good will and pleasure of even this Parliament if it so chooses, not because this Parliament may not have the strength to decide it-I do not deny that-but because this Parliament has not only laid down in this particular matter that a certain policy will be pursued in regard to Jammu and Kashmir State but it has been our policy. . . .⁶⁵ (7 August, 1952)

A piece of work that speaks about the real situation in Kashmir by drawing special attention to the hardships and strife of Kashmiris towards the quest for justice and independence is the collection of essays, *Kashmir: A case of Freedom*. The authors through their essays underlines the moral foundations for the Kashmir conflict by giving a clarion call for the Kashmiris' right to self-determination. This has been stressed by Arundhati Roy in her essay "Azadi: The only thing Kashmiris want" (Azadi means freedom). She strongly criticizes Indian claim of liberal democracy and puts that Indian security forces are responsible for gross human rights violations against those who want independence.

She cites numerous statements and speeches of Nehru under the heading "Seditious Nehru" in order to highlight the fact that it is not the Kashmiris only but Nehru himself believed the only solution of Kashmir dispute lies in giving Kashmiris the right to determine their own future, and thus maintains that Kashmir was never the

⁶⁵ Ibid, 535.

integral part of India. She cites one of Nehru's telegram which he wrote to the then PM of Pakistan, Liaquat Ali Khan. He wrote:

I should like to make it clear that the question of aiding Kashmir in this emergency is not designed in any way to influence the state to accede to India, our view which we have repeatedly made public, is that the question of accession in any disputed territory or state must be decided in accordance with the wishes of the people, and we adhere to this view.⁶⁶ (27 October, 1947)

These works present an excellent analysis of the right to self-determination and Kashmir dispute. Further discussion is done in subsequent chapters. An analysis of the right to self-determination in the case of Kashmir makes an interesting research.

⁶⁶ Tariq Ali et al., *Kashmir: The Case for Freedom* (New York, NY: Verso, 2011), 125.

Chapter 3

THEORETICAL FRAMEWORK: THE RIGHT TO SELF-DETERMINATION UNDER INTERNATIONAL LAW

3.1 Introduction

This chapter mainly provides a detailed explanation of the problems concerning the right to self-determination under international law which were discussed in chapter one. It includes the explanation of the concept of right to self-determination, its historical development in three phases (colonialism, de-colonization and post-decolonization), self-determination as a human right, and of the subjects entitled to the right. This chapter also provides an understanding of internal and external self-determination and their applicability as well as the description of secession as an external self-determination and as a remedy to the violation of internal self-determination and human rights of the people demanding secession.

3.2 Historical development

In this part the development of the right to self-determination is discussed as it evolves in three phases.

3.2.1 Post-World War I: Colonization

The origin of self-determination as an international political concept can be traced to period after WWI when it was pushed as a component of US Foreign Policy for post-war international peace settlement by then US President, Woodrow Wilson.

“The principle of self-determination by national groups developed as a natural corollary to growing ethnic and linguistic political demands in the 18th and 19th centuries”.⁶⁷ The term "Wilsonian self-determination" refers to the idea that sovereignty resides within the people and not in the state. In spite of the fact that self-determination was the main focus of political discussions in the 1920s, the Treaty of Versailles that determined the post-WWI peace settlement “did not implement a coherent theory of self-determination, nor there was a legal expression of the concept in the Covenant of the League of Nations.”⁶⁸

However, it was addressed by the system of mandates of the League of Nations.⁶⁹ There was a tacit recognition of the applicability of self-determination principle by the mandate system based on Article 22 of League including the fact that mandated territories are entitled to autonomy which might later lead to the establishment of an independent country.⁷⁰

The Aaland Island case presented another significant contribution to the development of the right to self-determination. A dispute between Finland and Sweden over the Aaland Islands. The Aaland Islands shape a cluster of islands in the Baltic

⁶⁷ Hurst Hannum, “Rethinking Self-Determination,” *Virginia Journal of International Law* 34, no.1 (1993): 2-3.

⁶⁸ Lori Fisler Damrosch et al., *International Law: Cases and Materials*, 5th ed. (St. Paul, MN: West, 2009), 324.

⁶⁹ Avalon Project - The Covenant of the League of Nations, accessed June 19, 2018, https://avalon.law.yale.edu/20th_century/leagcov.asp.

⁷⁰ “to those colonies and territories which as a consequence of the late war have ceased to be under the sovereignty of the States which formerly governed them and which are inhabited by peoples not yet able to stand by themselves under the strenuous conditions of the modern world, there should be applied the principle that the well-being and development of such peoples form a sacred trust of civilisation and that securities for the performance of this trust should be embodied in this Covenant. The best method of giving practical effect to this principle is that the tutelage of such peoples should be entrusted to advanced nations who by reason of their resources, their experience or their geographical position can best undertake this responsibility, and who are willing to accept it, and that this tutelage should be exercised by them as Mandatories on behalf of the League.”

Sea between Sweden and Finland. These were under Swedish rule until 1809 when Finland and the Islands both turned into a part of Russia. During the time of Russian rule, the Aaland Islanders managed to save their Swedish language and culture and when Finland declared its autonomy from Russia in 1917, the Islanders requested to be brought together with Sweden. The Islanders engaged the principle of self-determination to bolster their demand, however Finland denied and the question was brought before the Council of the League of Nations. Then a Committee of Jurists was appointed. The committee first remarked that in spite of the fact that principle of right to self-determination has a significant role in modern political thought but it must be kept in mind that it was not mentioned in the League's Covenant. Hence, it cannot be deemed as positive rule of international law no regardless of its inclusion in number of international treaties.⁷¹

Although the Islands remained the part of Finland but were given special autonomy to preserve their identity. Nonetheless, the right to self-determination was admitted as a possible remedy in exceptional cases where secession comes in as a last resort after every other alternative had been exhausted.⁷²

In sum, one can posit that self-determination in its pre-1945 conception made allusion to the sovereign equality among existing countries, especially the right of persons belonging to a country to select their own government void of outside interference. In this light, self-determination was not conceived from the perspective of the legitimate authority of specific regions or peoples to choose their own form of

⁷¹ Report of international committee of jurists entrusted by the council of League of Nations official journal, special supplement No. 3 (1920): 3.

⁷² Simone F. Van Den Driest, *Remedial Secession: A Right to External Self-determination as a Remedy to Serious Injustices?* (Cambridge: Intersentia, 2013), 26.

government independent of the desire of the other components of the country they belong to.⁷³

3.2.2 Post-World War II: Decolonization

Contemporary understanding of people's right to self-determination has been the product of United Nations law and practise. Self-determination only became embraced as a legal principle in 1945 after the adoption of the United Nations Charter.

The UN Charter mentions self-determination twice in Articles 1(2) and 55 which underscores the maintenance of amicable relations while observing the principles of equality and self -determination of the people as the major goal of the UN.⁷⁴ Reference to "people" in Article 1(2) and Article 55 of the Charter is a key issue to be underlined. One can notice from the restricted perspective of the UN Charter that self-determination as a legal principle was not defined in spite of the Crawford's contention that it was implied in the proclamation of the general right to self-determination.⁷⁵ The principle of self-determination nonetheless received needed clarifications and new explanations from successive UN General Assembly adopted resolutions. The aforementioned developments are generally referred to as "law of decolonization" with self-determination emerging as the principal legal (and political) tool in the decolonization process. "Under moral and political imperatives of

⁷³ James Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2009), 114.

⁷⁴ Article 1 (2): "*To develop friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples, and to take other appropriate measures to strengthen universal peace.*" Article 55: "*With a view to the creation of conditions of stability and well-being which are necessary for peaceful and friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples*". Available at: <https://www.un.org/en/charter-united-nations/>.

⁷⁵ James Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2009), 27.

decolonization... the vague "principle" of self-determination soon evolved into "right" of self-determination."⁷⁶

Resolution 1514 was adopted by the General Assembly of the UN in 1960, dubbed as “Declaration on granting independence to Colonial Countries and Peoples”. The Declaration emphasised that self-determination was the prerogative of "all people" and its denial was a violation of the Charter. It defined the possessors of self-determination as those seen as subject of exploitation, denial of fundamental human rights and dominion. The free determination of political and economic development was also merged to the implementation of self-determination in the resolution.⁷⁷ Burak Cop points out that this development is seen as a transition from the "principle" of to a "right to self-determination".⁷⁸ The cessation of armed activities or suppression and the exercise of complete independence is the ultimate goal of self-determination. Therefore, “all colonial territories have the right of independence”⁷⁹. Self-determination, in the context of decolonisation, takes an external rather than internal dimension.

Resolution 1541 of the UN General Assembly adopted the same year reassert the meaning of self-determination as restricted to colonial territories away from the territorial boundaries of their colonial masters. The identification of three alternative means under which self-determination can be achieved (within the framework of decolonisation) can be said to be most important contribution of this resolution. The

⁷⁶ Hurst Hannum, “Rethinking Self-Determination,” *Virginia Journal of International Law* 34, no.1 (1993): 12.

⁷⁷ General Assembly Resolution 1514 (XV), 1960. Available at: <http://www.un.org/en/decolonization/declaration.shtml>

⁷⁸ Burak Cop and Dogan Eymirlioglu, “The right of Self-determination in International Law Towards 40th Anniversary of the Adoption of ICCPR and ICESCR”, *Perceptions Journal of International Affairs* 10, no.4 (2005): 118.

⁷⁹ Hurst Hannum, “Rethinking Self-Determination,” *Virginia Journal of International Law* 34, no.1 (1993):12.

three alternative means are as follows: “Emergence as a sovereign independent State; Free association with an independent State; or Integration with an independent state.”⁸⁰

In this manner, it can be contended that the primary objective of self-determination is the attainment of independence and that the object of self-determination was principally colonies. The implication of this is a restriction in the application of self-determination more in the like of a "temporal nature" thereby eliminating the prospect of “a permanent right of self- determination”. In this context, self-determination takes place only under specific circumstances and within the parameters of the achievement of self-government and independence.⁸¹ The primordial principle under the resolution is the free will of peoples concerning their political and economic advancement. This is also referred to as “the principle of free choice”⁸² for a people to determine their political status. It also reiterates the attainment of independence as marking the completion of the right to self-determination.

The evolution of the principle of self-determination was significantly impacted by some of the International Court of Justice's advisory opinions which have been analysed by several scholars. A good example can be found in the Namibian case which illustrates the three key points guiding the principle of self-determination: reference to a people as a whole; reference to people under colonial administration, and reference to the external dimension of the principle. In spite of the fact that the case in question involved a colonial territory, the ICJ in the Namibia Opinion asserted the strong level of entrenchment the principle of self-determination has in international

⁸⁰ UNGA Res. 1541 (XV), Principle VI, 1960.

⁸¹ David Raic, *Statehood & the Law of Self-Determination* (The Hague, Kluwer Law International 2002), 226.

⁸² *Ibid*, 219.

law.⁸³The perspective of free political status determination of a people "by their own freely expressed will" is also confirmed in the case of Western Sahara.⁸⁴ Similarly, it upheld the right of the people of a given territory to determine their long-term political status. It was argued in both opinions that the principle of self-determination "was more than a guiding principle to be heeded and promoted by the United Nations, but a full-fledged right that could be invoked by its holders to claim separate statehood and sovereign independence."⁸⁵

Raïc states that the aforementioned prerogative was clearly defined as norm of "jus cogens" (a principle of international law that cannot be derogated) by States (with reference to Spain in the Western Sahara case).⁸⁶ The ICJ went further, in the case of East Timor to identify self-determination as vital principle in international of erga omnes nature:

In the Court's view, Portugal's assertion that the right of peoples to self-determination, as it evolved from the Charter, and from United Nations practice has an erga omnes character is irrefragable. The principle of self-determination of peoples has been recognized by the United Nations charter and in the jurisprudence of the court. It is one of the essential principles of contemporary international law.⁸⁷

The Wall Opinion tacitly acknowledged the applicability of the principle of self-determination to outside the context colonialism after reiterating the former ICJ

⁸³ Legal Consequences of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 276 (1970), Advisory Opinion, I.C.J. Reports 1971, para 31-32, 16. Available at: <https://www.refworld.org/cases,ICJ,4023a2531.html>

⁸⁴ Western Sahara Case, ICJ Reports 1975, 12.

⁸⁵ Christian Tomuschat, "Self-Determination in a Post-Colonial World" in *Modern Law and Self-Determination*, ed. Christian Tomuschat (Netherlands, Martinus Nijhoff, 1993), 2.

⁸⁶ David Raïc, *Statehood & the Law of Self-Determination* (The Hague, Kluwer Law International 2002), 218.

⁸⁷ East Timor (Portugal v. Australia), Judgement I.C.J. Report 1995, para, 29.

jurisprudence.⁸⁸ The right to self-determination is recognized here as a fundamental principle of present-day international law.

3.2.3 Post-Decolonization: Self-determination as a human right

Seen as a global and unquestionable right, self-determination has remained relevant in the post-decolonization era. It has been considered as a norm akin to that of equal rights and a prerogative to all people of all background. Embedded in this link is the notion that countries have to extend the right of internal and external determination of their political status to all peoples.⁸⁹ With the acceptance of this right as a legal principle in international law, self-determination has evolved from its primary conception as a principle to a human right standard. “There can be no doubt but that self-determination is the most important of all human rights.”⁹⁰

The fact that the inclusion of the right to self-determination into human rights Covenants as the only right which is not only common but is placed in the first Article of both, firmly suggests that the UN members were acknowledging its special significance. To recall Hector Gros-Espiell’s words, “The effective exercise of a people’s right to self-determination is an essential condition... for the genuine existence of the other human rights and freedoms”.⁹¹ To this end, the Afro-Asian bloc contended, during the negotiations concerning the human rights instrument of the UN, that self-

⁸⁸ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory, Advisory Opinion, I.C.J. reports 2004, para, 88.

⁸⁹ Evan Brewer, “To break free from the tyranny and oppression: proposing a model for a remedial right to secession in the wake of the Kosovo advisory opinion”, *Vanderbilt Journal of Transnational Law* 45, no.245 (2012): 257.

⁹⁰ Freeman, Michael. "The Right to Self-determination in International Politics: Six Theories in Search of a Policy." *Review of International Studies* 25, no. 3 (1999): 355.

⁹¹ Hector Gros-Espiell, “*The Right to Self-Determination: Implementation of United Nations Resolutions*” (New York: United Nations, 1980), para. 59.

determination represented the most primal of all human rights coming before the enjoyment of all other rights.⁹²

Enshrined in the UN human right covenants, the right to self-determination became a positive part of the treaty. The International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Cultural Rights (ICESC) in their Common Article I lay down: “1. All peoples have the right to self-determination. By virtue of the right they freely determine their political status and freely pursue their economic, social and cultural development.” It also emphasises that all the signatory states have the responsibility to abide by the principle of self-determination of the people.

The notion of the right to self-determination being a privilege of all peoples and that it is the established responsibility for states to promote its realisation is upheld in the Covenants. It therefore emerges unequivocally that self-determination of peoples is a collective right belonging to a certain group (referred to as people) and not individuals. The goal of the right to self-determination, according to Raic is to ensure “the effective development and preservation of the collective identity of a peoples as well as for the enjoyment of the individual human rights of its members”.⁹³

The Covenants, in their framing, offer a different perception from the decolonization conception of self-determination by underlining its "continuing" and "permanent" nature and the fact that it should be applied without external intervention. Cassese contends that right to self-determination is an "on-going right" and not a one-

⁹² Gerry Johannes Simpson, “The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age”, *Stanford Journal of International Law* 32 (1996): 269.

⁹³ David Raic, *Statehood & the Law of Self-Determination* (The Hague, Kluwer Law International 2002), 227.

time prerogative completely fulfilled with the attainment of independence as described by Raic.⁹⁴

The people's right to self-determination expressed in the previous documents was also reiterated and affirmed by the Vienna Declaration and Programme of Action which was adopted at the 1993 UN World Conference on Human Rights. Furthermore, the declaration points out: "the World Conference on Human Rights considers the denial of the right of self-determination as a violation of the human rights and underlines the importance of the effective realization of this right."⁹⁵

The Helsinki Act also did mention self-determination as:

By virtue of the principles of equal rights and self-determination of peoples, all peoples always have the right, in full freedom, to determine when and as they wish, their internal and external political status, without external interference, and to pursue as they wish their political, economic, social and cultural development.⁹⁶

Albeit the political nature of the document (void of legal power), it shows a consensus between Western and Soviet axes at that time on the regulatory principles in their relations. The fact that "all peoples always" possess the right to self-determination is mentioned and the internal and external dimension of such right clearly expressed in the Helsinki Final Act.

Self-determination hence developed from just a slogan to a principle and later into a real right in International Law, as well as a human right in International Human Rights Law.

⁹⁴ Antonio Cassese, *Self-determination of people* (Cambridge University Press 1995), 101.

⁹⁵ "Vienna Declaration and Programme of Action." OHCHR. Accessed June 19, 2018. /EN/ProfessionalInterest/Pages/Vienna.aspx.

⁹⁶ United Nations, "Conference on Security and Co-operation in Europe (CSCE): Final Act of Helsinki," Refworld, <https://www.refworld.org/docid/3dde4f9b4.html>.

3.3 Defining the subject of the right to self-determination

A similar amount of controversy shrouds over the identification of those who are entitled to the right to self-determination as with that over the content of self-determination. A careful examination of the "law of decolonization" in which the resolutions of the UN General Assembly make allusion to territorial units raises the interrogation posed by Hannum as to whether people can be equated with territories.⁹⁷ In this connection, it has been argued by McCorquodale that the "territorial approach" to the principle of self-determination should be rejected for its display of "reckless indifference" to the concept of people.⁹⁸ Crawford on his part opines "the question of the ambit of self-determination, the territories to which it applies, has arguably remained as much a matter of politics of law."⁹⁹

The logical conclusion that can be drawn from this is that right to self-determination is a possession of the people as attested in the text of relevant legal sources which explicitly identifies people as the subjects of the right. The determination of the "people" as the subject of the right to self-determination still does not erase the controversy over the subject. Ivor Jennings underscores precisely to this end, "On the surface it seems reasonable: let the people decide. It is in fact ridiculous because the people cannot decide until somebody decides who the people are".¹⁰⁰

How fitting it is to qualify a particular group as "a people" is more of factual than a legal question. The application of law however depends on the determination of

⁹⁷ Hurst Hannum, "Rethinking Self-Determination," *Virginia Journal of International Law* 34, no.1 (1993): 13.

⁹⁸ Robert McCorquodale, ed., *Self-Determination in International Law*, (Ashgate Publication Limited, 2000), 869.

⁹⁹ James Crawford, *"The Creation of States in International Law"* (Oxford: Oxford University Press, 2009), 115.

¹⁰⁰ Jennings quoted by Christine Griffioen, *Self-determination as a Human Right: The Emergency Exit of Remedial Secession* (Utrecht: Science Shop of Law, Economics and Governance, Utrecht University, 2010), 29.

this fact. The right to self-determination is exclusively reserved to a people. One must have enough ground rules to be able to determine if a particular group of persons form a people.

In spite of his affirmation that the notion of people can be defined with "reasonable precision", Crawford employs the ambiguous term "self-determination unit" in identifying the subject of the right.¹⁰¹ Some authors have nevertheless laid out workable definitions of a people. Murswiek links people to a territory in his definition as:

A people, as group which can be holder of the right to self-determination exists only if it lives in a distinct territory, where it constitutes the majority and where it is able to speak its own language, develop its own culture, cultivate its traditions or practice its particular religion.¹⁰²

The 1989 UNESCO International Meeting of Experts on Further Study of the Concept of the Right of Peoples provides another practical doctrinal definition of the notion of people. The Experts describe "people" as:

1. a group of individual human beings who enjoy some or all of the following common features:
 - (a) a common historical tradition;
 - (b) racial or ethnic identity;
 - (c) cultural homogeneity;
 - (d) linguistic unity;
 - (e) religious or ideological affinity;
 - (f) territorial connection;
 - (g) common economic life;
2. the group must be of a certain number which need not be large (e.g. the people of micro States) but which must be more than a mere association of individuals within a State;
3. the group as a whole must have the will to be identified as a people or the consciousness of being a people - allowing that groups or some members of such groups, though sharing the foregoing characteristics, may not have that will or consciousness; and possibly;

¹⁰¹ James Crawford, *The Creation of States in International Law* (Oxford: Oxford University Press, 2009), 124.

¹⁰² Dietrich Murswiek, "The Issue of a Right to Secession- Reconsidered" in *Modern Law and Self- Determination*, ed. Christian Tomuschat (Netherlands, Martinus Nijhoff, 1993), 27.

4. the group must have institutions or other means of expressing its common characteristics and will for identity.¹⁰³

3.4 Content/forms of the right to self-determination

Self-determination can be categorized into two dimensions: internal and external self-determination. The internal dimension of self-determination has to do with the exercise of self-determination by a people through their choice to live with others or seek autonomy within the state. External self-determination on the other hand refers to the people's choice to exercise their self-determination by creating an independent and sovereign state, integrate with an existing sovereign state or association with an independent State.

3.4.1 Internal self-determination

According to Cassese, internal self-determination refers to "the right to authentic self-government, that is, right for a people to really and freely choose its own political and economic regime".¹⁰⁴ On his part, McCorquodale posits concerning the internal dimension of self-determination that it has to do with the right of a community within a state to select their political status.¹⁰⁵ Hannum links the internal aspect of self-determination to democracy pointing out that people are entitled to a government that is representative and democratic.¹⁰⁶ Internal self-determination, according to Simpson

¹⁰³ Final Report and Recommendations, International Meeting of Experts on Further Study of the Concept of the Rights of Peoples, 1989, 7-8.

<https://unesdoc.unesco.org/ark:/48223/pf0000085152>

¹⁰⁴ Antonio Cassese, *Self-determination of peoples* (Cambridge University Press 1995), 111.

¹⁰⁵ Robert McCorquodale, "Self-Determination: A Human Rights Approach", *International and Comparative Law Quarterly* 43 (1994), 864.

¹⁰⁶ Hurst Hannum, *Autonomy, Sovereignty, and Self-Determination: The Accommodation of Conflicting Rights* (Philadelphia, University of Pennsylvania press, 2011), 30.

is alternatively denoted as democratic self-determination.¹⁰⁷ Self-determination should be perceived as a continuum rather than a right to be exercised once-for-all.

Unlike external self-determination for colonial peoples - which ceases to exist under customary international law once it is implemented - the right to internal self-determination is neither destroyed nor diminished by its having already once been invoked and put into effect.¹⁰⁸

Within the context of the ICCPR, internal self-determination has been defined by Cassese as the fulfilment of the rights contained in it.¹⁰⁹ This was evident in the case for Quebec secession where internal self-determination was understood as the normal course in the accomplishment of the right to self-determination.¹¹⁰

The aforementioned point of view is shared by Raic who identified self-determination as a legitimate right within the general scope of international law,¹¹¹ and whose continuance is fundamentally attached to a people's right to take part in the political process in their country.¹¹² He goes further to point out that a successful representation and respective participation in the political process can be achieved through a broad form of government similar to a type of "federalism, power-sharing, autonomy and holding of referenda".¹¹³

3.4.2 External self-determination

The more controversial dimension of the principle of self-determination is the external one. External self-determination, in the opinion of McCorquodale, "was applied most frequently to colonial situations as it concerns the territory of State - its

¹⁰⁷ Gerry Johannes Simpson, "The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age", *Stanford Journal of International Law* 32 (1996): 257.

¹⁰⁸ Antonio Cassese, *Self-Determination of Peoples* (Cambridge University Press 1995), 111.

¹⁰⁹ *Ibid*, 53.

¹¹⁰ *Ibid*, 102.

¹¹¹ David Raic, *Statehood & the Law of Self-Determination* (The Hague, Kluwer Law International 2002), 284.

¹¹² *Ibid*, 272.

¹¹³ *Ibid*, 272-273.

division, enlargement or change - and the state's consequent international relations with other states."¹¹⁴ The fact of the establishment of an independent sovereign state from a colonial power being an expression of external self-determination is undisputable. Away from the framework of colonialism, the only way in which external self-determination can be potentially exercised is through secession. There is a consensus among scholars that the right to secession is allowed in international law in the situation of occupation or foreign domination.

In the colonial context two practical examples can be cited in this context. First, the three Baltic States which eventually seceded from the Soviet Union owing to the fact that the Soviet Union annexed them in the course of World War II. Second, the right of the Palestinian people to external self-determination stands also undisputed today.

In the post-colonial case, the people's right to self-determination can be said to have been upheld in the context where a state respects their human rights, guarantees them access to governance and grants them representative government. As a consequence, the people cannot be entitled to external self-determination as long as the state respects their internal self-determination.

It is the opinion of the Supreme Court of Canada that the right to external self-determination constitute a basis for secession. According to the Court, the aforementioned right comes up in three different contexts:

Where "a people" is governed as part of a colonial empire: where "a people" is subject to alien subjugation, domination or exploitation: and possibly where "a people" is denied any meaningful exercise of its right to self-determination within the state of which it forms a part. In all three situations, the people in question are entitled to the right to self-

¹¹⁴ Robert McCorquodale, "Self-Determination: A human Rights Approach, *International and Comparative Law Quarterly* 43 (1994), 863.

determination because they have been denied the ability to exert internally their right to self-determination.¹¹⁵

3.5 Secession and right to secession under international law

The upsurge of “ethno-secessionism” during the 1990s as well as the claims of supposed “secessionary independence” has made the matter of secession and its inherent legal question a subject of pertinent concern among legal minds (scholars and theorists). Though not every secessionist employs the fulfilment of specific international or domestic law entitlement to justify their secession (or attempt), the invocation of the right to self-determination feature significantly in their rhetoric as grounds for their secessionist activities. The claims have been termed by Simpson as those of “secessionist self-determination”.¹¹⁶

A clarification of the right to secede and the concept of secession will be necessary to throw light on the issue. Various legal writings show there is a lucid mix-up concerning secession and the right to secede. “Secession occurs when part of an existing state separates from that state to become a new state or to join with another. In this way, secession is primarily a matter of fact rather than law.”¹¹⁷

A discussion on whether secession is regulated by international law may seem irrelevant since secession essentially happens on the ground. “International law could not possibly take sides in internal power struggles which call into question the very existence of a state”¹¹⁸ since those types of struggles are a clear facts. To this end, it

¹¹⁵ Reference Re Secession of Quebec, (1998) 2 SCR 217, para. 138.

¹¹⁶ Gerry J. Simpson, “The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age”, *Stanford Journal of International Law* 32 (1996): 274.

¹¹⁷ K. William Watson, “When in the Course of Human Events: Kosovo’s Independence and the Law of Secession”, *Tulane Journal of International and Comparative Law* (2008), 274.

¹¹⁸ Christian Tomuschat, “*Self-Determination in a Post-Colonial World*” in *Modern Law and Self-Determination*, ed. Christian Tomuschat (Netherlands, Martinus Nijhoff, 1993), 7.

can be contended that international law approaches secession with neutrality. In the opinion of Corten, the "legal-neutrality" thesis is a conventional view: "traditionally, international law remains neutral in regard to secession: it neither prohibits, nor authorizes it".¹¹⁹ Secession therefore may fall within the grey zone of international law.

There are two categories of the right to secede: unilateral secession and consensual or constitutional secession. Both are defined by Buchanan as:

A unilateral right to secede is a claim right that a group has independently of any constitutional provision for secession or any right conferred by consent of the state. A consensual right to secede might be granted explicitly in the constitution or might be implicit in the constitution when secession is possible through constitutional amendment. A consensual right to secede might also be created through negotiation.¹²⁰

This perspective is cautioned by Vidmar who asserts that right to secession can only be fulfilled with the authorization of the parent state.¹²¹ Consensual secession is understood to be peaceful and not constituting a violation of or influence on any international law legal precept such as territorial integrity, void of outside involvement and with the prior permission of the parent state.¹²²

However, a situation in which there is separation from one state and/or integration as part of another state without the approval of the "mother" state, that is, unilateral secession characterizes the notion of remedial secession as well as the source

¹¹⁹ Olivier Corten, "Territorial Integrity Narrowly Interpreted: Reasserting the Classical Interstate Paradigm of International Law", *Leiden Journal of International Law* 24, no.1 (2011):88.

¹²⁰ Allen Buchanan, "Uncoupling Secession from Nationalism and Interstate Autonomy from Secession" in *Negotiating Self-Determination*, ed. Hurst Hannum and Eillen F. Babbit (Lexington Books, 2005), 82.

¹²¹ Jure Vidmar, "Remedial Secession in International Law: Theory and Lack of Practice", *St Antony's International Review* 6, No. 1 (2010), 38.

¹²² Simone F. Van Den Driest, *Remedial Secession: A Right to External Self-determination as a Remedy to Serious Injustices?* (Cambridge: Intersentia, 2013), 93.

of controversy.¹²³ The Supreme Court of Canada in this regard reasoned that it is "clear that international law does not specifically grant component parts of sovereign states the legal right to secede unilaterally from "parent" state."¹²⁴ The court, notwithstanding, admitted secession can be permitted implicitly (under the right of self-determination of peoples) under some circumstances.¹²⁵

This is elaborated by the UN General Assembly "Declaration on Principles of International Law" 1970 which among other things contained a detail explanation of what self-determination of the "peoples" means. In this connection "It explicitly deems "alien subjugation, domination and exploitation" to be violations of the principle of self-determination and that people denied the right to self-determination may exercise that right by choosing independence, integration, or free association."¹²⁶

A non-exhaustive list of ways of implementation of the right to self-determination is also provided in the Declaration: "the establishment of a sovereign and independent State, the free association or integration with an independent State or the emergence into any other political status freely determined by a people."¹²⁷ There are two arguments that lend credence to the argument of proponents of the right to unilateral secession: First, the non-prohibition (in explicit terms) of secession in international law can be considered as an interferential permission; Second, it is incumbent on states to acknowledge the legitimacy of secession conducted in line with

¹²³ Ibid.

¹²⁴ Reference Re Secession of Quebec, (1998) 2 SCR 217, para. 111.

¹²⁵ Ibid, 112.

¹²⁶ K. William Watson, "When in the Course of Human Events: Kosovo's Independence and the Law of Secession", *Tulane Journal of International and Comparative Law* (2008), 276.

¹²⁷ General Assembly, *Declaration on Principles of International Law concerning Friendly Relations and Cooperation among States in accordance with the Charter of the United Nations*, 24 October 1970, A/RES/2625(XXV), available at: <https://www.refworld.org/docid/3dda1f104.html> [accessed 13 June 2019]

the exercise of self-determination given the fact that self-determination constitute an erga omnes right to which state are oblige to respect and ensure its realization. However, secession must be achieved as only the last resort.

3.6 Territorial integrity and right to secession

It was noted in the case of Quebec that:

The international law principle of self-determination has evolved within a framework of respect for the territorial integrity of existing states. The various international documents that support the existence of a people's right to self-determination also contain parallel statements supportive of the conclusion that the exercise of such a right must be sufficiently limited to prevent threats to an existing state's territorial integrity or the stability of relations between sovereign states.¹²⁸

Therefore, there exists an interconnection between the principle of self-determination and that of territorial integrity which must be clarified in a bid to bring out the substance of self-determination. Ex facie, there is a conflict between the territorial integrity and the right to self-determination.¹²⁹ The source of this conflict is the external dimension of the right to self-determination which entitles a people to set up an independent sovereign state thereby affecting the territorial boundaries of the "mother" state. The case of colonial self-determination was dissimilar in the sense that the colonies were not perceived as an integral part of their territories of the colonial masters in the ordinary sense. It was in the post-colonial era that the conflict between self-determination and territorial integrity emerged in the context of external self-determination or the right to secede.

Self-determination and territorial integrity, in the opinion of Murswiek, have a large degree of coordination.

When two legal norms conflict, neither should be interpreted in a way that the other loses its actual effect. Right to secession must be at least

¹²⁸ Reference Re Secession of Quebec, (1998) 2 SCR 217, para. 127.

¹²⁹ Gerry J. Simpson, "The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age", *Stanford Journal of International Law* 32 (1996): 283.

guaranteed if the people in question have no other chance of self-determination. On the other hand, right to self-determination must not be interpreted in a way that there is practically nothing left of the principle of territorial integrity.¹³⁰

It is the opinion of several writers that both the principles of territorial integrity and sovereignty are eroding slowly.¹³¹ States have inherited numerous obligations from the developed standard of human rights to the extent that they can no longer use sovereignty as an excuse for human rights violations within their boundaries. The "absolutist" conception of territorial integrity has been rejected by Buchanan who advocates a "progressive" conception of the principle. He posits that only legitimate states acting in conformity with international legal regulations are entitled to the principle of territorial integrity.¹³² As an essential precept in international legal order and instituted principle of human rights, the principle of self-determination may also demand that states fulfil some requirement.

The case can be easily made that "safeguard clause" of the Declaration on Principles of International Law makes it an obligation for states to conform to the internal dimension of self-determination through the establishment of representative government in order for that to benefit from the protection safeguarding their territorial integrity. In the Declaration it is made clear that only those states invoke the claim of territorial integrity which provide democratic rights to its people and respect for human rights. Where a state is failed to act in accordance with the right to self-determination, the people can exercise their right to secede as a last resort.¹³³

¹³⁰ Dietrich Murswiek, "The Issue of a Right to Secession- Reconsidered" in *Modern Law and Self- Determination*, ed. Christian Tomuschat (Netherlands, martinus Nijhoff, 1993), 38.

¹³¹ *Ibid*, 35.

¹³² Allen Buchanan, "Theories of Secession," *Philosophy and Public Affairs* 26, no. 1 (1997): 50, doi:10.1111/j.1088-4963.1997.tb00049.x.

¹³³ Gerry J. Simpson, "The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age", *Stanford Journal of International Law* 32 (1996): 283.

Also, the Vienna Declaration of 1993 (in spite of the ambiguity of some of its provision) neither obliges countries to grant those type of rights not proscribe it; but on the contrary permits the restriction of the possibility to lay claim to territorial integrity within the framework of discrimination and non-compliance of states.¹³⁴

It has been contended by Murswiek that the right of secession is a necessity for States' self-preservation. "The threat of the right of secession should then become a motivation for granting autonomy in time and this making any wish for secession superfluous. In this sense, the best precaution against secession is a right to secession".¹³⁵ The conclusion that can be drawn from the foregone is that the principle of territorial integrity cannot be categorically applied to all cases of the exercise of self-determination. Therefore, Secession can be evoked as a means of separation or external self-determination if certain specific requirements are met. Rygaert and Griffioen adopt a similar position with regards to external self-determination by identifying some preconditions which needs to be fulfilled before its invocation. These include: the presence of a people with an identity distinguishable from the remaining part of the population and constituting a "clear majority"; gross human right abuses and discrimination, non-involvement in political discourse and unproductive negotiation between the people under oppression and the sovereign country.¹³⁶ Such

¹³⁴ Evan Brewer, "To break free from the tyranny and oppression: proposing a model for a remedial right to secession in the wake of the Kosovo advisory opinion", *Vanderbilt Journal of Transnational Law* 45, no.245 (2012): 258.

¹³⁵ Dietrich Murswiek, "The Issue of a Right to Secession- Reconsidered" in *Modern Law and Self- Determination*, ed. Christian Tomuschat (Netherlands, martinus Nijhoff, 1993), 39.

¹³⁶ C. Rygaert and C. Griffioen, "The Relevance of the Right to Self-determination in the Kosovo Matter: In Partial Response to the Agora Papers," *Chinese Journal of International Law* 8, no. 3 (2009): 575, doi:10.1093/chinesejil/jmp021.

type of secession under special conditions is a remedy to safeguard peoples' identity and has been defined by Kohen as "qualified secession doctrine".¹³⁷

3.7 Remedial secession

In his quest for measures of legitimacy of secession, Buchheit was the first to introduce the term "remedial secession".¹³⁸ The theory laying the case for the right to remedial secession has ever since won significant support in the academic world. There exist in scholarly works certain linguistic variants to the appellation "right to remedial secession" like "remedial right to secession" or "qualified right of secession".

The right to self-determination has been separated into two categories by Buchanan: primary right theories and remedial right only. Theories of primary rights push forward the general right of the people to secede and "do not make the unilateral right to secede derivative upon the violation of other, more basic rights".¹³⁹ The remedial right only theory on the other hand calls for clear-cut right to secession. Secession, in this context, can be purely seen as "a remedy of last resort for persistent and grave injustices, understood as violations of basic human rights".¹⁴⁰

The general principles of law *ubi jus ibi remedium* form the basis of the doctrine of remedial secession. The right to self-determination constitute an application of the aforementioned principle. This implies a remedy has to be made available in the case of the existence of a people's right to self-determination. Ryngaert and Griffioen accurately argue remedy as:

¹³⁷ Marcelo G. Kohen, *Secession International Law Perspectives* (Cambridge: Cambridge Univ. Press, 2006), 106.

¹³⁸ Lee C. Buchheit, *Secession: The Legitimacy of Self-determination* (London: Yale University Press, 1978), 222.

¹³⁹ Allen Buchanan, "Uncoupling Secession from Nationalism and Interstate Autonomy from Secession" in *Negotiating Self-Determination*, ed. Hurst Hannum and Eillen F. Babbit (Lexington Books, 2005), 83.

¹⁴⁰ *Ibid*, 84.

But what if a state persistently denies a people the fundamental right of internal self-determination? What if a people does not have free choice but is repressed and suffers from gross violations of basic human rights, and all possible remedies for a peaceful solution to the conflict has been exhausted? Should that people not be allowed a “self-help remedy” in the form of external self-determination?¹⁴¹

The doctrine of remedial self-determination holds that the right to remedial self-determination emerges as a solution to the violation of the people right to self-determination (internal dimension). The exercise of remedial self-determination in this context can be perceived as a means through which the people utilise their right to (external) self-determination. The practicality of implementing *ubi jus ibi remedium* (a right when violated, it must be remedied) in international law has also been buttressed by Tomuschat who contends: "If international law is to remain faithful to its own premises, it must give victims a remedy enabling them to live in dignity".¹⁴²

Proponents of the remedial secession theory employ the "safeguard clause" found in the Declaration on Principles of International Law as the foundational evidence to establish the basis of remedial right theory in international law. Secession appears to be authorized in the "well-known passage about unrepresentative governments".¹⁴³ A translation of the safeguard clause has been put forward by Cassese which reads thus:

if in a sovereign State that government is 'representative' of the whole population, in that it grants equal access to the political decision-making process and political institutions to any group and in particular does not deny access to government to groups on the grounds of race, creed or colour, then that government respects the principle of self-

¹⁴¹ Christine Griffioen, *Self-determination as a Human Right: The Emergency Exit of Remedial Secession* (Utrecht: Science Shop of Law, Economics and Governance, Utrecht University, 2010), 2.

¹⁴² Christian Tomuschat, "Self-Determination in a Post-Colonial World" in *Modern Law and Self-Determination*, ed. Christian Tomuschat (Netherlands, Martinus Nijhoff, 1993), 9.

¹⁴³ Christian Tomuschat, "Self-Determination in a Post-Colonial World" in *Modern Law and Self-Determination*, ed. Christian Tomuschat (Netherlands, Martinus Nijhoff, 1993), 9.

determination; consequently, groups are entitled to claim a right to self-determination only where the government of a sovereign State denies access on such grounds.¹⁴⁴

The right to secession is gotten from the "safeguard clause" by proponents of the doctrine of remedial secession using the logic's method a 'contrario'. The people can opt for secession as a mean to repair the refusal of self-determination in the situation where the state fails to act consistent with the principle of self-determination and doesn't grant a people their right to internal self-determination. That type of country can also not lay claim to protection from the dismemberment of its territory. Cassese concurs to the above argument by concluding that "impairment of territorial integrity is not totally excluded, it is logically admitted".¹⁴⁵

Simpson asserts that the territorial integrity is made a rebuttable presumption in the Declaration and only the representative states that give peoples the right to internal self-determination can invoke such claim.¹⁴⁶ Remedial self-determination right emerges as a solution when a country's action stifles such presumption. Buchanan underscores that:

Such claims can be overridden or extinguished in the face of persistent patterns of serious injustices towards a group within a state. The validity of a state's claim to territory cannot be sustained if the only remedy that can assure that the fundamental rights of the group will be respected is secession.¹⁴⁷

¹⁴⁴ Antonio Cassese, *Self-determination of people* (Cambridge University Press 1995), 112.

¹⁴⁵ Ibid, 119.

¹⁴⁶ Gerry J. Simpson, "The Diffusion of Sovereignty: Self-Determination in the Post-Colonial Age", *Stanford Journal of International Law* 32 (1996): 283.

¹⁴⁷ Allen Buchanan, "Uncoupling Secession from Nationalism and Interstate Autonomy from Secession" in *Negotiating Self-Determination*, ed. Hurst Hannum and Eillen F. Babbit (Lexington Books, 2005), 85.

3.8 Conditions for remedial secession

It is constantly emphasised by remedial secession theorists that the theory places "significant constraint on unilateral secession".¹⁴⁸ There are well defined conditions that have to be fulfilled before remedial right to secession can be invoked. A plethora of scholarly work on the circumstances warranting secession abounds in the academia. Rygaert and Griffioen on their part outline:

Four fundamental cumulative conditions that must be fulfilled before the right to self-determination may be invoked. First of all, the group invoking the right is a "people". The "people" has the distinct identity and represent a clear majority within a given territory. A minority is not necessarily a "people". Second, massive violations of basic human rights and systematic discrimination at the hands of a repressive regime have taken place. Third, violations cannot be prevented and remedied because the "people" is excluded from political participation, and is not given internal self-determination (e.g., through devolution or federalism). Finally, negotiations between the "repressive" regime and the "people" lead nowhere.¹⁴⁹

In sum, theorists agree that the following conditions have to be fulfilled to justify the exercise of the right to self-determination:

1. The seceding entity qualifies as a "people".
2. The right to internal self-determination of the people has been denied as well as the perpetuation of gross violations of human rights.
3. Secession comes in as the final solution (the last resort), that is an ultima ratio means.

¹⁴⁸ Ibid, 85.

¹⁴⁹ C. Rygaert and C. Griffioen, "The Relevance of the Right to Self-determination in the Kosovo Matter: In Partial Response to the Agora Papers," *Chinese Journal of International Law* 8, no. 3 (2009): 576, doi:10.1093/chinesejil/jmp021. See also John Dugard and David Raic, "The Role of Recognition in the Law and Practice of Secession" in *Secession: International Law Perspectives*, ed. Marcelo Kohen (Cambridge University Press, 2006), 109.

The right to of self-determination which thus evolved as right for colonized people to the right of persecuted people in the post-colonial era guarantees the people a political future based on their will. It therefore became the demand of the Kashmiris which throughout their existence has been subjugated and persecuted by different rulers. The next two chapters discusses the nature of Kashmir issue and the subsequent developments in light of the principle of self-determination.

Chapter 4

RIGHT TO SELF-DETERMINATION OF THE PEOPLE OF KASHMIR

4.1 Introduction

Kashmir is distinguished by its unparalleled beauty. It is called a paradise on earth. The first European to come to the Valley of Kashmir, Francois Bernier also made note of it: “In truth, the kingdom surpasses in beauty all that my warm imagination had anticipated...It is not indeed without reason that the Mogols call Kachemire the terrestrial paradise of the Indies...”¹⁵⁰ The pre-eminence of Kashmir in the South Asian region and beyond is determined by its history. Only by delving into this dimension would we be able to understand the significance of Kashmir in regard to the right of self-determination and vice versa. This chapter is the synopsis of the history of Kashmir from the period of Ashokan Empire up to the era of Dogra rule as well as the post partition period when the subcontinent was divided into India and Pakistan. For the most of its part, the entire history of Kashmir revolves around the notion of the right to self-determination of Kashmiris which was ignored in each era and thus resulted in disorder and chaos there. The partition gave the ultimate blow to the desires of the Kashmiris when Dogra Maharaja acceded to India regardless of the will of the people. Consequently, the people of Kashmir are still demanding their right to self-determination. This chapter throws light on various events that highlight their

¹⁵⁰ François Bernier, Irving Brock, and Archibald Constable, *Travels in the Mogul Empire*, 1656-1668 (New Delhi: Asian Educational Services, 1996), 400-401.

struggle for their right of self-determination and explains well enough the fact how this right is the valid explanation for strive of independence by the people of Kashmir.

4.2 Early history

Kashmir stands out as the unique place that has a Sanskrit historical record. It is called "Kalhana's Rajtarangini" which is a historical essay in verse comprised of eight volumes authored from 1148 - 1150 C.E. Though it cannot be considered as a bona fide historical text, it nevertheless offers a preview into the early history of Kashmir.

The earliest documented history of Kashmir starts from the third century B.C.E. when it constituted part of the great Ashokan Empire with significant Buddhist influence- a historical heritage that continues in present day Ladakh. Then the Kushans subsequently governed Kashmir, and an era ushered, characterized by intellectual renaissance and affluence during which "Kashmiris became famous throughout Asia as learned, cultured and humane and the intellectual contribution of writers, poets, musicians, scientists to the rest of India was comparable to that of ancient Greece to European civilisation."¹⁵¹ During the reign of Kanishka, Buddhism attained its peak establishing close ties with Central Asia and China which became Buddhist mission destinations.

Six centuries of Buddhist eminence came to a close at the end of Kanishka's reign with northern India yielding to the conquest of Huns from Central Asia. Forecasting Buddhism's decline in Kashmir was the rise of Mihiraluca -the 'White Hun'. His was the rule of brutality and destruction according to Kalhana, represented "by the vultures which flew ahead of him, eager to feast on the carnage which they

¹⁵¹ Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (London: I.B. Tauris, 2003), 2.

had by experience come to associate with his presence.”¹⁵²Romila Thapar observes that, “there are local traditions surviving in Kashmir where various places are associated with acts of cruelty and tyranny attributed to Mihiraluka.”¹⁵³ Mihiraluka’s rise to the throne represented the end of Buddhism and the start of an era of Hindu sway in Kashmir that continued for over seven centuries.

The chronicles of Kalhana ends in the twelfth century. Kalhana’s description of the social conditions in medieval Kashmir is also cited by Ferguson:

the great authority and power of landlords over productive resources at the expense of the cultivator and population, the power of bureaucrats over ordinary people and the deception practised by merchants, while the Brahmins who were supposed to be above worldly matters keenly pursued the accumulation of wealth.¹⁵⁴

The failure of Hindu influence in Kashmir was presaged by the lack of internal unity and effective administration. Two men (Rinchin Shah and Shah Mir) both of whom significantly changed the course of history in Kashmir were hired at the start of the fourteenth century by Kashmir’s Hindu king Sinha Deva. Rinchin rose to prominence as sovereign of Kashmir and had as successor, Shah Mir from Swat (now situated in Pakistan) who removed the last Hindu king of Kashmir Udayanadeva to emerge as Kashmir’s ruler in 1346 C.E.¹⁵⁵ Kashmir then went into an age of Muslim influence that continued till the early nineteenth century and involved the reign of Afghan rulers, Mughal emperors, and independent Sultans.

¹⁵² James P. Ferguson, *Kashmir: An Historical Introduction* (London: Centaur, 1961), 14.

¹⁵³ Romila Thapar, *A History of India* (Harmondsworth, England: Penguin Books, 1966), 141.

¹⁵⁴ *Ibid*, 27-29.

¹⁵⁵ *Ibid*, 29-30.

Till its occupation by Akbar (1586 C.E.), upon which it became part of the Mughal empire (an annexation that signalled the termination of Kashmir as a kingdom), Kashmir kept its independence under a succession of kings.

In the same manner at which Mughal authority over India began to fade during the eighteenth century, so was its grip over its territories. Kashmir succumbed into a period of Afghan rule during which Kabul replaced Delhi as the capital. Political violence, religious intolerance, cultural destruction, and non-governance characterized the seven decades under the Afghan rule (1752 C.E. - 1819 C.E.). The Kashmiris, incapable of resisting an Afghan onslaught (characterized by brutality and coercion) made a request for assistance to the ruler of the north-western kingdom of Punjab, Ranjit Singh. An appeal for liberation from one tyrant drew Kashmir into a fateful and oppressive servitude that stretched for over a century.

Kashmir (after its annexation from the Afghans in 1819 C.E.) formed part of Ranjit's great Sikh empire in the Punjab with Lahore as the capital. Kashmiris' wellbeing, governance or administration was not a prime preoccupation to the Sikh regime. To this end Ferguson notes that the Sikhs, "were conquerors who owed their power purely to their military capacity and were interested only in reaping the advantages of their conquest."¹⁵⁶ Francis Younghusband cites a visitor to Kashmir in 1824 who notes that:

Everywhere people were in the most abject condition, exorbitantly taxed by the Sikh government, and subjected to every kind of extortion and oppression by its officers. Not one-sixteenth of the cultivable surface is in cultivation, and the inhabitants, starving at home, are driven in great numbers to the plains of Hindustan.¹⁵⁷

¹⁵⁶ Ibid, 50.

¹⁵⁷ Francis Edward Younghusband, *Kashmir* (London: A. & C. Black, 1917), 136.

4.3 Dogra Rule and Treaty of Amritsar

The coming of the British and a succession of Anglo-Sikh wars ended in the division of Ranjit Singh's Sikh empire. as a recompense for collusion with colonial authority, Kashmir was sold 'forever' by the British to Maharaja Gulab Singh (Dogra ruler) for the sum of £500,000 (Rs. 750000) in 1846¹⁵⁸ in what came to be known as the Treaty of Amritsar,¹⁵⁹ portrayed as "infamous sale deed".¹⁶⁰ A British visitor to the Valley, Robert Thorp, protested his government's double-dealing in vain, "But oh! British reader! Forget not that these and other frightful miseries are produced by a government which the British power forced upon the people of Cashmere; by a government into whose hands British statesmen sold the people of Cashmere."¹⁶¹ The Maharaja's descendants continued to rule as sovereign princes until the termination of British colonial dominion over the Indian subcontinent in August 1947.

Gulab Singh, similar to his predecessors, was a skilful soldier, nevertheless he and his Dogra successors were deficient of the political acumen to administer Kashmir.¹⁶² A series of natural disasters aggravated the catastrophic economic and social effects of Sikh mal-governance. In 1877, the state experienced a famine during which it is believed that starvation claimed the lives of two thirds of the population. People were prevented from migrating to areas where food was available due to an official ban on migration.¹⁶³ Ferguson comments that this was "a time for the Muslims

¹⁵⁸ Alastair Lamb, *Kashmir: A Disputed Legacy: 1846 - 1990* (Karachi: Oxford University Press, 1992), 8.

¹⁵⁹ See Appendix C.

¹⁶⁰ Muhammad Yusuf Saraf, *Kashmiris Fight-for Freedom*, vol. 1 (Lahore, Pakistan: Ferozsons, 1977), 187-90.

¹⁶¹ Robert Thorp, *Cashmere Misgovernment* (Calcutta: Wyman brothers, 1868), 42-43.

¹⁶² James P. Ferguson, *Kashmir: An Historical Introduction* (London: Centaur, 1961), 61-63.

¹⁶³ Francis Edward Younghusband, *Kashmir* (London: A. & C. Black, 1917), 181.

to suffer. Mosques were closed and the call to prayer forbidden.”¹⁶⁴ Muslims were barred from the army and not allowed to carry a firearm.¹⁶⁵ At the turn of the century, the strongly unpopular Dogra regime was characterized by a corrupt bureaucracy, a grinding tax regime, a stifling state monopoly over all commercial enterprise, indifference to human suffering and religious persecution.¹⁶⁶

In terms of territorial expansion, the Kashmir Valley added to the previously existing Dogra territories of Ladakh, Baltistan, and Gilgit together with the kingdoms of Hunza and Nagar. The Poonch fiefdom (a district associated with the Punjab) was ultimately brought under Dogra control by 1936.¹⁶⁷ The Princely State of Jammu and Kashmir in 1947 was formed of these principal regions under Kashmir’s last Dogra monarch, Maharaja Hari Singh.

The welfare of the Kashmiris was not the particular priority of Maharaja Hari Singh. In this connection, Kashmiri Hindu writer G.N. Kaul has been cited by Sumantra Bose. Kaul “paints a Dickensian picture of Srinagar in the early 1920’s - prostitution, thievery, beggary, disease, illiteracy and unemployment were apparently rife.”¹⁶⁸ Whereas the Pandits were living better life. Minister of Kashmir Sheikh Abdullah cites Albion Banerjee who summarized the situation of Kashmiris in 1939.

In the state of Jammu and Kashmir, injustices of various kinds are prevalent. The Muslims, who form an overwhelming majority, are illiterate, steeped in poverty, and driven like dumb cattle. No rapport exists between the government and the people. There is no system to

¹⁶⁴ James P. Ferguson, *Kashmir: An Historical Introduction* (London: Centaur, 1961), 49.

¹⁶⁵ Victoria Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (London: I.B. Tauris, 2003), 17.

¹⁶⁶ Francis Edward Younghusband, *Kashmir* (London: A. & C. Black, 1917), 178-179.

¹⁶⁷ Alastair Lamb, *Crisis in Kashmir 1947 to 1966* (London: Routledge & Kegan Paul, 1966), 14.

¹⁶⁸ Sumantra Bose, *The Challenge in Kashmir: Democracy, Self-determination and a Just Peace* (Thousand Oaks: Sage, 1997), 24.

redress their grievances. Public opinion is not permitted. Newspapers are generally non-existent.¹⁶⁹

4.4 Indian Independence Act 1947 and the Princely State of Jammu and Kashmir

The State of Jammu and Kashmir was one of the 565 Princely States in the Indian Sub-continent under British dominion (See map in Figure 1). The Indian Independence Act 1947¹⁷⁰ had established a constitutional framework for the division of British colonial India. The process of decolonization pursued by the British brought about the emergence of two new territories in the state of Pakistan and India. Likewise, it also instigated a crisis in the Indian Princely States, which were keeping up special constitutional entente with the British Crown different from British India, which was under direct British rule and governance.

¹⁶⁹ Sheikh Muhammad Abdullah, *Flames of the Chinar: An Autobiography* (New Delhi: Penguin Books, 1993), 16.

¹⁷⁰ See Appendix D.



Figure 1: Map of India under British Colonial rule¹⁷¹

The Indian Independence Act was put forward by the British in 1947. Under its Section 7, it specified that when the Indian subcontinent acquired independence on August 15, 1947, all treaties and agreements made with leaders of every single Princely State would automatically become null and void. In this regard, the Indian Independence Act 1947 Section 7 (b) alluded to the abrogation of British suzerainty over the Indian States as:

The suzerainty of His majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof. And all powers, rights, authority or jurisdiction

¹⁷¹ Navnita Chadha Behera, *Demystifying Kashmir* (Washington D.C.: Brookings Institution Press, 2006), 5.

exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise.¹⁷²

Many scholars have tried to clarify the status of the Princely States from a constitutional and legal perspective. Prakash Chander contended that, “At that time, there were also around 565 Princely States, large and small, which were under British suzerainty but were not directly ruled by the British Government.”¹⁷³ Lamb also opines that, “In 1947 the State of Jammu and Kashmir was one of those Indian Princely States, at least 562 (some authorities list 565 or, even, 584) in all, which constituted about a third of the extent of the British Indian Empire.”¹⁷⁴ From the constitutional prism, the Princely States or 'Indian states' were totally distinguished from 'British India'. In this respect, Princely States constituted a distinct issue in the process of decolonisation. The last British viceroy Mountbatten clarified the status of Indian States and British India as:

There is a vast difference between the legal status of British India and the Indian States. British India is territory over which His Majesty's Government has the complete right to negotiate on behalf of all, and the principle there is to do exactly what the leaders of the communities in those territories want. The Indian States have never been British territory. They have been independent States in treaty relations with the British.¹⁷⁵

As a result of the Indian Independence Act 1947, which came into effect on August 15, 1947 when two new territories of Pakistan and India emerged as semi-sovereign States separately, it coincided with the termination of British Paramountcy or suzerainty.

¹⁷² K. S. Hasan, *The Kashmir Question: Documents on the Foreign Relations of Pakistan*, 1st ed. (Karachi: Pakistan Institute of International Affairs, 1966), 9-11.

¹⁷³ Prakash Chander, *India and Pakistan: Unending Conflict* (New Delhi: APH Publishing Corporation, 2003), 96. See also Appendix I.

¹⁷⁴ Alastair Lamb, *Kashmir: A Disputed Legacy: 1846 - 1990* (Hertingfordbury, Hertfordshire: Roxford Books, 1991), 4.

¹⁷⁵ K. S. Hasan, *The Kashmir Question: Documents on the Foreign Relations of Pakistan*, 1st ed. (Karachi: Pakistan Institute of International Affairs, 1966), 5.

Several writers concur that the Princely States that were not particularly designated to India or Pakistan were given the choice to join India or Pakistan or, in uncommon cases, to stay autonomous. Bose writes, “With the lapse of British “Paramountcy” princely states were technically free to accede to either Dominion or to become independent states.”¹⁷⁶ Alastair Lamb on his part notes, “On 15 August 1947 the State of Jammu and Kashmir became to all intents and purposes an independent state. There is no other possible interpretation of the lapse of Paramountcy.”¹⁷⁷

While engaged in process of choosing the future status of Princely States as indicated by the Indian Independence Act of 1947, several diplomatic and political manoeuvres were made to persuade the Maharaja Hari Singh to choose either to join India or Pakistan. As according to the Act, the Princely States – J&K constituting arguably the biggest, (although it was comparatively more politically developed yet singular in the perspective that it shared borders with both Pakistan and India as well as China and Soviet Russia) – had the alternative of keeping their independence. This was the preferred option of the Maharaja. In any case, with a specific end goal to persuade the Maharaja, Muhammad Ali Jinnah, Nehru, Gandhi and Mountbatten all went to Kashmir at various periods, within the scope of their various political strategies in Kashmir.

On July 25, 1947, a gathering for all the rulers of Princely States was convened by the Viceroy of India Lord Louis Mountbatten during which he stressed they had to make a decision before August 15, 1947 in their respective positions as rulers on

¹⁷⁶ Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* (Cambridge, MA: Harvard University Press, 2003), 30.

¹⁷⁷ Alastair Lamb, *Kashmir: A Disputed Legacy: 1846 - 1990* (Hertingfordbury, Hertfordshire: Roxford Books, 1991), 154.

whether they wished to join either India or Pakistan. All of them complied promptly but for the leaders of three Princely States: Hyderabad, Junagarh, and Jammu & Kashmir.

Numerous studies such as those of Bose (2003), Korbel (1954) and Lamb (1991) disclose in the same way that the Maharaja was hesitant about joining Dominion but preferred keeping the independent status of Jammu & Kashmir, though he was available to arranging a quantum of authority transfer to his subjects. The hesitance (implicit or explicit refusal) of the Maharaja to decide on the issue pushed him to offer ‘Standstill Agreement’ (as was allowed under a subsection 7 of the Independence Act) with both Pakistan and India as a temporal arrangement to check the progress of both states till such a time when he makes the ultimate decision. Sardar Ibrahim Khan described it as:

The Maharaja approached both India and Pakistan for conclusion of a Standstill Agreement with two Dominions, as they then were. India demurred, while Pakistan accepted the offer and the Standstill Agreement with Pakistan came into force on the 15th of August 1947. Pakistan thus stepped into the shoes of the pre-partition government of India and acquires lawful control over the Defence, Foreign Affairs and Communications of the State.¹⁷⁸

That Agreement “allowed various existing arrangements regarding economic activities and the provision of services between J&K and newly-created Pakistan, to continue until new ones superseded them”¹⁷⁹. As a result of the Standstill Agreement, Pakistan was involved with Jammu and Kashmir from the day it was established viz. August 15, 1947.

¹⁷⁸ Sardar Mohammed Ibrahim, *The Kashmir Saga* (Mirpur, Kashmir: Verinag, 1990), 48.

¹⁷⁹ Christopher Snedden, *The Untold Story of the People of Azad Kashmir* (London: Hurst & Company, 2012), 83.

4.5 Quit Kashmir Movement and Poonch uprising

The foregoing discussion revealed that the Indian Princely States were free to join either the Dominion or remain independent. Moreover, on August 15, 1947 the State of Jammu & Kashmir, technically and legally, became a sovereign State in its own right. An upsurge of unrest was experienced in Kashmir at the close of the 19th Century. The cumulated frustration of the repressed Kashmiris became apparent and movements allied to or against Hindu Dogra surfaced. There was a split among several of these groups into pro-Pakistan and pro-India factions on which nation Kashmir was to become part of in the post partition argument (The ethnic and religious make-up is discussed in the next chapter which elucidate that split).

From the perspective of self-determination, this period is significant because it was in the reign of Hari Singh that democratic thought was rooted in Kashmir. The region had remained under feudal system for centuries together with the absence of civil rights and small sense of protest among the people concerning poor conditions. The notion of autonomous rule gained currency among the Kashmiris for the first time as a result of the ideas of enlightenment that led the Kashmiris into begin championing their cause at levels never seen before. Since the early 1930s, Jammu & Kashmir Muslims – on their part – had been battling politically against the authoritarian governance of the Maharaja pushing for civic and political freedoms.¹⁸⁰

At this time, the "Kashmir for the Kashmiris" movement started, standing up against the Maharaja's autocratic and lavish rule. There was a reorganisation of the Anjuman-i-Islam into the Young Men's Muslim Association for Jammu under the leadership of Ghulam Abbas. The Mirwaiz of Kashmir, Yusuf Shah (spiritual leader

¹⁸⁰ Ibid, 30.

of all the Muslim population) also took an active role in the promotion of the improvement of the conditions of the Muslim inhabitants of Jammu and Kashmir.

This era also witnessed the emergence of Sheik Mohammad Abdallah, called the 'Lion of Kashmir'. His party, the All India Muslim Conference (subsequently changed into the National Conference) spearheaded the resistance against Hari Singh. A 'Quit Kashmir' movement against Hari Singh was launched in 1946 by the National Conference which called for the establishment of representative government. The National Conference also additionally declared its intentions to "end communalism" by stopping to reason in terms of Muslims and non-Muslims, and asked "all Hindus and Sikhs to participate as equals in the democratic struggle."¹⁸¹ Abdallah stated in a public speech that "the time has come to tear up the Treaty of Amritsar... sovereignty is not the birthright of Maharaja Hari Singh. Quit Kashmir is not a question of revolt. It's a matter of right."¹⁸² Violent protest erupted leading to an aggressive state response which claimed the lives of nearly two-dozen people.¹⁸³ Abdallah along with other activists were imprisoned for nine years by Hari Singh's regime as a result of his insubordination and resistance.

By June 1947, 'a no-tax' movement was introduced in Poonch, which quickly formed into a Muslim revolt spearheaded by the Sudhan tribe on August 8, 1947 against the government of Maharaja Hari Singh.¹⁸⁴ The 'Poonch Uprising', as the revolt came to be known, was a popular defiance movement to secure political liberties, a representative government and social justice. Poonch had been managed through

¹⁸¹ Alastair Lamb, *Crisis in Kashmir 1947 to 1966* (London: Routledge & Kegan Paul, 1966), 31.

¹⁸² Sumantra Bose, *The Challenge in Kashmir: Democracy, Self-determination and a Just Peace* (Thousand Oaks: Sage, 1997), 25.

¹⁸³ *Ibid*, 26.

¹⁸⁴ Sardar Mohammed Ibrahim, *The Kashmir Saga* (Mirpur, Kashmir: Verinag, 1990), 87.

history as a fiefdom inside the State of Jammu & Kashmir and there were countless individuals from Poonch and Mirpur areas who had served in the British Indian armed force.¹⁸⁵ Around then, those who led the movement displayed a sense of maturity by inviting Hari Singh to Rawalakot to express their political and democratic grievance.

The invitation was extended by a member of Prajha Sabha (the existing assembly) Khan Mohammad Khan, alongside other leaders of the World War II veterans from Poonch, to help him to remember the significance of considering the desires of the local inhabitants before settling on any choice about the future status of J&K state after division of the Indian sub-continent. However, human rights violations were perpetuated by the Maharaja's forces when he left Rawalakot.¹⁸⁶

The partition of the Indian subcontinent in 1947 was accompanied by a communal mass killings which created the greatest refugee crisis of the twentieth century.¹⁸⁷ The partition's violence and communal passion also resonated in Kashmir. Hari Singh augmented his Hindu and Sikh forces and ordered Muslims to surrender their weapons. The situation of Hindu refugees fleeing violence from north-west Pakistan was used by members of a Hindu right wing organization dubbed the Rashtriya Swayam Sevak Sangh (RSS) as an occasion to conspire with the Maharaja's police in the massacre and eviction of Muslims in the eastern districts of Jammu.¹⁸⁸ The crisis reached its peak with the entry of several thousand Pathan tribesmen from the North West Frontier Province (NWFP)¹⁸⁹ into the town of Baramulla, on the road

¹⁸⁵ Alastair Lamb, *Kashmir: A Disputed Legacy: 1846 - 1990* (Karachi: Oxford University Press, 1992), 121.

¹⁸⁶ Muhammad Yusuf Saraf, *Kashmiris Fight-for Freedom*, vol. 1 (Lahore, Pakistan: Ferozsons, 1977), 783-804.

¹⁸⁷ Ian Talbot, *India and Pakistan* (London: Arnold, 2000), 157.

¹⁸⁸ Sumantra Bose, *The Challenge in Kashmir: Democracy, Self-determination and a Just Peace* (Thousand Oaks: Sage, 1997), 26.

¹⁸⁹ Province of Pakistan, renamed as Khyber Pakhtunkhwa.

towards the capital, Srinagar, manifestly to support the indigenous Poonch revolt. Hari Singh at this point, pleading incapability of defending his kingdom opted to accede to India on condition that Delhi send troops to defend his territory. However, the accession contained an understanding that made it provisional and “conditional on the will of the people being ascertained as soon as law and order were restored.”¹⁹⁰

4.6 Instrument of Accession

The Maharaja's qualification or power to sign the Instrument of Accession with India was rejected by Pakistan on the bases that: to start with, the majority Muslim part areas where to go to Pakistan according to the partition plan; in addition, the so-called instrument of accession was obtained under duress and manipulation, and signed within a context that was intentionally orchestrated to ease Jammu & Kashmir's accession; and lastly, the Maharaja had fled the capital and therefore vacated power as ruler of Kashmir.

Also, scholars have raised numerous concerns on the legitimacy of the Instrument of Accession. As Josef Korbel (one of the UNCIP member) underscores, “The Maharaja's last-minute decision was, as history would indicate, no decision at all. It was only a final manoeuvre – a last vacillation.”¹⁹¹ In the same connection, Alastair Lamb asserts, “the Maharaja by 26 October 27, 1947 was no longer competent to sign any Instrument of Accession because he had to all intents and purposes been overthrown by his own subjects”¹⁹² whereas the Poonch Rebels established firm control over the region of Poonch while Gilgit Scouts did same in Gilgit Agency.

¹⁹⁰ Abdul Gafoor Abdul Majeed Noorani, *The Kashmir Question* (Bombay: Manaktalas, 1964), 31.

¹⁹¹ Josef Korbel, *Danger in Kashmir* (New Jersey: Princeton University Press, 1954), 64.

¹⁹² Alastair Lamb, *Kashmir: A Disputed Legacy: 1846 - 1990* (Hertingfordbury, Hertfordshire: Roxford Books, 1991), 150.

Consequently, the newly established Azad Kashmir Government replaced the Maharaja's reign on October 24, 1947.¹⁹³

Some writers such as D.A. Mahapatra and Shekhawat posit the accession voluntary, unconditional and absolute. It was not conditional upon the ratification by the people of Kashmir because it is stipulated in the Indian Independence Act of 1947 that if the governor general signed the Instrument of Accession then it is final.¹⁹⁴ Nonetheless, Bose asserted that Indian government and Kashmir's last Maharaja had concurred only to a transitory accession with a referendum to be held at the end of the hostilities in which the final status of Kashmir was going to be decided.¹⁹⁵ In this regard, confirmation can be found in correspondence between the Maharaja and Lord Mountbatten. Mountbatten had answered to the Maharaja's letter on October 27, 1947 as follows:

In the special circumstances mentioned by Your Highness my Government has decided to accept the accession of Kashmir State to the Dominion of India. In consistence with their policy that in the case of any state, where issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State. It is my Government's wish that as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the State's accession should be settled by a reference to the people.¹⁹⁶

A.G Noorani argues that "A hyper-technical stand has been consistently and dishonestly adopted by India in respect of the State of Jammu and Kashmir."¹⁹⁷ Lord

¹⁹³ Ibid, 150-151.

¹⁹⁴ Debidatta Aurobinda. Mahapatra and Seema Shekhawat, *Kashmir across LOC* (New Delhi: Gyan Pub. House, 2008), 15.

¹⁹⁵ Sumantra Bose, *The Challenge in Kashmir: Democracy, Self-determination and a Just Peace* (Thousand Oaks: Sage, 1997), 27.

¹⁹⁶ K. S. Hasan, *The Kashmir Question: Documents on the Foreign Relations of Pakistan*, 1st ed. (Karachi: Pakistan Institute of International Affairs, 1966), 57.

¹⁹⁷ Abdul Ghafoor Noorani, "Kashmir's Accession to India Is Strictly "conditional", " *Greater Kashmir*, March 14, 2015, <https://www.greaterkashmir.com/news/gk-magazine/kashmirs-accession-to-india-is-strictly-conditional/>.

Mountbatten's reply letter to Maharaja unequivocally shows the accession was shrouded with controversy. He further points out that, "Mountbatten's letter was a collateral document which formed an integral part of the Instrument of Accession and rendered the accession conditional on the ascertainment of "the wishes of the people of Kashmir",¹⁹⁸ and that will of the people were to be ascertained when conditions became under control.¹⁹⁹

Also, an examination of the Instrument of Accession, which comprises nine articles, shows without doubt that the territory of Jammu & Kashmir did not enter a merger with the Union of India, but was instead incorporated through a conditional and provisional accession (with specific conditions).

4.7 United Nations resolutions and right to self-determination of the people of Kashmir

Following the growing strain and internal rebellion against the Maharaja in Jammu & Kashmir, a conflict erupted between India and Pakistan over the control of the region in 1947. The Indian government decided to take the issue to the UN Security Council and filed a complaint on January 1, 1948. Three UN Resolutions were passed from 1948 – 49 calling upon the governments of India and Pakistan to organize a plebiscite in order to establish the wishes of the Kashmiris and permit them to choose their own future. In this regard, the Resolution was passed by the Security Council on January 17, 1948, asking both India and Pakistan 'to refrain from making any statement and from doing or permitting any acts which might aggravate the situation'.²⁰⁰ Another Resolution was passed on January 20, 1948, creating a five

¹⁹⁸ Ibid.

¹⁹⁹ Ibid.

²⁰⁰ Kashmir, UN Security Council Resolution 38, <https://www.mtholyoke.edu/acad/intrel/kashun38.htm>. See Appendix E.

member UN Commission for India and Pakistan (UNCIP) to ascertain the facts about this situation and carry out a mediatory function.²⁰¹

UNCIP reached its first Resolution on August 13, 1948 consisting of three sections: Section 1 handled the issue of the establishment of a truce; Section 2 dealt with the truce agreement, and Section 3 with determining 'the future status of Jammu & Kashmir in accordance with the free and impartial will of the people'.²⁰² The UNCIP passed its second (and last – to date) Resolution on January 5, 1949 under which in which many operative guidelines for the conduct of a plebiscite to ascertain the free will of people of Jammu & Kashmir were elucidated.²⁰³

The UNCIP in 1950-51, made known the failure to bring a solution to the Kashmir issue to the Security Council of the UN. Consequently, General McNaughton, Sir Owen, and Dr. Frank Graham Dixon were appointed by the UNSC at different times, and were entrusted the responsibility of carrying out mediation between the two parties (India and Pakistan). After close examination of the issue, they all held discussions with the various parties proposing to them solutions which could ensure a plebiscite to determine the free will of the Kashmiris.²⁰⁴ Nevertheless, due to lack of agreement, no progress could be made. According to Nasreen Akhtar, Pakistan

²⁰¹ Kashmir, UN Security Council Resolution 39, <https://www.mtholyoke.edu/acad/intrel/kashun39.htm>. See Appendix F.

²⁰² Resolution Adopted by the United Nations Commission for India and Pakistan on 13 August 1948, <https://www.mtholyoke.edu/acad/intrel/uncom1.htm>. See Appendix G.

²⁰³ Resolution Adopted at the Meeting of the United Nations Commission for India and Pakistan on 5 January, 1949, <https://www.mtholyoke.edu/acad/intrel/uncom2.htm>. See Appendix H.

²⁰⁴ Nasreen Akhtar, "A RESPONSE TO "THE KASHMIR CONFLICT", " *International Journal on World Peace* 27, no. 1 (March 2010): 47, <http://www.jstor.org/stable/20752915>.

accepted all the proposals given by the UN representatives but India did not accept any of these.²⁰⁵

To this end, A.G. Noorani cites Jawaharlal Nehru's statement spelling out the policy of the Indian government: "Our view which we have repeatedly made is that the question n of accession in any disputed territory or state must be decided in accordance with the wishes of the people."²⁰⁶ Nehru nevertheless had swung towards a volte-face on Kashmir by 1954 when he put across the doubtful contention that the joining of Pakistan into the CENTO and SEATO²⁰⁷ military alliances barred the possibility of a plebiscite in Kashmir. The U-turn was complete by 1956 when Nehru virtually repudiated plebiscite in Kashmir.²⁰⁸

In 1954, the controversial accession to India was endorsed by the Constituent Assembly of Jammu and Kashmir (Indian-Administered Kashmir). It went further in 1956, to enact the Constitution which identified the State of Jammu and Kashmir as part and parcel of the Union of India. Article 3 of the Constitution of Jammu and Kashmir stipulates that "The State of Jammu and Kashmir is and shall be an integral part of the Union of India". India refers to these as grounds that invalidate the need for a plebiscite, contending that the Constituent Assembly represents the people of Jammu and Kashmir. "However", as Bose contends, "The Security Council resolutions – notably those of March 1951 and January 1957 – are unequivocal that such participation and representation could not be regarded as a substitute for an internationally supervised plebiscite."²⁰⁹

²⁰⁵ Ibid.

²⁰⁶ Abdul Gafoor Abdul Majeed Noorani, *The Kashmir Question* (Bombay: Manaktalas, 1964), 34.

²⁰⁷ Ibid, 66.

²⁰⁸ Ibid, 72.

²⁰⁹ Ibid, 73.

Opinions differ on whether the legal interpretation of the UN Resolutions on the Kashmir question limited the Kashmiris' choice uniquely to accession with India or Pakistan or included the alternative of independence. Concerning Kashmir, a unique interpretation expressed in the legal context of the Kashmir conflict becomes problematic.

An examination of the two resolutions put together by UNCIP reveals a difference that is worth noting. It is stated in the first Resolution that 'the future status of Jammu & Kashmir is subject to the free will of the people of the disputed state of Jammu & Kashmir'.²¹⁰ This shows open-endedness and is therefore interpreted to include a possible autonomy or independence for J&K. In contrast, the second Resolution says, 'the question of the accession of the State of Jammu and Kashmir to India or Pakistan',²¹¹ illustrating the restriction of the Kashmiris' choice to India or Pakistan. It demonstrates that this resolution involved a unique interpretation of self-determination (in the eventuality of a plebiscite) as an alternative of being part of Pakistan or India.

Nevenda Chada Behera points out, the second UNCIP Resolution issued on January 5, 1949 with respect to the tenure of a referendum limited the Kashmiris' choice to either joining India or Pakistan, which involves a "singular notion of the right to self-determination and ruled out independence, framed the Kashmir issue as an India-Pakistan conflict and played down the question of people's 'political' rights."²¹² But according to Dr. Nazir Gilani, there are two opinions regarding the resolutions of

²¹⁰ Resolution Adopted by the United Nations Commission for India and Pakistan on 13 August 1948, <https://www.mtholyoke.edu/acad/intrel/uncom1.htm>.

²¹¹ Resolution Adopted at the Meeting of the United Nations Commission for India and Pakistan on 5 January, 1949, <https://www.mtholyoke.edu/acad/intrel/uncom2.htm>.

²¹² Navnita Chadha Behera, *Demystifying Kashmir* (Washington D.C.: Brookings Institution Press, 2006), 104.

UNSC and UNCIP. According to one view the reference to the plebiscite in the resolutions is limited to accession of either of the two countries-India or Pakistan. While others hold that the people of Kashmir has the general right of self-determination stipulated in the UN Charter on the basis of 'equality of people' and which also includes the right to independence as well. [Therefore], the people of Kashmir should follow the common principle of self-determination [as envisaged in the UN Charter].²¹³

In this regard the explanation provided by Karen Parker is helpful. She has explained the concept of self-determination in the context of 'decolonisation-colonization mandate'. She has arranged it into two distinct circumstances; one is dubbed perfect decolonisation and the other imperfect decolonisation. Parker thinks of the case of Kashmir as an 'imperfect' decolonization process in which it has necessitated the involvement of the United Nations.²¹⁴

Hence, with that elucidation, it could be deduced that the people of Kashmir have their right to self-determination which is laid down in the Charter of the United Nations and Human Rights Covenants (discussed in chapter three). The history is thus a witness that people of Kashmir never get their right of self-determination by which they could decide their social economic and political life. This chapter provides the roadmap to the circumstances (which will be discussed in the next chapter) leading to the movement of freedom from the authoritative Indian yoke by the people of Kashmir.

²¹³ Nazir Gilani, "10 Week Interregnum Divided Kashmir," *Rising Kashmir*, 2013, <http://www.risingkashmir.in/news/10-week-interregnumdivided-kashmir-44943.aspx>.

²¹⁴ Karen Parker, "Understanding Self-Determination: The Basics," U.S. Military Involvement in Mexico, <http://www.guidetoaction.org/parker/selfdet.html>.

Chapter 5

APPLICABILITY OF REMEDIAL SECESSION IN JAMMU AND KASHMIR

5.1 Introduction

This chapter aims to provide an explanation of the aftermath of accession of Kashmir to India which was done without the consent of the people of Kashmir. They were betrayed and ultimately the plebiscite never took place. So being, a provisional accession was later proclaimed by the Indian leadership to be permanent. Consequently, they initiated their movement of independence. This chapter is therefore divided into two parts. First part discusses the erosion of autonomy- the violation of internal self-determination while the second part investigates the human rights violation in J&K in order to substantiate the applicability of remedial secession in the Kashmir issue.

5.2 Current status of Kashmir

Following the repercussions of the 1948 hostilities between India and Pakistan over Kashmir, a truce line (Line of Control or LoC) was delineated in July 1949 which forms the de-facto border between them. Approximately two-thirds of Kashmir falling within Indian territory and about one-third into Pakistani territory (See Figure 2). Since then there occurred neither reversal nor an affirmation of this division of Kashmir across the LoC.



Figure 2: Map of Kashmir after 1949 partition²¹⁵

5.2.1 Azad Jammu and Kashmir

The areas of Azad Jammu and Kashmir (AJK) which means free Kashmir, and Gilgit and Baltistan (GB-northern areas) turn out to be part of Pakistan. The Pakistan administered Kashmir is entirely a Muslim state with both regions (GB and Azad Kashmir) constitute 99% Muslims.²¹⁶ People in Azad Kashmir are mostly Punjabis with other ethnic groups such as Kashmiris, Gujjars, Juts, Rajputs, Mughals, Awans,

²¹⁵ Kashmir Maps - Perry-Castañeda Map Collection - UT Library Online, <https://legacy.lib.utexas.edu/maps/kashmir.html>.

²¹⁶ Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* (Cambridge, MA: Harvard University Press, 2005), 9.

Abbasis and Sudhans.²¹⁷ Muzaffarabad is the state capital and the total population according to 2017 census is 4.45 million.²¹⁸

5.2.2 Jammu and Kashmir

India administered Jammu, Ladakh and the Kashmir Valley. In Indian controlled Kashmir, each region has cultural distinction and there also include within it majority religious and ethnic groups with smaller minorities. The Kashmir Valley which is the largest part and constitute the seat of the present crisis is overwhelmingly Muslim (97.16%) in its composition with a small Hindu minority (1.84%). Jammu region comprises of 65.23% Hindus, 3.69% Muslims, and 4% others- Sikhs and Buddhists. Whereas in Ladakh 45.87% is Buddhist population, 47.40% are Muslims and 6% are Hindus.²¹⁹ The people speak different languages such as Urdu, Kashmiri, Hindi, Balti, Ladakhi, Punjabi, Gojri, Pashto and Shina.²²⁰ Srinagar is the summer capital while Jammu is the winter capital of the state and the total population of J&K is about 14.324 million.²²¹

5.3 Autonomy of Jammu and Kashmir under Indian Union

Under very special circumstances, the state of Jammu and Kashmir acceded to India in October 1947 which is still considered as unfair and unlawful occupation (discussed in chapter four). Indian jurisdiction in Kashmir was restricted by the post-1947 constitutional provisions to the areas of defence, foreign affairs and

²¹⁷ Christopher Snedden, *The Untold Story of the People of Azad Kashmir* (London: Hurst & Company, 2012), 128-133.

²¹⁸ "Census 2017: AJK Population Rises to over 4m," *The Nation*, August 26, 2017, <https://nation.com.pk/27-Aug-2017/census-2017-ajk-population-rises-to-over-4m>.

²¹⁹ Jammu and Kashmir: Official State Portal, <https://jk.gov.in/jammukashmir/?q=demographics>.

²²⁰ Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* (Cambridge, MA: Harvard University Press, 2005), 9-10.

²²¹ Manisha Bolder, "Population of Jammu & Kashmir 2019," *India Population 2019*, May 10, 2018, <https://indiapopulation2019.com/population-of-jammu-kashmir-2019.html>.

communication according to Instrument of Accession. The Constituent Assembly of India in 1949 adopted Article 306A as a provisional extension of autonomy to Kashmir pending a plebiscite.²²² The adoption of Article 370²²³ of the Indian Constitution formalised this condition which granted the limited powers to the Centre to legislate for Jammu and Kashmir. In 1951, Sheikh Abdullah then formed the first government in Kashmir as its Prime Minister. “Naya Kashmir” (New Kashmir)-a land reform programme that promised rights of ownership to peasants mainly Muslims was the most significant agenda of Abdullah’s regime’s manifesto. The reforms culminated in the reallocation of 230,000 acres of land by 1953- a factor that greatly boosted of Abdullah.²²⁴

The ‘Delhi Agreement’ (1952)²²⁵ which was subsequently negotiated between Prime Ministers Abdullah and Nehru, approved Kashmir’s autonomy as Article 370 of the Indian Constitution.²²⁶ Since then, successive regimes in New Delhi made the rhetorical declaration of Kashmir being ‘an integral part of India’ their trademark.

On one hand, Sheikh Abdullah’s secular and socialist inclinations instilled a rapprochement between him and the Nehru administration, his vocalization of the independence option later was regarded as high treason by the Indian state. Such reaction reflected Indian worries about the independence of Kashmir more than the purported dissident inclinations of Abdullah himself.²²⁷

²²² Abdul Gafoor Abdul Majeed Noorani, *The Kashmir Question* (Bombay: Manaktalas, 1964), 47.

²²³ See Appendix I.

²²⁴ Sten Widmalm, *Kashmir in Comparative Perspective: Democracy and Violent Separatism in India* (London: Routledge, 2015), 182.

²²⁵ See Appendix- K

²²⁶ Sumantra Bose, *The Challenge in Kashmir: Democracy, Self-determination and a Just Peace* (New Delhi: Sage, 1997), 32.

²²⁷ Parmanand Parashar, *Kashmir and the Freedom Movement* (New Delhi: Sarup & Sons, 2004), 1-10.

Actually, the hypothetical option of Kashmiri independence remained open as long as the issue of accession remained unresolved. India's growing distrust and aggression towards Sheikh Abdullah culminated in his removal inciting extensive protest across Kashmir. At the end of twenty-three years of imposed political oblivion by India, during which Kashmir's sovereignty was methodically and fundamentally eroded, Sheikh Abdullah entered into a treaty with Indian Prime Minister Indira Gandhi making the 'special status' of Kashmir merely a sham. Kashmir, in a 1975 treaty between them, was "made a constituent unit of India...legitimising the usurpation of the right of self-determination and thereby making India and Pakistan the arbiters of Kashmir's destiny"²²⁸ with a dissemblance to the original form of Article 370.

The option or possibility of self-determination virtually ended with the legal incorporation of Kashmir as an integral part of India. Abdullah can be blamed for accepting a treaty that eroded Kashmir's independence. The destruction of Kashmir's sovereignty and its assimilation within the Indian Union was therefore inscribed into law without the approval of the Kashmiris. This legal farce is well summarized by C.P. Surendran: "Clearly, no hegemonic power could be more 'legal' in its efforts to convert a sphere of dominance into territorial acquisition."²²⁹

5.3.1 Tampered autonomy: Denial of internal right of self-determination

Regardless of the assurance visualized under the Constitution, the approach received by India towards the self-rule of Jammu and Kashmir has brought about the loss of trust and affirmation that the state of Jammu and Kashmir had in its democratic

²²⁸ Tapan Bose, Dinesh Mohan, Gautam Navlakha, and Sumanta Banerjee, "India's 'Kashmir War'" *Economic and Political Weekly* 25, no. 13 (1990): 35. <http://www.jstor.org/stable/4396095>.

²²⁹ C.P. Surendran, Should We Give Up Kashmir? In *Secular Crown on Fire: The Kashmir Problem*, ed. A. A. Engineer (Delhi: Ajanta 1991), 59.

association with India. “No other state in India had to wait so long for democracy as Jammu and Kashmir.”²³⁰ It is not just astounding yet additionally unpalatable to perceive how the Constitution of India has been terribly abused to infringe upon the self-rule of the State. Baljit writes:

Although India accommodated the Kashmiri nationalist sentiments by providing political autonomy through the instrument of special status under article 370 but the process of its erosion was also set in motion simultaneously. Kashmiris resent the theft of the autonomy that was guaranteed to them.²³¹

He further quotes Nehru, whose words not only reflected this infringement but rather fortified it: “We feel that this process of gradual erosion of article 370 is going on.... We should allow it to go on.”²³² Nehru was not the only one in holding such a view. On 4 December 1964, only a year later, the then Home Minister, G L Nanda stated that Article 370 could be employed as a ‘tunnel in the wall’ to expand the control and power of the centre over Jammu and Kashmir.²³³ According to Article 370(2), the President is entitled to pass orders in regard to matters mentioned in IoA. Other than those matters, the orders have to be presented before the state’s government for the purpose of concurrence.²³⁴ After that when the Constituent Assembly of the state was created, these matters needed to put before it for the final concurrence. The State’s Constituent Assembly completed its work of drafting the State's Constitution and was dissolved in 1956. This ought to end the power of the President to pass orders regarding

²³⁰ Sten Widmalm, *Kashmir in Comparative Perspective: Democracy and Violent Separatism in India* (London: Routledge, 2015), 56.

²³¹ Baljit S. Mann, Kashmir conflict: A Reflection of Competing Nationalisms of India and Pakistan in *Conflicts in Jammu and Kashmir: Impact on Polity, Society and Economy*, ed. V.R. Raghwan (New Delhi: Vij Books India 2012), 80.

²³² *Ibid.*

²³³ Parmanand Parashar, *Kashmir and the Freedom Movement*, 1st ed. (New Delhi: Sarup & Sons, 2004), 6.

²³⁴ See Appendix I.

the matters that are not mentioned in the IoA but forty two Presidential Orders were passed from 1954 to 1986 which substantially tampered the autonomy of the state.²³⁵

The significant reversal of autonomy²³⁶ occurred when the state's legislation was substantially restricted by such Orders as well as the residuary powers were curtailed. The provisions of the Constitution of India relating to emergency, Central Bureau of Investigation (CBI), judiciary's regulation, All India Services and finance among others were extended to the state.²³⁷ State's autonomy further suffered essentially from 1990 to 1996 when rather through amendments as had been done in Punjab, the president's rule was imposed in J&K through executive orders.²³⁸

The following key instances further illustrate the rising centralization of the Indian State.

The leader of the National Conference and first Prime Minister of Jammu and Kashmir, Sheikh Abdullah was dismissed when after three Ministers of the National Conference challenged his authority in the cabinet in the year 1953. Abdullah was then arrested on the ambiguous pretext of a meeting with an emissary from Pakistan. Bakshi Ghulam Mohammad installed by Indian government as his successor who "had no hang-ups about autonomy and saw the relationship with India as an arrangement to get maximum financial assistance for the State, with a percentage for family and

²³⁵ Gazala Peer and Javedur Rahman, "An Unpleasant Autonomy: Revisiting the Special Status for Jammu and Kashmir." *Economic and Political Weekly* 47, no. 23 (2012): 73. <http://www.jstor.org/stable/23214924>.

²³⁶ "The overall impact of the special concessions, the special status accorded and the guarantees given was multifold. It enabled Jammu and Kashmir to have a separate Constituent Assembly which would frame a separate state constitution for the state. It also laid down that the central legislations and Acts passed by the Indian Parliament from the union and the concurrent list would not be extended to the state unless ratified by the constituent assembly of the state or the state government." (Parashar 2004, 3)

²³⁷ Ibid.

²³⁸ Ibid.

friends.”²³⁹ Indian authority was stretched to all areas beyond those spelt out in Article 370, during the tenure of Bakshi. This did not only demonstrate a clear violation of the Article itself but also undermined India’s lack of commitment to safeguard Kashmir’s self-government. The constitutional safeguards that protected the autonomy of Jammu and Kashmir was increasingly eroded in the period thereafter. The right of the centre to make laws for the state was extended in 1954.

The Indian government considered it expedient in 1963 to replace Bakshi Ghulam Mohammed with G.M. Sadiq whose government led the extension of Articles 356 and 357 of the Indian Constitution to Kashmir. The office of an elected Sadr-i-Riyasat (President of the state) was replaced by that of a Governor (appointed by the President of India) in 1965. This measure enabled the Governor to dismiss government and put in place 'President's rule' at the behest of the Indian government. The Indian government through such legal manipulations undermined the spirit and letter of Article 370 to which it had the legal responsibility to safeguard. Sumantra Bose notes in this context that “Kashmir’s political arena came to be dominated with politicians installed at New Delhi’s behest and its day-to-day administration gradually usurped by people with no roots among the population.”²⁴⁰

Another factor that curbed the autonomy of the state is placing obstructions in the way of political participation. Dissentions were deliberately curbed by New Delhi who equated ideas of anti-government and pro-independence with an anti-national stand. In line with the policy of restricting all national dissention is an ideology that regards “national interest [as] more important than democracy, and as Kashmiri

²³⁹ Ajit Bhattacharjea, *Kashmir, the Wounded Valley* (New Delhi: UBS Publishers Distributors, 1994), 205.

²⁴⁰ Sumantra Bose, *The Challenge in Kashmir: Democracy, Self-determination and a Just Peace* (New Delhi: Sage, 1997), 34.

politics revolved around personalities, there was no material for democracy there.”²⁴¹ The Plebiscite Front was formed in 1955 by Mirza Afzal Beg bringing to the limelight the issue of the 'will of the Kashmiri people'. A charge was brought against Beg for being anti-national as well as an accusation for scheming to overthrow the government. Sheikh Abdullah, released in January earlier the same year, was rearrested in November 1958 on charges of inciting riots and entertaining plans to merge with Pakistan. Both cases were baseless as the arrest was arbitrary and the allegations unproven.²⁴²

Another demonstration of obstructing political dissent occurred during Ghulam Sadiq's regime with the arrest of Bakshi who had threatened to dismantle the government through a motion of no-confidence. Similarly, Farooq Abdullah, the then Chief Minister was dismissed and replaced with G. M. Shah in 1984 by Jagmohan who had been appointed Governor. Earlier, Sheikh Abdullah's son Farooq Abdullah won a decisive mandate in the ensuing 1984 elections despite a conceited communal campaign by Indira Gandhi that focused on the suspected secessionist, antinational 'threat' posed by Sikhs in Punjab and Muslims in Kashmir. With strong pressure in the aftershock of the disastrous assault on the Amritsar Golden Temple²⁴³ and in fright against growing opposition union (that involved Chief Minister Farooq Abdullah) to totalitarian politics and the removal of duly elected governments by her regime, Indira Gandhi played her final, fateful card in Kashmir by dismissing Farooq Abdullah's legitimately elected government in 1984. According to Puri:

²⁴¹ Ibid, 39.

²⁴² Ajit Bhattacharjea, *Kashmir, the Wounded Valley* (New Delhi: UBS Publishers Distributors, 1994), 225-226.

²⁴³ In 1980s some separatist groups of Khalistan Movement occupied Amritsar Temple located in Amritsar, Punjab. Indira Gandhi ordered Operation Bluestar against them. It costed several lives including 492 civilians.

The dismissal of Sheikh Abdullah signalled the message that the Kashmiris would not be allowed to secede even if they rejected staying with India. Meanwhile, Farooq's dismissal sent across the message that the Kashmiris would not also be free to choose their own government if they remained part of India.²⁴⁴

India's sabotage of democracy in Kashmir preceded Farooq Abdullah mending fences with India. His inclination to abandon principle in order to gain power aroused widespread Kashmiri resentment since his alliance was with the same Congress party that had so cynically destabilized democracy in Kashmir.

A direct consequence of Farooq's compromise on the interests and autonomy of Kashmir with Delhi was the creation of a broad alliance of political groups under the banner of the Muslim United Front (MUF) - broad coalition of Islamic groups comprising the Jamaat-i-Islami, Ummat-e-Islami and Ittehad-ul-Musulmeen, using resistance to political interference from the Centre as their appeal to voters. The people's disappointment was compounded by the widespread perception that the elections had been rigged to usher in the "Rajiv-Farooq Coalition" (1986) which was 'widely perceived as a total capitulation to the Centre'.²⁴⁵ Farooq Abdullah's National Conference won a majority of seats in the 1987 elections in spite of widespread allegations of rigging by the MUF. Rigging accusations were never investigated while the arrest of several MUF leaders drove public dislike and anger. Sten Widmalm cites Abdul Ghani Lone who summarized Kashmiris rage against democracy, "It was this [subversion of democracy] that motivated the young generation to say "to hell with the democratic process and all that this is about" and they said, "lets go for the armed

²⁴⁴ Balraj Puri, *Kashmir towards Insurgency* (New Delhi: Orient Longman, 1993), 34.

²⁴⁵ Navnita Chadha. Behera, *State, Identity and Violence: Jammu, Kashmir, and Ladakh* (New Delhi: Manohar, 2000), 125.

struggle”.²⁴⁶ The high-handed attitude of the Indian establishment’s towards democracy in Kashmir and the bitterness, such a policy provoked among Kashmiris prefigured the calamity that followed.

The extreme government repression (which has resulted in allegations of human rights abuse against the state) is a third element that can be identified in the collapse of democracy. As boiling anger changed into mass upheaval, the Indian government focused its response on virtual military rule in Kashmir. Kashmir fell under the shadow of military rule - marking its capitulation into a state of violence and chaos from which it is yet to arise. Further discussion is provided in the following part on human rights violations.

5.3.2 Abrogation of Article 370 and Article 35 A- The final blow on the autonomy of J&K and its people

India claims to be the largest democracy in the world, which the Kashmiri leader Shaikh Abdullah also endorsed for the reason to accede to India. He said in 1952:

Normally, under the principles governing the Partition of India, our riyasat (princely state) of Jammu and Kashmir should have gone to Pakistan, but we chose India for its secularism, its democracy and its caring nature towards the citizens of Jammu and Kashmir.²⁴⁷

But its relationship with the Jammu and Kashmir is reflected in the continued erosion of the autonomy of the state which it should provide and which made Shaikh Abdullah even early on to change his stance. He uttered these words in 1953, “I regret my mistake of coming in the way of merger with Pakistan. I had fears that they won’t

²⁴⁶ Sten Widmalm, *Kashmir in Comparative Perspective: Democracy and Violent Separatism in India* (London: Routledge, 2015), 80.

²⁴⁷ “The Crisis in Kashmir.” *Tribune*, August 23, 2019.
<https://tribunemag.co.uk/2019/08/the-crisis-in-kashmir>.

treat me well, but I was wrong. Now I feel back stabbed, I no longer trust Indian rulers, we have different ways now.”²⁴⁸

A detailed discussion has been made in this chapter on the erosion of the spirit of article 370 but the recent action of the Indian government against the autonomy and right to self-determination of the Kashmiris has made it imperative to delve deep into this issue. On August 5, 2019, Indian State changed the special status of J&K by scrapping Article 370 of the Indian constitution that provided for the foundation of state’s relationship with the Indian union. According to lawyer Asad Rahim, the accession of J&K to India was enshrined through Article 370. The former chief minister of J&K, Mehbooba Mufti, who made a government in the state with the coalition of BJP, also said that “The abrogation of Article 370 hasn’t just made accession null and void but also reduces India to an occupation force in Jammu and Kashmir.”²⁴⁹ The Indian government passed a Presidential Order 2019 under Article 370, stipulating that all the provisions of Indian constitution will be applied to the state of J&K making the state’s constitution virtually ineffective as well as rendering the clauses of article 370 ‘inoperative’.²⁵⁰

²⁴⁸ “Wavering Sheikh.” Rising Kashmir, November 8, 2015.
<http://www.risingkashmir.com/article/wavering-sheikh>.

²⁴⁹ Khan, Asad Rahim. “Laws of Occupation.” DAWN.COM, August 6, 2019.
<https://www.dawn.com/news/1498368/laws-of-occupation>.

²⁵⁰ The new text of Article 370 is laid down as: “*All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgement, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise.*”

Along with it, the Jammu and Kashmir Reorganization Bill, 2019, was also passed in Indian parliament which has changed the status of J&K as two union territories comprising Jammu and Kashmir territories with a legislative assembly on one hand and Ladakh territory on the other hand. The Bill will come onto effect from 31st October, 2019.

Both these Acts are passed without the consent of the state's Legislative Assembly. According to A.G. Noorani, it is unconstitutional. He underscores that Article 370 presents a 'solemn pact', that it cannot be amended or abrogated unilaterally either by the Indian government or by state's legislature. The analysis of Article 370 according to Noorani specifies six provisions which give J&K a 'special status' representing privileges and autonomy and which cannot be altered:

- a. The articles of Indian constitution are not applicable to J&K in their entirety.
- b. Only for the subjects mentioned in the IoA (Defence, foreign affairs and communication) does the Indian state has jurisdiction.
- c. Other than these subjects mentioned above, can only be passed with concurrence of state government.
- d. The concurrence is however temporary because it has to rectified by the constituent assembly.
- e. The power of state government to give concurrence would become void one the constituent assembly began to work.
- f. Finally, Article 370 cannot be amended or abrogated without the approval of constituent assembly.²⁵¹

²⁵¹ "Jammu and Kashmir Article 370: Law and Politics." Article 370: Law and politics. The Hindu, 2000.
<https://frontline.thehindu.com/static/html/fl1719/17190890.htm>.

However, frequent Presidential Orders have been passed since 1950. The Orders passed from 1956 to 1994 (forty seven in number) are especially controversial because according to Cottrell these orders were passed without the approval of the constituent assembly and some of these were even passed when there was no government at all in J&K and when President's rule was imposed.²⁵² These Orders extended many of the articles of Indian constitution to the state of J&K-ninety six subjects from the Union List and sixty six subjects from the State List have been extended. Interestingly, these Orders were placed as amendments to the Presidential Order of 1954 which had the approval of Constituent Assembly so that their unconstitutionality could be hidden, according to Cottrell.²⁵³

All these exercises are against the erosion of the autonomy of J&K envisaged under Article 370. The people who are against this Article most specifically the members of present ruling party of India -Bharatiya Janata party (BJP) always aspire to abrogate this Article and even included this as an agenda in their manifesto in the elections of 2014 and 2019. The Supreme Court of India gave its verdict in this regard in 2015 that the article 370 cannot be amended or abrogated because it is contingent on the approval of Constituent Assembly and because the assembly dissolved itself in 1956 without recommending anything regarding this Article. Consequently, the Article 370 became a permanent provision in spite of its title, 'temporary'. The apex Court gave the same decision in 2018.²⁵⁴

²⁵² Jill Cottrell, "Kashmir: The vanishing autonomy" in *Practising Self-Government: A Comparative Study of Autonomous Regions*, ed. Yash Ghai and Sophia Woodman (Cambridge University Press, 2013), 173–175.

²⁵³ *Ibid*, 174.

²⁵⁴ "Special Status to J-K: Article 370 Not a Temporary Provision, Says Supreme Court." *Hindustan Times*, April 3, 2018. <https://www.hindustantimes.com/india-news/special-status-to-j-k-article-370-not-a-temporary-provision-says-supreme-court/story-wNb5Bz0EOVIDU4NmRn537J.html>.

Notwithstanding, the abrogation of Article 370 by the Indian government stands black and white as the erosion of the internal right to self-determination of the people of J&K because they have been deprived of their autonomy completely. Not only this but the Presidential order of 2019 also scrapped Article 35A also known as Permanent Resident's Law' of the constitution which was added under presidential order 1954. This Article gives the state the power to legislate on the matters related to citizenship, property, settlement, and employment. It bars outsiders from buying land, settling permanently, winning government scholarships for education and from government jobs locally in J&K. It also bars the female residents of the state that marry outside of J&K as well the children of such females from having property.²⁵⁵

These actions of the Indian State are in the complete violation of the right to self-determination of the people of Kashmir which was not only guaranteed in the constitution and by the apex court of India but was also guaranteed by its forefathers. The first Prime Minister of India, Jawaharlal Nehru, irrevocably stated on numerous occasions that the future of Kashmir would be decided according to the wishes of the people of Kashmir. He once stated:

We have fought the good fight about Kashmir on the field of battle... (and) ...in many a chancellery of the world and in the United Nations, but, above all, we have fought this fight in the hearts and minds of men and women of that State of Jammu and Kashmir. Because, ultimately - I say this with all deference to this Parliament - the decision will be made in the hearts and minds of the men and women of Kashmir; neither in this Parliament, nor in the United Nations nor by anybody else.²⁵⁶

²⁵⁵ See appendix

²⁵⁶ "Jammu and Kashmir Article 370: Law and Politics." Article 370: Law and politics. The Hindu, 2000.

<https://frontline.thehindu.com/static/html/fl1719/17190890.htm>. Nehru also said, "*I say with all respect to our Constitution that it just does not matter what your Constitution says; if the people of Kashmir do not want it, it will not go there. Because what is the alternative? The alternative is compulsion and coercion.*"

On the contrary the Indian government is alienating the people of Kashmir to their detriment and have used compulsion and coercion against them. Irrespective of where one stands concerning Article 370 being a necessity to safeguard the interests of the Kashmiris, the fact of India's commitment to respect the autonomy of the state of Jammu and Kashmir (as explained in the Instrument of Accession) stills stands. It is the non-fulfilment of this commitment that clearly impacted the inhabitants of the State. Aijaz Wani cites A.G. Noorani that, "it is the breach of trust and continuous erosion of autonomy on the part of India (done illegally and unconstitutionally) which resulted in creating the sense of alienation among the people of the state."²⁵⁷ He adds "restoration of autonomy is the viable solution to the vexed Kashmir problem".²⁵⁸ In this context where there was a blockage in democratic means to raise voices against rampant violation of autonomy it was likely that such entities opt for a path of independence.

5.4 Human rights violations in Jammu and Kashmir and the International Human Rights Law

Since early 1990, Jammu and Kashmir (J&K) has been the site of massive human rights violations by the Indian security forces. The Indian army, and the paramilitary forces, Central Reserve Police Force (CRPF) and the Border security personnel (BSF) were reported to have been engaged in brutality against civilians in the form of mass killings, torture, illegal arrests and detentions, sexual violence, enforced disappearances, assault on media persons and health workers, and the restrictions on freedoms of speech and expression, religion, assembly and association

²⁵⁷ Aijaz Ashraf Wani, "Article 370: A Constitutional History of Jammu and Kashmir - Aijaz Ashraf Wani, 2014," SAGE Journals, 93, accessed March 10, 2019, <https://journals.sagepub.com/doi/abs/10.1177/0306396814542921?journalCode=racb>
²⁵⁸ Ibid.

and political participation, in order to crush their strife towards autonomy and independence.

Many human rights groups estimate that close to 100,000 civilians have died since 1989.²⁵⁹ According to the Jammu and Kashmir Coalition of Civil Society organization (JKCCS) there have been more than 70,000 killings, over 8000 forced disappearances, and hundred cases of rape and mass torture, committed by Indian security forces.²⁶⁰ Moreover, there have had no prosecution at all in civilian courts. In 2016, when the visit of the office of the UN High commissioner for human rights and the NHRC to Jammu and Kashmir was denied by Indian government, it was ruled that the presence of indefinite number of armed forces “mocks the democratic process of India.”²⁶¹ According to JKCCS approximately 700,000 soldiers are currently deployed in J&K, making it the world’s highest militarized zone.²⁶²

Indian government use Armed Forces Special Powers Act (AFSPA), Public Safety Act (PSA), and Disturbed Areas Act (DAA) which are termed as ‘draconian laws’. These acts especially AFSPA give unlimited immunity to armed personnel which shield them against the human rights violations.²⁶³

India signed the ICCPR in 1979, and thus bound to oblige by the Articles 4, 6 and 7. Article 6 explicitly prohibits arbitrary deprivation from the right to life, even in

²⁵⁹ Tribune.com.pk. "40,000 People Killed in Kashmir: India." The Express Tribune. August 10, 2011. Accessed June 10, 2018.

<https://tribune.com.pk/story/228506/40000-people-killed-in-kashmir-india/>.

²⁶⁰ JKCCS, Annual Human Rights Review Report 2018, 9. <http://jkccs.net/annual-human-rights-review/>

²⁶¹ US state department country report, 2016, 4. <https://www.state.gov/reports-bureau-of-democracy-human-rights-and-labor/country-reports-on-human-rights-practices/>

²⁶² JKCCS, Annual Human Rights Review Report 2018, 9.

²⁶³ “Crisis in Kashmir”

(http://www.cfr.org/publication/17155/crisis_in_kashmir.html) Council on Foreign Relations.

times of emergency. Articles 4 and 7 unequivocally prohibits all forms of cruel, degrading and inhuman treatment, even in the midst of national emergency or during any threat to national security.²⁶⁴ Asia watch and PHR in their report stated that the Indian armed forces operating in J&K “have systematically violated these fundamental norms of international human rights law.”²⁶⁵

As India has ratified the four Geneva Conventions of 1949, it is similarly bound by the international humanitarian law. Common Article 3 of these Conventions is the applicable law in this regard. Article 3 places obligation on each party to abide by the following provisions, irrespective of the conduct of other parties:

(1) Persons taking no active part in the hostilities, including members of armed forces who have laid down their arms and those placed hors de combat by sickness, wounds, detention, or any other cause, shall in all circumstances be treated humanely, without any adverse distinction founded on race, color, religion or faith, sex, birth or wealth, or any other similar criteria.²⁶⁶

In line with this, the acts of violence such as murder, mutilation, torture, rule treatment, as well as outrage upon personal dignity, taking of hostages and carrying out detentions without charge or trial are prohibited. It also lays down that wounded and sick person must also be given treatment.²⁶⁷

More importantly, India being one of the members when the Universal Declaration of Human Rights (UDHR) was adopted by the UNGA is under legal responsibility to allow all kinds of rights and freedom enshrined in the declaration. On

²⁶⁴ Article 4: "In time of public emergency which threatens the life of the nation and the existence of which is officially proclaimed...no derogation from articles 6, 7, 8 (paragraphs 1 and 2), 11, 15, 16 and 18 may be made under this provision." Article 7: "No one shall be subjected to torture or to cruel, inhuman or degrading treatment or punishment." ICCPR, UNGA Resolution 2200 A (XXI), 1966.

²⁶⁵ "The-human-rights-crisis-in-kashmir-a-pattern-of-impunity-june-1993-226-pp," *Human Rights Documents Online*: 29, doi:10.1163/2210-7975_hrd-2261-0130.

²⁶⁶ Ibid, 31.

²⁶⁷ Ibid.

the contrary, India is committing heinous crimes and gross human rights violations against Kashmiris who are demanding their right to self-determination. The following are few of the massacres carried out by Indian forces (See Table 1):

Table 1: Massacres by Indian forces

Gawakadal massacre: 21 January 1990
CRPF troopers killed fifty one civilians during protests against previous raids in which CRPF troops wantonly arrested and molested women. ²⁶⁸
Handwara massacre: 25 January 1990
BSF soldiers killed twenty five people and left numerous injured by indiscriminate firing during a peaceful protest. ²⁶⁹
Zakoora and Tengpora massacre: 1 March 1990
Thirty three protesters were killed and forty seven were injured by Indian forces. ²⁷⁰
Hawal massacre: 21 May 1990
More than sixty civilians were killed and hundreds were wounded by the indiscriminate firing of paramilitary soldiers during the funeral of Mirwaiz Muhammad Farooq (Kashmiri separatist leader). ²⁷¹
Sopore massacre: 6 January 1993

²⁶⁸ "Gaw Kadal Massacre: Lone Survivor Recounts CRPF Terror," Greater Kashmir, March 14, 2015. <https://www.greaterkashmir.com/news/more/news/gaw-kadal-massacre-lone-survivor-recounts-crpf-terror/>.

²⁶⁹ Ahmed, Mushtaq. "January 25, 1990: When BSF Gunned down 25 in Handwara." Kashmir Reader. January 25, 2014. Accessed May 10, 2018. <https://kashmirreader.com/2014/01/25/january-25-1990-when-bsf-gunned-down-25-in-handwara/>.

²⁷⁰ "Zakura, Tengpora Carnages Haunt Survivors," Greater Kashmir, March 13, 2015, <https://www.greaterkashmir.com/news/more/news/zakura-tengpora-carnages-haunt-survivors/>.

²⁷¹ Arif Shafi Wani, "Hawal Massacre Anniversary: 'It Was Hell; Saw Paramilitary Men Firing with Machine Guns on Civilians'," Greater Kashmir, May 21, 2015, <https://www.greaterkashmir.com/news/kashmir/hawal-massacre-anniversary-it-was-hell-saw-paramilitary-men-firing-with-machine-guns-on-civilians/>.

Fifty five civilians were killed by Indian troops and set fire to numerous buildings and homes. ²⁷²
Bijbehara massacre: 22 October 1993
During the protests over the siege of the Hazratbal Mosque, fifty one civilians were killed by armed forces. Out of them, twenty five were students. ²⁷³
Kupwara massacre: 27 January 1994
Twenty seven civilians were killed, mainly traders by army. Those survived, reported that the massacre was carried to punish those who observed shutdown on 27 th of January. ²⁷⁴

5.4.1 Reports on human rights violations

The reports by international human rights organizations and civil society are significantly essential to make account of the gross human rights violations in J&K by the Central government, State governments and security forces of India. These reports will be helpful in assessing the applicability of remedial secession in the Kashmir case as the consequence of human rights violations. For the convenience, this section is divided into two parts. Part one deals with human rights violations occurred before the new developments that took place on August 5th, 2019, in Kashmir, whereas part two deals with human rights violations after that period.

(i) Pre-5th August reports

²⁷² "23-years On, Sopore Massacre Still Haunts Survivors," Greater Kashmir, January 06, 2016, <https://www.greaterkashmir.com/news/kashmir/23-years-on-sopore-massacre-still-haunts-survivors/>.

²⁷³ "23 Years of Bijbehara Massacre: 'Guilty Yet to Be Punished'," Kashmir Observer, April 04, 2017, <https://kashmirobsrver.net/2016/local-news/23-years-bijbehara-massacreguilty-yet-be-punished-11333>.

²⁷⁴ <https://www.greaterkashmir.com/news/kashmir/1994-kupwara-massacre-27-civilians-shot-dead-for-observing-shutdown-on-jan-26/>

(a) Amnesty International

Amnesty International reported in 1993 that the BSF killed fifty one people, and twenty were wounded as a result of arbitrary firing.²⁷⁵ Similarly, in 1995, Hundreds of extrajudicial killings of civilians had been reported. Several of the violations that occurred in the years 2016 and 2019 included killings of civilians, hundreds were blinded by pellet-firing ban on newspapers printing and publishing, shutdown of all sorts of communication, curfew, and detention of human rights activists and hundreds of other people on spurious grounds.²⁷⁶

(b) Human Rights Watch

In 1993 report, Human Rights Watch stated that Indian security forces “assaulted civilians during search operations, tortured and summarily executed detainees in custody and murdered civilians in reprisal attacks.”²⁷⁷ Security personnel used rape to “punish and humiliate communities. Soldiers and police use rape as a weapon to punish, intimidate, coerce, humiliate and degrade.”²⁷⁸ In the year 2017, it was reported that Impunity is secured for the armed forces. It also reported frequent communication shutdown for several weeks and closing of schools and colleges.²⁷⁹

²⁷⁵ United Nations, "Amnesty International Report 1994 - India," Refworld, January 1, 1994, <https://www.refworld.org/docid/3ae6a9f56e.html>.

²⁷⁶ United Nations, "Amnesty International Report 2016/17 - India," Refworld, February 22, 2017, <https://www.refworld.org/docid/58b033f113.html>.

²⁷⁷ "News-from-asia-watch-rape-in-kashmir-a-crime-of-war-may-9-1993-21-pp," *Human Rights Documents Online* 5, no. 9, 1, doi:10.1163/2210-7975_hrd-2261-0141.

²⁷⁸ *Ibid*, 3.

²⁷⁹ "World Report 2018 - Status of Human Rights Around the World." Human Rights Watch. January 19, 2018. Accessed June 12, 2018, <https://www.hrw.org/world-report/2018>.

(c) Asia Watch

Similarly, Asia Watch in its report of 1993 reported cases of extrajudicial executions, rape, disappearances and injuries resulting from arbitrary shootings of civilians by Indian soldiers.²⁸⁰ The cases of torture that were reported include:

Severe beatings, electric shock, suspension by the feet or hands, stretching the legs apart, burning with heated objects, sexual molestation and psychological deprivation and humiliation. One common form of torture involves crushing the leg muscles with a heavy wooden roller. This practice results in the release of toxins from the damaged muscles that may cause acute renal (kidney) failure. This report documents a number of such cases which required dialysis. Since 1990, doctors in Kashmir have documented 37 cases of torture-related acute renal failure; in three cases the victims died.²⁸¹

Impunity was also reported for all the crimes involving cases of deaths in custody, rape, illegal detention and indiscriminate firing on civilians.²⁸²

(d) Jammu Kashmir Coalition of Civil Society

One hundred and eight civilians were killed, and nineteen civilians including five women have been shot dead by armed forces during fake encounters. Additionally, many cases of disappearances, abduction, injuries, and torture on men and women had been reported in 2017.

The use of 'human shields' is a common phenomenon among security forces. In 2004 Chattibandi incident they used five civilians which were died during crossfires between army and the militants.²⁸³

²⁸⁰ The-human-rights-crisis-in-kashmir-a-pattern-of-impunity-june-1993-226-pp, *Human Rights Documents Online*: 14, doi:10.1163/2210-7975_hrd-2261-0130.

²⁸¹ The-human-rights-crisis-in-kashmir-a-pattern-of-impunity-june-1993-226-pp, *Human Rights Documents Online*: 14, doi:10.1163/2210-7975_hrd-2261-0130.

²⁸² *Ibid*, 97.

²⁸³ "Annual Human Rights Review," "Jammu Kashmir Coalition of Civil Society (JKCCS), 28, <http://jkccs.net/annual-human-rights-review/>."

The assault on media is also rampant. Since early 90s, many journalists have been killed, and many cases of suspension of internet and telecommunication were reported.

Freedom of religion was also curtailed throughout 2017. Muslims were barred from offering Friday prayers in the mosques, and political leaders such as Mirwaiz Umar Farooq and Yasin Malik were reported arrested. The state government also imposed twenty state-wide and forty region wise curfews.²⁸⁴

(e) Kashmir Institute of International Relations

The Kashmir Institution in 2016, reported numerous cases of detention, and arbitrary arrests.

Young, minors, aged, human rights activists, lawyers, mentally challenged, cancer patients, and political as well as non-political persons were arrested and booked under controversial Public Safety Act (PSA). Dozens of government employees including 33 of education department have been booked for participating in pro-freedom protests.²⁸⁵

Thousands of cases of torture as well as injuries were also reported. Moreover, during the protests of 2016, numerous hospitals and hundreds of ambulances were also attacked. Press emergency, blockade of internet, curtailment of freedom of religion, and burning of schools were also observed.

A summary of the atrocities that took place in Kashmir can be seen in Table 2 below.

²⁸⁴ Ibid, 38.

²⁸⁵ “Human Rights Report 2016,” Kashmir, August 21, 2017, 6, “<http://kashmirvalley.info/human-rights-report-2016-indian-occupied-jammu-kashmir/>.”

Table 2: Summary of atrocities in Kashmir

From January 1989 to December 21st, 2016²⁸⁶	
Total killings	Over 100,000
Custodial killings	Over 7,073
Civilians arrested/detained	Over 137,469
Enforced disappearances	Between 8,000 to 10,000
Structures destroyed/arson	Over 107,043
Women widowed	Over 22,824
Children orphaned	Over 107,591
Women gang raped/molested	Over 10,717

(f) United Nations Human Rights Office of the High Commissioner (UNHCR), 2016-2018

For the first time the UNHCR reported a detailed account of Indian atrocities in J&K issued on June, 2018.²⁸⁷ The report contains the details of violations of human rights ranging from administrative detention, excessive use of force, killings perpetrated in 2018, use of pellet-firing shotgun, arbitrary arrests and detention including those of children, torture, enforced disappearances, lack of access to justice and impunity, military courts and tribunals impeding access to justice, to sexual violence, restrictions on the right to freedom of expression, reprisals against human rights defenders and restrictions on journalists, violations of the right to health, and

²⁸⁶ Ibid, 29.

²⁸⁷ “The report is highly significant because it also contains details of human rights violations in Azad Kashmir, Pakistan. The report is helpful in comparing the intensity of violations in both sides. Available at: <https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23198%20>”.

violations of the right to education. The report mentions that High Commissioner for Human Rights was denied access to J&K by the Indian authorities therefore the OHCHR remotely monitored the situation there. It is mentioned in the report that Indian security forces has used excessive force against the protestors which led to number of injuries and unlawful killing. Pellet firing, one of the most dangerous weapons, was used against them during 2016 unrest killing 130 to 145 civilians.

The report also mentions that in 2018, the protests triggered again due to the excessive use of force against demonstrators which lead to long strikes which also included college students.

It was demanded in the report that Indian government must stop excessive use of force, repeal the arbitrary and unjust Acts (AFSPA and PSA), and provide justice to the victims and redressal of their losses.²⁸⁸ The Human Rights Commissioner, Zeid Al Hussein acknowledged the sufferings of the Kashmiris and their struggle for justice. He said, “The political dimensions of the dispute between India and Pakistan have long been centre-stage, but this is not a conflict frozen in time. It is a conflict that has robbed millions of their basic human rights, and continues to this day to inflict untold suffering.”²⁸⁹ The Human Rights Commission, hence urged in the report that:

There remains an urgent need to address past and ongoing human rights violations and to deliver justice for all people in Kashmir who have been suffering seven decades of conflict. Any resolution to the political situation in Kashmir should entail a commitment to ending the cycles of violence and accountability for past and current human rights violations and abuses committed by all parties and redress for victims. Such a resolution can only be brought about by meaningful dialogue that includes the people of Kashmir.²⁹⁰

²⁸⁸ Ibid, 13.

²⁸⁹ "First-ever UN Human Rights Report on Kashmir Calls for International Inquiry into Multiple Violations," OHCHR,

“<https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=23198>”

²⁹⁰ "Office of the United Nations High Commissioner for Human ...," 6,

“<https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf>”

(ii) Post-5th August

The other side of the undemocratic exercise by the Indian state of abrogating Articles 370 and 35 A is equally in contradiction to the right of self-determination of the Kashmiris and this is related to human rights violations. While abrogating Articles 370 and 35 A, the government of India arrested more than hundred political leaders and more than four thousand has been detained who are subjected to torture by Indian armed forces under PAS (it allows the armed forces to arrest anyone for two years without any charges) since the revocation of Articles.²⁹¹ The political leaders who are arrested include key figures like Farooq Abdullah (National Conference Party) son of Shaikh Muhammad Abdullah and three times chief minter of J&K, Umar Abdullah his son as well as former chief minister of J&K, Mehbuba Mufti (People's Democratic Party) also a former chief minister, Shah Faesal who is hailed as a role model for young Kashmiris (former officer in the government of India. He resigned from services due to human rights violations in Kashmir and established his own Jammu Kashmir Political Movement), Syed Ali Gilani (Hurriyat leader), Umar Farooq (religious leader from Mirwaiz family), and Junaid Azim Mattu, the mayor of Srinagar.²⁹²

In addition to detentions an unprecedented blackout has been imposed in Kashmir since August, 5 by the Indian government blocking all kinds of commination, telephone, internet, and ban on media coverage, and on travelling. This situation leads to raising concerns from the international organizations such as the OIC, United

²⁹¹ Afp. "About 4,000 People Arrested in Kashmir since August 5: Govt Sources to AFP." The Hindu. The Hindu, August 18, 2019.

"<https://www.thehindu.com/news/national/about-4000-people-arrested-in-kashmir-since-august-5-govt-sources-to-afp/article29126566.ece>."

²⁹² Fareed, Rifat. "Key Kashmir Political Leaders Arrested by India since August 5." India News | Al Jazeera. Al Jazeera, August 17, 2019.

"<https://www.aljazeera.com/news/2019/08/kashmir-key-political-leaders-arrested-india-august-5-190817155454403.html>."

Nations, Amnesty International, Human Rights Watch and Genocide Watch. All these organizations call these restrictions as serious human rights violations and immediate removal but it has been a month that no restriction has been lifted from the J&K region.

The most noteworthy among these are the concerns of Genocide Watch which issued a 'Genocide Alert' for the J &K according to which there are signs of genocide that is anticipated in the backdrop of revocation of Articles 370 and 35 A. The organization calls the United Nations- which itself has raised concerns over the human rights violations in J&K- to stop India from committing a possible genocide. The Alert provides for the early warnings of massacres leading to genocide in J&K including the massacres and persistent impunity of such killings that may account for genocide later, the stringent Hindutva ideology of BJP, unlimited and authoritative military rule of minority (Hindus and Sikhs) over majority Muslims, black out of communication (media, internet, telephone, mobile and trade), lock down, rampant human rights violations (torture, detentions without charges, rape, arbitrary arrests, and deportations of human rights activists and Muslim political leaders.²⁹³

In the light of these reports, all kinds of human rights violations are being done in J&K by the Indian state thus the remedial secession is an established fact in Kashmir case because it fulfils all the conditions of secession (independence/external self-determination). First, the people of Kashmir are constituted as 'people' (as discussed in the previous chapter), second, they are being deprived of their autonomy that is internal self-determination and also are the victims of gross human rights violations, and third, secession is the ultima ratio for Kashmir problem as Kashmiris have been suffering for seven decades and therefore the final resolution lies in their will.

²⁹³“Current Alerts Genocide Watch: India: Kashmir.” genocidewatch. Genocide Watch, n.d. <https://www.genocidewatch.com/copy-of-current-genocide-watch-aler#!>

Chapter 6

EXERCISING THE RIGHT TO SELF- DETERMINATION- PEOPLES' CHOICE

6.1 Introduction

The right to self-determination is essentially the right of a people to determine their own destiny. In particular, the principle allows a people to choose its own political status and to determine its own form of economic, cultural and social development. Exercise of this right can result in a variety of different outcomes ranging from political independence through to full integration within a state. In practice, the possible outcome of an exercise of self-determination will often determine the attitude of governments towards the actual claim by a people or nation. Thus, while claims to cultural autonomy may be more readily recognized by states, claims to independence are more likely to be rejected by them. Nevertheless, the right to self-determination is recognized in international law as a right belonging to peoples and not to states or governments.

The preferred outcome of an exercise of the right to self-determination varies greatly among peoples. For some the only acceptable outcome is full political independence. This is particularly true of occupied or colonized nations. For others the goal is a degree of political, cultural and economic autonomy, sometimes in the form of a federal relationship. For others yet, the right to live on and manage a people's traditional lands free of external interference and incursion is the essential aim of a struggle for self-determination.

The outcome (internal or external self-determination) of the peoples' choice who exercise their right to self-determination usually comes forth by means of referendum or plebiscite where people through votes decide their political status. This chapter is thus divided into two parts. The first part will be dealing with the referendum cases while the second part will be dealing with the surveys. These cases are analyzed for the purpose of examining the preferences of the peoples as the result of exercising their right to self-determination, the conditions that led to such referenda and the reactions of the parent state. The state reactions will also explain whether the referendum/plebiscite yield into any solution for the disputed areas.

6.2 Referenda

This part examines the referenda that took place in Eritrea, South Sudan and Iraqi Kurdistan. The objective of this part is twofold: first, to explain the circumstances leading to the demands of secession of these states from their parent state, and second, to explain the reactions of the parent states in terms of their territorial integrity. These cases primarily reveal the people's choices based on their right to self-determination and their preferred choices in the form of internal or external self-determination.

6.2.1 Eritrean independence referendum, 1993

The referendum was held in the aftermath of thirty years of Eritrean war of independence. It began in 1961, when the autonomy of Eritrea was revoked. It formed a federating unit with Ethiopia. It was then annexed by the Emperor Haile Selassie in 1962 and as such an armed struggle was ensued by Eritrean Liberation Front (ELF), which was later changed into Eritrean People's Liberation Front (EPLF).²⁹⁴ The war ended in 1991 when EPLF was succeeded to capture capital of Ethiopia, Addis Ababa.

²⁹⁴ The Washington Post. Accessed March 20, 2019.
<https://www.washingtonpost.com/wp-srv/inatl/longterm/eritrea/overview.htm?noredirect=on>

The total casualties during war had been reported from 70,000 to 100,000.²⁹⁵ Subsequently on 27 April, 1993, Eritrea proclaimed independence in the outcome of the referendum where 98.5% of votes were casted in favor.²⁹⁶

6.2.2 South Sudan independence referendum, 2011

Sudan was under Anglo-Egyptian rule and got independence in 1956. Soon clashes started between North Sudan and South Sudan. These two areas were different from each other from the geographical outlook as well as on the basis of ethnicity. Where most people are Muslims in the north, there are more than two hundred ethnic groups in the south. The new government in Khartoum was accused of not fulfilling the promise of federation and giving autonomy to the other part as well as imposing Islamic rule.²⁹⁷ Thus, referendum was held between 9 and 15 January, 2011, to determine whether South Sudan should become an independent country and separate from Sudan. 99.57% of the people voted for independence. South Sudan formally became independent from Sudan on 9 July, 2011.²⁹⁸ The referendum was the result of two civil wars.

First Sudanese Civil War, also known as the Anyanya Rebellion or Anyanya I, was a conflict from 1955 to 1972 between the northern part of Sudan and the southern Sudan region that demanded representation and more regional autonomy. However, the agreement that ended the First Sudanese Civil War's fighting in 1972 failed to completely dispel the tensions that had originally caused it, leading to a reigniting of

²⁹⁵ “Eritrea Profile – Timeline”, BBC News, November 15, 2018, accessed March 20, 2019, <https://www.bbc.com/news/world-africa-13349395>.

²⁹⁶ Ibid, citation 1.

²⁹⁷ “South Sudan Profile – Overview”, BBC News, April 27, 2016, accessed March 20, 2019, <https://www.bbc.com/news/world-africa-14019208>.

²⁹⁸ “South Sudan Referendum: 99% Vote for Independence”, BBC News, January 30, 2011, accessed March 20, 2019, <https://www.bbc.com/news/world-africa-12317927>.

the north-south conflict during the Second Sudanese Civil War, which lasted from 1983 to 2005. It was between the central Sudanese government and the Sudan People's Liberation Army. It was largely a continuation of the First Sudanese Civil War of 1955 to 1972. The war lasted for 22 years. Roughly two million people died as a result of war. Four million people in southern Sudan were displaced at least once during the war. The civilian death toll is one of the highest of any war since World War II, and was marked by a large number of human rights violations. These include slavery and mass killings.²⁹⁹

6.2.3 Kurdish independence referendum, 2017

The Kurds are an ethnic group in the Middle East estimated to number anywhere from a low of 25 million, to possibly as high as 35 million, mostly inhabiting a contiguous area spanning adjacent parts of southeastern Turkey (Northern Kurdistan), northwestern Iran (Eastern Kurdistan), northern Iraq (Southern Kurdistan), and northern Syria (Western Kurdistan). The Kurds are culturally, historically and linguistically classified as belonging to the Iranian peoples.³⁰⁰ A referendum took place on December 25, 2017 for Iraqi Kurdistan to determine the political status of Kurdistan region and the Kurdish areas beyond its administration to become an independent state. 93% of votes were casted in favor. However, the Iraqi government rejected the results.³⁰¹

²⁹⁹ Mollie Zapata, "Sudan: Independence through Civil Wars, 1956-2005", The Enough Project, December 13, 2011, accessed March 20, 2019, <https://enoughproject.org/blog/sudan-brief-history-1956>.

³⁰⁰ Al Jazeera, "Independence and the Iraqi Kurds," Iraq | Al Jazeera, January 23, 2019, accessed March 20, 2019, <https://www.aljazeera.com/programmes/aljazeeraworld/2019/01/independence-iraqi-kurds-190122043558455.html>.

³⁰¹ Bethan McKernan Beirut @mck_beth, "93 per Cent Vote Yes in Kurdish Independence Referendum," The Independent, October 10, 2017, accessed March 20, 2019, <https://www.independent.co.uk/news/world/middle-east/kurdistan-referendum-results-vote-yes-iraqi-kurds-independence-iran-syria-a7970241.html>.

The Kurdish-Iraqi dispute began at the end of World War I and lasted until the 2003 invasion of Iraq by the US. First Mahmud Barzanji and then another Kurdish sheikh Ahmed Barzani and his younger brother Mustafa Barzani attempted to secede from Iraq, but they all failed in their attempts of secession. Ultimately, in 1961 first Iraqi-Kurdish war erupted that lasted until 1970 and that resulted in great number of casualties from 75,000 to 105,000.³⁰² Afterwards the negotiations took place in order to resolve the conflict by giving autonomy to Kurds in Iraq. The negotiations failed however and in 1974, the fighting resumed in second Iraqi-Kurdish war resulting in 7,000 to 20,000 deaths. Mustafa Barzani fled to Iran along with other leaders.

The conflict then took a new turn during Iran-Iraq war in which Kurdish parties collaborated with Iran against Saddam Hussein. Consequently, to curb Kurdish opposition, Iraqi government began Al-Anfal campaign against them which as dubbed as 'Kurdish Genocide' in which 50,000 to 200,000 Kurds were died.³⁰³ In 1991, following the Persian Gulf War, Kurds succeeded to achieve an autonomous region. The Kurdish political parties then formed Kurdish Regional Government (KRG, semi-autonomous) in north Iraq. The relation between Iraqi government and KRG over power sharing and oil is still under strain.³⁰⁴

6.3 Surveys

This part analyses the results of surveys that were undertaken in the dispute areas of Cyprus and Kashmir. The surveys reflect the choices of the people of these

³⁰² "University of Central Arkansas: UCA," Political Science, accessed March 20, 2019, <https://uca.edu/politicalscience/dadm-project/middle-eastnorth-africapersian-gulf-region/iraqkurds-1932-present/>.

³⁰³ Dave Johns, "The Crimes of Saddam Hussein," PBS, accessed March 20, 2019, https://www.pbs.org/frontlineworld/stories/iraq501/events_uprising.html.

³⁰⁴ "University of Central Arkansas: UCA," Political Science, accessed March 20, 2019, <https://uca.edu/politicalscience/dadm-project/middle-eastnorth-africapersian-gulf-region/iraqkurds-1932-present/>.

disputed states- their aspiration towards their future on the basis of their right to self-determination which entitles them to choose freely their political, economic and cultural lives.

6.3.1 Cyprus survey, 2015

The dispute in Cyprus between the two communities-Turkish Cypriots and the Greek Cypriots- began in 1963 when President Makarios proposed constitutional changes.³⁰⁵ This step raised fears among the Turkish Cypriots which could repeal the power sharing arrangement between the two communities. It eventually resulted in inter communal violence and Turkish intervention in 1974. Since then Cyprus is divided into Turkish Republic of Northern Cyprus on one side and Republic of Cyprus on their side of the Green Line (de facto border line).³⁰⁶ The UN mediated and a comprehensive peace settlement plan was proposed known as Annan Plan in 2002. In the said plan, reunification of Cyprus was proposed which would constitute a federation. After many revision, the plan was put forward before the people of both communities and hence a referendum was held in 2004. While the majority of Turkish Cypriots accepted the plan by 65% of votes, the Greek Cypriots rejected it by 76% of votes. And thus the conflict continues.³⁰⁷ In 2015, first public opinion poll was conducted in order to determine people's choice for the political settlement if they use their right to self-determination in any future referendum.

➤ Greek Cypriots' choices

The following are the preferences of Greek Cypriots:

³⁰⁵ "Cyprus Country Profile," BBC News, November 12, 2018, <https://www.bbc.com/news/world-europe-17217956>.

³⁰⁶ Ibid.

³⁰⁷ Ahmet Sözen and Kudret Özersay, "The Annan Plan: State Succession or Continuity," *Middle Eastern Studies* 43, no. 1 (2006): 125, doi: 10.1080/00263200601079773.

1. Unitary state.
2. Federation- a distant solution but is favored by a majority.
3. Statas quo is unacceptable.

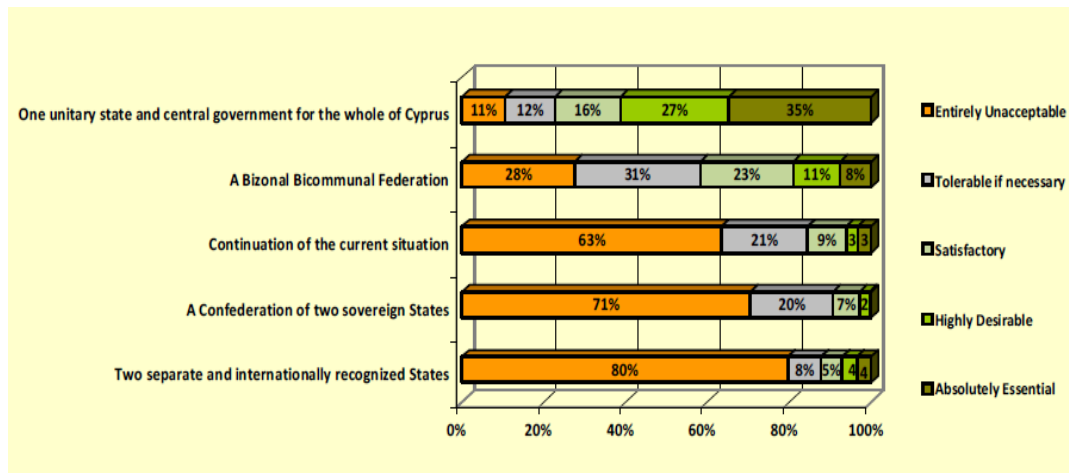


Figure 3: Greek Cypriot choices for a political settlement³⁰⁸

➤ **Turkish Cypriots' choices**

The following are the preferences of the Turkish Cypriots:

1. Two independent states.
2. Federation as a compromise
3. Status quo is also acceptable.

³⁰⁸ Derya Beyatli, Katerina Papadopo, and Erol Kaymak, "Solving the Cyprus Problem: Hopes and Fears," *Interpeace: International Organization for Peacebuilding*, June 30, 2011, 19, https://scoreforpeace.org/files/publication/pub_file/Hopes and Fears Report ENGLISH 27-04-2011 with reference to EC Rep.pdf.

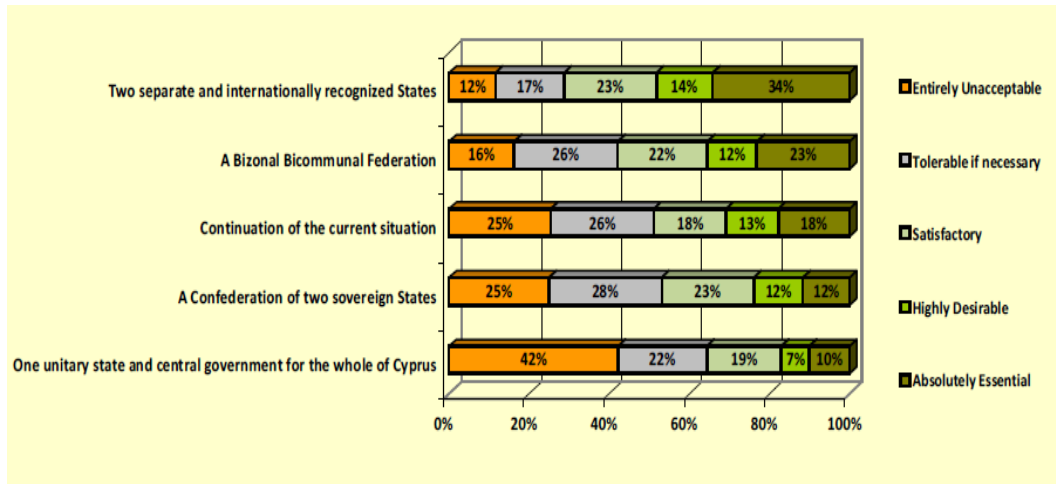


Figure 4: Turkish Cypriot choices for a political settlement³⁰⁹

6.3.2 Kashmir survey, 2010

In 2010, a comprehensive survey was conducted for the first time by Robert W. Bradnock to determine how the people of both sides: Azad Kashmir and Jammu Kashmir- wish to exercise their right to self-determination if there would be any future referendum. Table 3 and 4 shows the preferences of Kashmiris when asked about the most preferred option they would choose:

³⁰⁹ Ibid.

Table 3: Preferences of Kashmiris in the event of a referendum³¹⁰

	Jammu and Kashmir districts %										
	Srinagar	Jammu	Anantnag	Udhampur	Baramula	Kathua	Leh	Punch	Rajauri	Badgam	Kargil
Independence	82	1	74	0	95	0	30	0	0	75	20
Join India	8	47	22	73	2	63	67	6	0	10	80
Join Pakistan	6	*	2	0	2	0	0	0	0	7	0
LoC to be permanent	0	39	0	14	0	3	2	94	100	1	0
Joint sovereignty ^a	1	2	0	0	*	12	0	0	0	0	0
Joint sovereignty ^b	0	3	*	4	0	1	1	0	0	0	0
Status quo to be maintained	*	*	0	*	0	1	0	0	0	0	0
Refused	2	*	0	2	0	2	0	0	0	*	0
Don't know	1	8	1	7	2	29	0	0	0	7	0

a The full question was: Joint sovereignty for India & Pakistan over foreign affairs + autonomy for whole of Kashmir for internal affairs

b The full question was: Joint sovereignty for India & Pakistan over foreign affairs + local control over internal affairs

Table 4: Preferences of Kashmiris in the event of a referendum³¹¹

	Combined %			AJK districts %						
	Total	AJK	J&K	Muzaffarabad	Mirpur	Bhimber	Kotli	Poonch	Bagh	Sudanhoti
Independence	43	44	43	43	47	47	42	58	31	45
To join India	21	1	28	3	0	*	1	0	1	0
To join Pakistan	15	50	2	51	46	42	52	39	64	55
LoC to be permanent	14	1	19	1	1	5	0	0	3	*
Joint sovereignty ^a	1	2	1	2	5	6	1	*	*	0
Joint sovereignty ^b	1	*	1	*	*	0	0	*	0	0
Status quo to be maintained	*	*	*	0	0	0	0	2	1	0
Refused	1	1	1	*	*	*	4	*	1	0
Don't know	4	*	5	*	*	0	0	0	0	0

According to Bradnock the option of independence is greatly preferred by the Kashmiris (44 % in AJK and 43% in J&K) over other alternatives which can be seen in the tables above. Along with it, the other question which is relevant to this study was asked about the main problems facing Kashmiris. Those problems include unemployment, government corruption, poor economic development, human rights abuse and Kashmir conflict as shown in Table 5 and 6 below:

³¹⁰ Robert W. Bradnock, "Kashmir: Paths to Peace," Chatham House, 19, <https://www.chathamhouse.org/publications/papers/view/109338>.

³¹¹ Ibid.

Table 5: The main problems facing Kashmiris³¹²

Top answers	Jammu and Kashmir districts %										
	Srinagar	Jammu	Anantnag	Udhampur	Baramula	Kathua	Leh	Punch	Rajauri	Badgam	Kargil
Unemployment	96	80	98	48	94	82	55	95	96	95	87
Govt. corruption	70	76	62	59	68	73	47	92	72	54	36
Poor econ. development	37	51	38	23	42	88	16	56	75	26	7
Human rights abuses	87	3	73	6	88	8	18	2	5	55	42
Kashmir conflict	43	38	28	47	24	65	13	60	39	13	9

Table 6: The main problems facing Kashmiris³¹³

Top answers	Combined %			AJK districts %						
	AJK+J&K	AJK	J&K	Muzaffarabad	Mirpur	Bhimber	Kotli	Poonch	Bagh	Sudanhota
Unemployment	81	66	87	51	71	34	94	71	66	74
Govt. corruption	56	22	68	23	21	42	36	8	8	7
Poor econ. development	44	42	45	36	45	43	65	36	38	15
Human rights abuses	37	19	43	23	13	32	31	8	12	5
Kashmir conflict	33	24	36	24	24	31	28	18	22	22

Human right abuses are relatively high in J&K- 43% overall but individually in each district the abuses are even higher as compared to AJK (19%). The people of AJK are also less prone to other problems in relation to their neighbors in J&K. It is interesting to note that where human rights violations are higher, the people there are demanding independence. This can be seen in the Figures 5 and 6 below:

³¹² Robert W. Bradnock, "Kashmir: Paths to Peace," 7.

³¹³ Ibid.

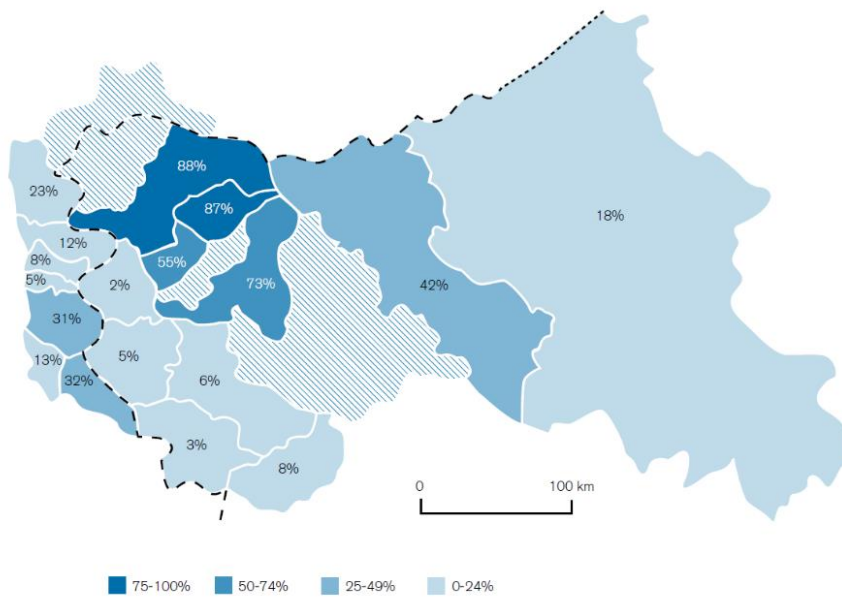


Figure 5: Proportion of human rights violations by districts (J&K)³¹⁴

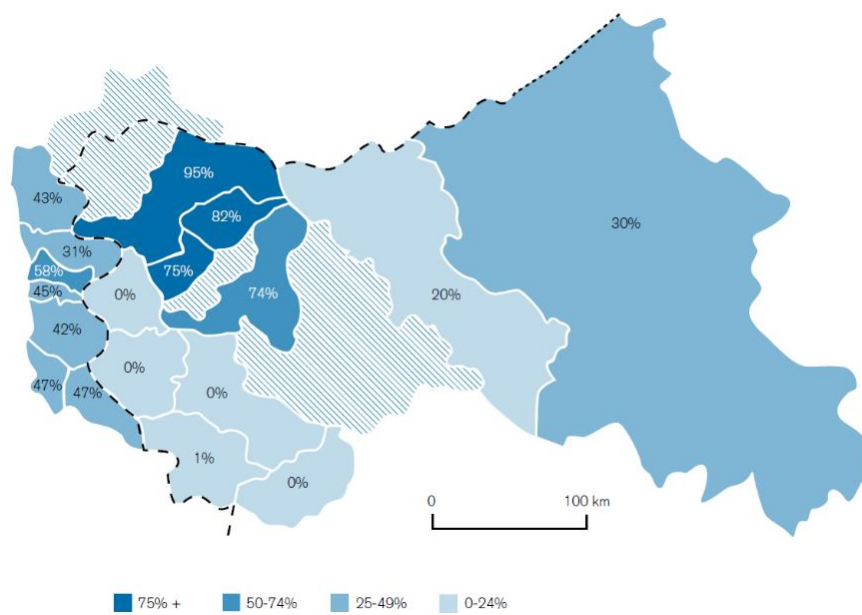


Figure 6: Proportion of demand of independence by districts (J&K)³¹⁵

³¹⁴ Ibid.

³¹⁵ Ibid, 16.

6.4 Analysis of the results of referenda and surveys

The purpose of this chapter is threefold, viz, to determine the circumstances leading to referenda, the aspirations of the peoples towards their political future, and the reactions of the parent states towards the peoples' claim of their right to self-determination. The cases of Eritrea, South Sudan and Iraqi Kurdistan reflect one common thing that when their autonomy/internal self-determination was curtailed, they demanded their right of external self-determination in the form of independence/secession. Plebiscite/ referendum in such cases is a viable option.

But while independence of Eritrea and South Sudan was accepted by their respective parent states (consensual secession), the independence of Iraqi Kurdistan was rejected by Iraq although the people overwhelmingly voted for secession. This is where the problem lies that despite International Law recognizes peoples' right to self-determination as a preemptory norm, states do not really comply with this. Therefore, states at least grant their people especially the ethnic groups the desired autonomy so that there would be no fragmentation.

The case of Cyprus is also one of autonomy but the secession of North Cyprus from the Republic of Cyprus had been done unilaterally. Referendum in such a case is unlikely to bring any solution. Also, there is involved two communities- Greeks and Turks- which might create a hurdle in finding a solution through a referendum as can be observed through the results of the poll discussed above. Hence, a solution lies in a political settlement based on negotiations acceptable to all the parties concerned.

As regard to Kashmir, many factors complicate it. The Kashmir issue is itself based on the right to self-determination, yet it remains elusive whether the solution lies in the plebiscite (on the lines of UNSC Resolutions) because as has been discussed in chapter two and shown in the survey, there exist different races and groups that

possess different aspirations. Some want complete independence, some favor union with India and some with Pakistan. This is plainly elaborated by Sumatra Bose:

the internal social and political context of IJK, and of J&K as a whole, thus resembles the Russian matryoshka doll-layers of complexity which render easy ‘solutions’ such as plebiscite or partition impracticable if not dangerous, and which call for a more sophisticated approach.³¹⁶

Hence, any solution would require the concerned parties, Kashmiris, India and Pakistan, to reach a settlement reflected of people’s aspirations. And thus, expanding the choices in the plebiscite for instance, the independence option, which is supported by many Kashmiris and can be seen in the survey above, might result in a resolution of Kashmir issue.

³¹⁶ Sumantra Bose, *Kashmir: Roots of Conflict, Paths to Peace* (Cambridge, MA: Harvard University Press, 2005), 12.

Chapter 7

CONCLUSION

The right of self-determination which developed as a political right after WWI, underwent a process of evolution and became a legal right after WWII for colonized people. It evolved later as a fundamental human right in post decolonization period after its inclusion in the human rights Covenants. Self-determination is found in both a customary and treaty laws. In the present modern era, right to self-determination is usually exercised internally. Internal self-determination for many is equivalent to self-government where people are given the required autonomy to decide their political future within the existing state.

On the other hand, it has been an agreed opinion of various scholars that it can also be exercised externally as a right of secession. However, the exercise of this right is limited to certain conditions because self-determination specifically secession clashes with the territorial integrity and thus states do not allow an easy path for it. According to a doctrine of 'remedial secession', the right to secession as such would only be applicable as a last resort if the parent state violates the internal self-determination and abuse human rights, and no other remedy is available to address the situation. Right of self-determination, hence put limit on the unlimited sovereignty of states. Territorial integrity can be claimed only when the states act in accordance with the standards of human rights.

There is another debate over the subjects of right to self-determination-who fit in for this right. UNESCO has adopted a comprehensive definition which defines

people as a reasonable large group of individuals sharing common historical traditions, racial identity, culture, language, religion, territory and economic life. The right to self-determination thus entitles people to choose their political, social and economic future.

The genesis of Kashmir issue lies in the non-fulfilment of the pledge of this very right given to the Kashmiris at the time of partition of subcontinent into India and Pakistan in 1947. According to the partition plan enunciated in the Indian independence Act, the Muslim majority areas were to accede to Pakistan but the Hindu ruler, Hari Singh opted to accede Kashmir to India. Notwithstanding, the accession of Jammu and Kashmir with India on the basis of Instrument of Accession was provisional on the condition that the accession would be finalized only after the Kashmiris approved of it- that is either they wanted to join India or Pakistan. Indian state never fulfilled that condition and consequently crisis emerged in Kashmir. The Security Council thus intervened and pass numerous resolutions. The resolutions of the UNSC allowed Kashmiris to decide their future through a plebiscite. On the contrary, Indian state never let the plebiscite took place (although it was India who went to the United Nations for the resolution of the issue).

Despite giving Kashmiris the right of self-determination to decide their future, Indian government formulated another way of controlling Jammu and Kashmir by introducing Article 370 (prohibits Indian government to make laws for J&K other than stipulated in Instrument of Accession) in its constitution. But for Kashmiris this was not equivalent for their right of self-determination as nothing happened according to their will. Moreover, the Article was itself temporary and conditional. It was stipulated only for the time being till the final resolution of Kashmir issue (based on Kashmiris' choice). UN, also in one of the resolutions declared that the right of self-determination

of Kashmiris cannot be eliminated by the mere introduction of such article because Kashmir issue has to be resolved through a plebiscite, and no other artificial arrangement could substitute their right to self-determination.

Consequently, after adding article 370, Indian state began to reckon Kashmir as its 'integral part'. The sabotage of democratic principles by the Indian government further worsened the situation to the extent that people began demanding independence. Subsequent rigging of elections, the arrests of political and religious leaders, imposition of presidential orders and governor rule which eroded their autonomy (provided in Article 370), and gross human rights violations are few of the acts that completely contradict with self-determination of the people.

Thus, when Kashmiris did not achieve their right to decide their future earlier, and when their autonomy which was guaranteed under article 370 was violated, they began their independence movement. It was peacefully ensued by the Kashmiris until the Indian state embarked on the path of using force in order to supplant their movement arbitrarily instead of pleasing the disillusioned people of Jammu and Kashmir. The presence of over tens of thousands of Indian security forces in Kashmir which makes it the world's highly militarized zone, and the enactment of inhuman acts- AFSPA, PSA, and DAA- which give unlimited authority to security forces question Indian democracy.

The recent act of the Indian government is another instant of disappointing Kashmiris further towards Indian democracy. Instead of fulfilling its national and international obligations, India went on to abrogate 'Article 370' and 'Article 35 A' of its constitution to make Jammu and Kashmir its union territory and to annul its disputed status altogether. It was done without the approval of the state's legislative assembly and the people of Kashmir through a presidential order on August 5, 2019.

The abrogation of both articles by the Indian state gave another blow to the hopes of Kashmiris since these articles provide Jammu and Kashmir an autonomous status and special privileges until the final resolution of Kashmir issue which lie in giving Kashmiris their right to self-determination. Thus, what Indian government has done is in fact the direct contradiction to the right of self-determination of Kashmiris because the abrogation of Articles is the tacit refusal by the Indian state not only of the right of internal self-determination but also of the right to secede.

Since seceding unilaterally always happens to be problematic, the emerging theory of right of 'remedial secession' has been adopted to justify secession from the parent state. The right of remedial secession as a remedy or final resort is valid in the case of Kashmir because along with curtailing the guaranteed autonomy (internal self-determination) the Indian state is also indulged in massive human rights violations. To recall Buchanan the violations of basic and fundamental human rights such as right to life, right to honour, right to property, right to privacy, right to fair trial, freedom of religion, freedom of assembly, and right to political participation along with the denial of autonomy are all accounted for the right to secede. Genocide is also recognized as a ground for remedial secession as both the violations of human rights and genocide are prohibited under international law.

The use of force by the Indian government led to persistent and gross violations of human rights. According to reports of human rights organizations, the Indian government and its security forces are indulged in innumerable violations of human rights ranging from torture, custodial killings, pellet firing, illegal detentions, enforced disappearances, arson, rape, curfews, communication shutdown, ban on religious freedom and freedom of association, assembly and expression. More than one lac people have been died since 1990. This spearheaded UN Human Rights Office in 2018

first time ever in seven decades to demand an investigation over human rights abuses in Indian administered Kashmir as well as the peaceful settlement of the issue.

Since August 5, there has been a complete lockdown in J&K and no sort of communication is available to them. All the Kashmiri leadership is under detention. Numerous Killings and illegal detentions have been reported. It has been more than two months now that the lock down is in place depriving Kashmiris of their basic human rights. According to Genocide Watch the crisis that exacerbated after 5th August, can lead to genocide in Jammu and Kashmir. Peaceful settlement of the Kashmir issue is not warranted in such a scenario and thus secession firmly applied here as a remedy of last resort.

The realization of the right to self-determination is therefore necessary so that people might not stand up against the states. Right to self-determination not only is beneficial for the people themselves but also for the peace of the world because the subversion of this right can result in violence and which can further erupt into major crisis that is evident in Jammu and Kashmir. The use of force and the subversion of democratic principles by the Indian state according to many scholars is the reason that many Kashmiris took up the arms to achieve independence. The crisis entered into new phase after August 5, and which strengthen further the demand of Kashmiris for external self-determination and remedial secession.

However, the issue of Kashmir not only is the dispute between Kashmiris and Indian state, it also involves the state of Pakistan. Kashmir has been an outstanding issue between India and Pakistan since 1947. This leads to the formation of different allegiances within Kashmir. There are groups of people among whom some are pro-India, some are pro-Pakistan and others who demand independence as can be observed in the survey on Kashmir. According to the author of the survey plebiscite restricting

to only India and Pakistan, would not yield any solution. And hence, the option of independence which most people are aspiring for in Kashmir can be added in the agenda of UNSC resolutions for the final resolution of the issue. It is also indicative of the fact that external self-determination in the form of remedial secession is the ultima ratio in the Kashmir case and this can be done along with a certain kind of agreement like a 'Good Friday Agreement', between India, Pakistan and Jammu and Kashmir, so that all the factions can be satisfied and no more violence occur.

Years old disputes which witnessed massive human rights violations had been resolved by endowing people with right to self-determination which afford them to decide their future such as the referenda that took place in Eritrean, Sudanese, and Kurdish (impending solution) cases. The resolution of Cyprus dispute also hinges on the same principle. It is also determined in the decisions of Aaland, Namibia, East Timor, and Western Sahara as well as in the Declaration of Vienna, and Declaration on Granting Independence to Colonial Countries and Peoples that the final resolution of the disputes lies in effective realization of right to self-determination which can be manifested by the different choices of the people such as internal autonomy or independence.

In conjunction with all provided analysis, it is recommended that an institutional framework be established under international law which could adjudicate over the disputes regarding the right of self-determination –by virtue of attaining a status of jus- cogens, so that violations of human rights can be protected as well as the peace of the world can be maintained. To recall Boutros Ghali's words, "the states territorial integrity and peoples' right to self-determination must not be permitted to work against each other" and so a remedy must be provided to address such issues.

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APPENDICES

Appendix A: Instrument of Accession of Jammu and Kashmir State

The Instrument of Accession was signed by Maharaja Hari Singh, the then ruler of the State of Jammu & Kashmir and accepted by the then Governor-General of India, Lord Mountbatten, on 26 October 1947. The following is the text of the actual Instrument of Accession:

Whereas, the Indian Independence Act, 1947, provided that as from the fifteenth day of August 1947, there shall be set up an independent dominion known as INDIA, and that the Government of India Act, 1935, shall, with such omissions, additions, adaptations and modifications as the Governor-General may by order specify, be applicable to the dominion of India.

And whereas the Government of India Act, 1935, as so adapted by the Governor-General provides that an Indian State may accede to the Dominion of India by an Instrument of Accession executed by the Ruler thereof.

Now, therefore, I Shriman Indar Mahandar Rajrajeshwar Maharajadhiraj Shri Hari Singhji, Jammu Kashmir Naresh Tatha Tibbetadi Deshadhipathi, Ruler of Jammu and Kashmir State, in the exercise of my sovereignty in and over my said State do hereby execute this my Instrument of Accession and I hereby declare that I accede to the Dominion of India with the intent that the Governor-General of India, the Dominion Legislature, the Federal Court and any other Dominion authority established for the purposes of the Dominion shall, by virtue of this my Instrument of Accession but subject always to the terms thereof, and for the purposes only of the Dominion, exercise in relation to the State of J&K (hereinafter referred to as `this State') such functions as may be vested in them by or under the Government of India Act, 1935, as in force in the Dominion of India, on the 15th day of August 1947 (which Act as so in force in hereafter referred to as "the Act").

I hereby assume the obligation of ensuring that due effect is given to the provisions of the Act within this State so far as they are applicable therein by virtue of this my Instrument of Accession.

I accept the matters specified in the Schedule hereto as the matters with respect to which the Dominion Legislature may make laws for this State.

I hereby declare that I accede to the Dominion of India on the assurance that if an agreement is made between the Governor-General and the Ruler of this State whereby any functions in relation to the administration in this State of any law of the Dominion Legislature shall be exercised by the Ruler of this State, then any such agreement shall be deemed to form part of this Instrument and shall be construed and have effect accordingly.

The terms of this my Instrument of Accession shall not be varied by any amendment of the Act or of the Indian Independence Act, 1947, unless such amendment of the Act or of the Indian Independence Act 1947, unless such amendment is accepted by me by an Instrument supplementary to this Instrument.

Nothing in this Instrument shall empower the Dominion Legislature to make any law for this State authorizing the compulsory acquisition of land for any purpose, but I hereby undertake that should the Dominion for the purposes of a Dominion law which applies in this State deem it necessary to acquire any land, I will at their request acquire the land at their expense or if the land belongs to me transfer it to them on such terms as may be agreed, or, in default of agreement, determined by an arbitrator to be appointed by the Chief Justice of India.

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 arrangements with the Government of India under any such future constitution.

Nothing in this Instrument affects the continuance of my sovereignty in and over this state, or, save as provided by or under this Instrument, the exercise of any powers, authority and rights now enjoyed by me as Ruler of this State or the validity of any law at present in force in this State.

I hereby declare that I execute this Instrument on behalf of this State and that any reference in this Instrument to me or to the Ruler of the State is to be construed as including a reference to my heirs and successors.

Given under my hand this 26th day of October, Nineteen Hundred and Forty Seven.

Acceptance of Instrument of Accession of Jammu and Kashmir State by the Governor
General of India

I do hereby accept this Instrument of Accession.

Dated this Twenty-Seventh day of October Nineteen Hundred and Forty-Seven.

(Sd).Lord

Mountbatten

Governor General of India

Schedule

The matters with respect to which the Dominion Legislature may make laws for this State.

Defence

The naval, military and air forces of the dominion and any other armed forces raised or maintained by the Dominion; any armed forces, including forces raised or maintained by an acceding State, which are attached to, or operating with, any of the armed forces of the Dominion.

- Naval, military and air force works, administration of cantonment areas.
- Arms, fire-arms, ammunition.
- Explosives.

External Affairs

- External affairs; the implementing of treaties and agreements with other countries; extradition, including the surrender of criminals and accused persons to parts of His Majesty's Dominions outside India.
- Admission into, and emigration and expulsion from, India including in relation thereto the regulation of the movements in India of persons who are not British subjects domiciled in India or subjects of any acceding State, pilgrimages to places beyond India.
- Naturalization.

Communications

- Posts and Telegraphs, including telephones, wireless, broadcasting, and other like forms of communications.
- Federal Railways; the regulation of all railways other than minor railways in respect of safety, maximum and minimum rates and fare, station and service terminal charges, interchange of traffic and the responsibility of railway Adm. as carriers of goods and passengers.
- Maritime shipping and navigation, including shipping and navigation in tidal waters; Admiralty jurisdiction.
- Port quarantine.
- Major ports, that is to say, the declaration and delimitation of such ports, and the constitution and powers of Port Authorities therein.
- Aerial and air navigation; the provision of aerodromes; regulation and organization of air traffic and of aerodromes.

- Lighthouses, including lightships, beacons and other provisions for the safety of shipping and ac.
- Carriage of passengers and goods by sea or by air.
- Extension of the powers and jurisdiction of members of the police force belonging to any unit to railway area outside that unit.

Ancillary

- Elections to the Dominion Legislature, subject to the provisions of the Act and of any order made thereunder.
- Offences against laws with respect to any of the aforesaid matters.
- Inquiries and statistics for the purpose of any of the aforesaid matters.
- Jurisdiction and powers of all courts with respect to any of the aforesaid matters but, except with the consent of the Ruler of the Acceding State, not so as to confer any jurisdiction of powers upon any courts other than ordinarily exercising jurisdiction in or in relation to that State.

Source:

https://www.satp.org/satporgtp/countries/india/states/jandk/documents/actsandordinances/instrument_accession.htm

Appendix B: Mountbatten's conditional acceptance of accession

Text of Lord Mountbatten's letter dated 27 October, 1947 to signify his acceptance of the Instrument of Accession signed by the Kashmir Maharaja.

"My dear Maharaja Sahib,

Your Highness' letter dated 26 October has been delivered to me by Mr. V. P. Menon.

In the special circumstances mentioned by your Highness my Government have decided to accept the accession of Kashmir State to the Dominion of India.

Consistently with their policy that in the case of any State where the issue of accession has been the subject of dispute, the question if accession should be decided in accordance with the wishes of the people of the State, it is my Government's wish that as soon as law and order have been restored in Kashmir and her soil cleared of the invader the question of the State's accession should be settled by a reference to the people.

Meanwhile in response to your Highness' appeal for military aid action has been taken today to send troops of the Indian Army to Kashmir to help your own forces to defend your territory and to protect the lives, property and honour of your people.

My Government and I note with satisfaction that your Highness has decided to invite Sheikh

Abdullah to form an interim Government to work with your Prime Minister.

With kind regards, I remain,

Yours sincerely,

October 27, 1947.

Mountbatten of Burma."

Source: <https://www.mtholyoke.edu/acad/intrel/kasmount.htm>

Appendix C: Treaty of Amritsar, 1846

The Treaty of Amritsar, executed by the British East India Company and Raja Gulab Singh of Jammu after the First Anglo-Sikh War, established the independent princely state of Jammu and Kashmir under the suzerainty of the British Indian Empire.

Following is the detailed Treaty of Amritsar:

Treaty of Amritsar

March 16, 1846

The treaty between the British Government on the one part and Maharajah Gulab Singh of Jammu on the other concluded on the part of the British Government by Frederick Currie, Esq. and Brevet-Major Henry Montgomery Lawrence, acting under the orders of the Rt. Hon. Sir Henry Hardinge, G.C.B., one of her Britannic Majesty's most Honorable Privy Council, Governor-General of the possessions of the East India Company, to direct and control all the affairs in the East Indies and by Maharajah Gulab Singh in person - 1846.

Article 1: The British Government transfers and makes over forever in independent possession to Maharajah Gulab Singh and the heirs male of his body all the hilly or mountainous country with its dependencies situated to the eastward of the River Indus and the westward of the River Ravi including Chamba and excluding Lahol, being part of the territories ceded to the British Government by the Lahore State according to the provisions of Article IV of the Treaty of Lahore, dated 9 March 1846.

Article 2: The eastern boundary of the tract transferred by the foregoing article to Maharajah Gulab Singh shall be laid down by the Commissioners appointed by the British Government and Maharajah Gulab Singh respectively for that purpose and shall be defined in a separate engagement after survey.

Article 3: In consideration of the transfer made to him and his heirs by the provisions of the foregoing article Maharajah Gulab Singh will pay to the British Government the sum of seventy-five lakhs of rupees (Nanukshahee), fifty lakhs to be paid on or before the 1st October of the current year, A.D., 1846.

Article 4: The limits of territories of Maharajah Gulab Singh shall not be at any time changed without concurrence of the British Government.

Article 5: Maharajah Gulab Singh will refer to the arbitration of the British Government any disputes or question that may arise between himself and the Government of Lahore or any other neighbouring State, and will abide by the decision of the British Government.

Article 6: Maharajah Gulab Singh engages for himself and heirs to join, with the whole of his Military Forces, the British troops when employed within the hills or in the territories adjoining his possessions.

Article 7: Maharajah Gulab Singh engages never to take to retain in his service any British subject nor the subject of any European or American State without the consent of the British Government.

Article 8: Maharajah Gulab Singh engages to respect in regard to the territory transferred to him, the provisions of Articles V, VI and VII of the separate Engagement between the British Government and the Lahore Durbar, dated 11 March 1846.

Article 9: The British Government will give its aid to Maharajah Gulab Singh in protecting his territories from external enemies.

Article 10: Maharajah Gulab Singh acknowledges the supremacy of the British Government and will in token of such supremacy present annually to the British Government one horse, twelve shawl goats of approved breed (six male and six female) and three pairs of Cashmere shawls.

This Treaty of ten articles has been this day settled by Frederick Currie, Esq. and Brevet-Major Henry Montgomery Lawrence, acting under directions of the Rt. Hon. Sir Henry Hardinge, Governor-General, on the part of the British Government and by Maharajah Gulab Singh in person, and the said Treaty has been this day ratified by the seal of the Rt. Hon. Sir Henry Hardinge, Governor-General. Done at Amritsar the sixteenth day of March, in the year of our Lord one thousand eight hundred and forty-six, corresponding with the seventeenth day of Rubeel-ul-Awal (1262 Hijri).

(Signed) H. Hardinge (Seal) (Signed) F. Currie (Signed) H. M. Lawrence

Source: <https://www.revolvy.com/page/Treaty-of-Amritsar-%281846%29>

Appendix D: Indian Independence Act, 1947

An Act to make provision for the setting up in India of two independent Dominions, to substitute other provisions for certain provisions of the Government of India Act, 1935, which apply outside those Dominions, and to provide for, other matters consequential on or connected with the setting up of those Dominions. [18th July 1947]

Be it enacted by the King's most Excellent Majesty, by and with the advice and consent of the Lords Spiritual and Temporal, and Commons, in this present Parliament assembled, and by the authority of the same, as follows:-

1.-(i) As from the fifteenth day of August, nineteen hundred and forty-seven, two independent Dominions shall be set up in India, to be known respectively as India and Pakistan.

(2) The said Dominions are hereafter in this Act referred to as the new Dominions ", and the said fifteenth day of August is hereafter in this Act referred to as "the appointed day".

Text of Article 7:

7.--(1) As from the appointed day-

(a) His Majesty's Government in the United Kingdom have no responsibility as respects the government of any of the territories which, immediately before that day, were included in British India;

(b) the suzerainty of His Majesty over the Indian States lapses, and with it, all treaties and agreements in force at the date of the passing of this Act between His Majesty and the rulers of Indian States, all functions exercisable by His Majesty at that date with respect to Indian States, all obligations of His Majesty existing at that date towards Indian States or the rulers thereof, and all powers, rights, authority or jurisdiction

exercisable by His Majesty at that date in or in relation to Indian States by treaty, grant, usage, sufferance or otherwise , and

(c) there lapse also any treaties or agreements in force at the date of the passing of this Act between His Majesty and any persons having authority in the tribal areas, any obligations of His Majesty existing at that date to any such persons or with respect to the tribal areas, and all powers, rights, authority or jurisdiction exercisable at that date by His Majesty in or in relation to the tribal areas by treaty, grant, usage, sufferance or otherwise.

Source: http://www.legislation.gov.uk/ukpga/1947/30/pdfs/ukpga_19470030_en.pdf

Appendix E: Security Council Resolution 38 (1948)

Submitted by the Representative of Belgium and adopted by the Security Council at its 229th meeting held on 17 January, 1948. (Document No. S1651, dated the 17th January, 1948).

THE SECURITY COUNCIL

Having heard statements on the situation in Kashmir from representatives of the Governments of India and Pakistan, Recognising the urgency of the situation. Taking note of the telegram addressed on 6 January by its President to each of the parties and of their replies thereto; and in which they affirmed their intention to conform to the Charter of the United Nations.

1. Calls upon both the Government of India and the Government of Pakistan to take immediately all measures within their power (including public appeals to their people) calculated to improve the situation, and to refrain from making any statements and from doing or causing to be done or permitting any acts which might aggravate the situation;
2. Further requests each of those Governments to inform the Council immediately of any material change in the situation which occurs or appears to either of them to be about to occur while the matter is under consideration by the Council, and consult with the Council thereon.

The Security Council voted on this Resolution on 17-1-48 with the following result:
In favour: Argentina, Belgium, Canada, China, Colombia, France, Syria, U.K. and U.S.A.

Against: None

Abstaining: Ukrainian S.S.R. and U.S.S.R.

Source: <https://www.mtholyoke.edu/acad/intrel/kashun38.htm>

Appendix F: Security Council Resolution 39 (1948)

Submitted by the Representative of Belgium and adopted by the Security Council at its 230th meeting held on 20 January, 1948. (Document No. S/654, dated the 20th January, 1948).

THE SECURITY COUNCIL

Considering that it may investigate any dispute or any situation which might, by its continuance,

endanger the maintenance of international peace and security, and that, in the existing state of affairs between India and Pakistan, such an investigation is a matter of urgency.

Adopts the following resolution:

[A] A Commission of the Security Council is hereby established, composed of representatives of

three Members of the United Nations, one to be selected by India, one to be selected by Pakistan,

and the third to be designated by the two so selected. Each representative on the Commission shall be entitled to select his alternates and assistants.

[B] The Commission shall proceed to the spot as quickly as possible. It shall act under the authority of the Security Council and in accordance with the directions it may receive from it. It shall keep the Security Council currently informed of its activities and of the development of the situation. It shall report to the Security Council regularly, submitting its conclusions and proposals.

[C] The Commission is invested with a dual function;

(1) to investigate the facts pursuant to Article 34 of the Charter of the United Nations;

(2) to exercise, without interrupting the work of the Security Council, any mediatory

influence

likely to smooth away difficulties, to carry out the directions given to it by the Security Council; and to report how far the advice and directions, if any, of the Security Council, have been carried out.

[D] The Commission shall perform the functions described in Clause C: (1) in regard to the situation in the Jammu and Kashmir State set out in the letter of the Representative of India addressed to the President of the Security Council, dated 1 January

1948, and in the letter from the Minister of Foreign Affairs of Pakistan addressed to the Secretary-General, dated 15 January 1948; and (2) in regard to other situations set out in the letter from the Minister of Foreign Affairs of Pakistan addressed to the Secretary-General, dated 15 January 1948, when she Security Council so directs.

[E] The Commission shall take its decision by majority vote. It shall determine its own procedure. It may allocate among its members, alternate members, their assistants, and its personnel such duties as may have to be fulfilled for the realisation of its mission and the reaching of its conclusions.

[F] The Commission, its members, alternate members, their assistants, and its personnel, shall be entitled to journey, separately or together, wherever the necessities of their task may require, and, in particular within those territories which are the theatre of the events of which the Security Council is seized.

[G] The Secretary-General shall furnish the Commission with such personnel and assistance as it

may consider necessary.

The Security Council voted on this Resolution on 20-1-1948 with the following result:

In favour: Argentina, Belgium, Canada, China, Colombia, France, Syria, U.K., and U.S.A.

Against: None

Abstaining: Ukrainian S.S.R. and U.S.S.R.

Source: <https://www.mtholyoke.edu/acad/intrel/kashun39.htm>

Appendix G: Resolution adopted by the United Nations Commission for India and Pakistan on 13 August 1948. (Document No.1100, Para. 75, dated the 9th November, 1948).

THE UNITED NATIONS COMMISSION FOR INDIA AND PAKISTAN
Having given careful consideration to the points of view expressed by the Representatives, of India and Pakistan regarding the situation in the State of Jammu and Kashmir, and Being of the opinion that the prompt cessation of hostilities and the correction of conditions the continuance of which is likely to endanger international peace and security are essential to implementation of its endeavours to assist the Governments of India and Pakistan in effecting a final settlement of the situation, Resolves to submit simultaneously to the Governments of India and Pakistan the following proposal:

PART I
CEASE-FIRE ORDER

[A] The Governments of India and Pakistan agree that their respective High Commands will issue separately and simultaneously a cease-fire order to apply to all forces under their control in the State of Jammu and Kashmir as of the earliest practicable date or dates to be mutually agreed upon within four days after these proposals have been accepted by both Governments.

[B] The High Commands of Indian and Pakistan forces agree to refrain from taking any measures that might augment the military potential of the forces under their control in the State of Jammu and Kashmir. (For the purpose of these proposals '-forces under their control" shall be considered to include all forces, organised and unorganised, fighting or participating in hostilities on their respective sides).

[C] The Commanders-in-Chief of the Forces of India and Pakistan shall promptly

confer regarding any necessary local changes in present dispositions which may facilitate the cease-fire.

[D] In its discretion, and as the Commission may find practicable, the Commission will appoint military observers who under the authority of the Commission and with the co-operation of both Commands will supervise the observance of the cease-fire order.

[E] The Government of India and the Government of Pakistan agree to appeal to their respective peoples to assist in creating and maintaining an atmosphere favourable to the promotion of further negotiations.

PART II
TRUCE AGREEMENT

Simultaneously with the acceptance of the proposal for the immediate cessation of hostilities as outlined in Part I, both Governments accept the following principles as a basis for the formulation of a truce agreement, the details of which shall be worked out in discussion between their Representatives and the Commission.

A.

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

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

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

B.

(1) When the Commission shall have notified the Government of India that the tribesmen and Pakistan nationals referred to in Part II A2 hereof have withdrawn, thereby terminating the situation which was represented by the Government of India to the Security Council as having occasioned the presence of Indian forces in the State of Jammu and Kashmir, and further, that the Pakistan forces are being withdrawn from the State of Jammu and Kashmir, the Government of India agrees to begin to withdraw the bulk of their forces from the State in stages to be agreed upon with the Commission.

(2) Pending the acceptance of the conditions for a final settlement of the situation in the State of Jammu and Kashmir, the Indian Government will maintain within the lines existing at the moment of cease-fire the minimum strength of its forces which in agreement with the Commission are considered necessary to assist local authorities in the observance of law and order. The Commission will have observers stationed where it deems necessary.

(3) The Government of India will undertake to ensure that the Government of the State of Jammu and Kashmir will take all measures within their power to make it publicly known that peace, law and order will be safeguarded and that all human and political rights will be guaranteed.

C.

(1) Upon signature, the full text of the Truce Agreement or communique containing the principles thereof as agreed upon between the two Governments and the Commission, will be made public.

PART

III

The Government of India and the Government of Pakistan reaffirm their wish that the

future status of the State of Jammu and Kashmir shall be determined in accordance with the will of the people and to that end, upon acceptance of the Truce Agreement both Governments agree to enter into consultations with the Commission to determine fair and equitable conditions whereby such free expression will be assured. The UNCIP unanimously adopted this Resolution on 13-8-1948. Members of the Commission: Argentina, Belgium, Colombia, Czechoslovakia and U.S.A.

Source: <https://www.mtholyoke.edu/acad/intrel/uncom1.htm>

Appendix H: Resolution adopted at the meeting of the United Nations Commission for India and Pakistan on 5 January, 1949. (Document No. 5/1196 para. 15, dated the 10th January, 1949).

THE UNITED NATIONS COMMISSION FOR INDIA AND PAKISTAN

Having received from the Governments of India and Pakistan in Communications, dated December 23 and December 25, 1948, respectively their acceptance of the following principles which are supplementary to the Commission's Resolution of August 13, 1948;

1. The question of the accession of the State of Jammu and Kashmir to India or Pakistan will be decided through the democratic method of a free and impartial plebiscite;

2. A plebiscite will be held when it shall be found by the Commission that the cease-fire and truce arrangements set forth in Parts I and II of the Commission's resolution of 13 August 1948, have been carried out and arrangements for the plebiscite have been completed;

3.

(a) The Secretary-General of the United Nations will, in agreement with the Commission,

nominate a Plebiscite Administrator who shall be a personality of high international standing and commanding general confidence. He will be formally appointed to office by the Government of Jammu and Kashmir.

(b) The Plebiscite Administrator shall derive from the State of Jammu and Kashmir the powers he considers necessary for organising and conducting the plebiscite and for ensuring the freedom and impartiality of the plebiscite.

(c) The Plebiscite Administrator shall have authority to appoint such staff or assistants

and observers as he may require.

4.

(a) After implementation of Parts I and II of the Commission's resolution of 13 August 1948, and when the Commission is satisfied that peaceful conditions have been restored in the State, the Commission and the Plebiscite Administrator will determine, in consultation with the Government of India, the final disposal of Indian and State armed forces, such disposal to be with due regard to the security of the State and the freedom of the plebiscite.

(b) As regards the territory referred to in A 2 of Part II of the resolution of 13 August, final disposal of the armed forces in that territory will be determined by the Commission and the Plebiscite Administrator in consultation with the local authorities.

5. All civil and military authorities within the State and the principal political elements of the State will be required to co-operate with the Plebiscite Administrator in the preparation for and the holding of the plebiscite.

6.

(a) All citizens of the State who have left it on account of the disturbances will be invited and be free to return and to exercise all their rights as such citizens. For the purpose of facilitating repatriation there shall be appointed two Commissions, one composed of nominees of India and the other of nominees of Pakistan. The Commissions shall operate under the direction of the Plebiscite Administrator. The Governments of India and Pakistan and all authorities within the State of Jammu and Kashmir will collaborate with the Plebiscite Administrator in putting this provision to effect.

(b) All persons (other than citizens of the State) who on or since 15 August 1947, have

entered it for other than lawful purpose, shall be required to leave the State.

7. All authorities within the State of Jammu and Kashmir will undertake to ensure in collaboration with the Plebiscite Administrator that:

(a) There is no threat, coercion or intimidation, bribery or other undue influence on the voters in plebiscite;

(b) No restrictions are placed on legitimate political activity throughout the State. All subjects of the State, regardless of creed, caste or party, shall be safe and free in expressing their views and in voting on the question of the accession of the State to India or Pakistan. There shall be freedom of the Press, speech and assembly and freedom of travel in the State, including freedom of lawful entry and exit;

(c) All political prisoners are released;

(d) Minorities in all parts of the State are accorded adequate protection; and

(e) There is no victimisation.

8. The Plebiscite Administrator may refer to the United Nations Commission for India and Pakistan problems on which he may require assistance, and the Commission may in its discretion call upon the Plebiscite Administrator to carry out on its behalf any of the responsibilities with which it has been entrusted;

9. At the conclusion of the plebiscite, the Plebiscite Administrator shall report the result thereof to the Commission and to the Government of Jammu and Kashmir. The Commission shall then certify to the Security Council whether the Plebiscite has or has not been free and impartial;

10. Upon the signature of the truce agreement the details of the foregoing proposals will be elaborated in the consultation envisaged in Part III of the Commission's resolution of 13 August 1948. The Plebiscite Administrator will be fully associated in

these consultations;

Commends the Governments of India and Pakistan for their prompt action in ordering a cease-fire to take effect from one minute before midnight of first January 1949, pursuant to the agreement arrived at as provided for by the Commission's resolution of 13 August 1948; and Resolves to return in the immediate future to the sub-continent to discharge the responsibilities imposed upon it by the resolution of 13 August 1948, and by the foregoing principles.

The UNCIP unanimously adopted this Resolution on 5-1-1949. Members of the Commission: Argentina, Belgium, Colombia, Czechoslovakia and U.S.A.

Source: <https://www.mtholyoke.edu/acad/intrel/uncom2.htm>

Appendix I: Article 370 of the Indian Constitution

The following is the text of Article:

[370. Temporary provisions with respect to the State of Jammu and Kashmir

(1) Notwithstanding anything in this Constitution,--

(a) the provisions of article 238 shall not apply in relation to the State of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said State shall be limited to-

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation.--For the purposes of this article, the Government of the State means the person for the time being recognised by the President as the Maharaja of Jammu and Kashmir acting on the advice of the Council of Ministers for the time being in office under the Maharaja's Proclamation dated the fifth day of March, 1948;

(c) the provisions of article 1 and of this article shall apply in relation to that State;

(d) such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions and modifications as the President may by order² specify:

Provided that no such order which relates to the matters specified in the Instrument of Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second proviso to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify:

Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification.

1. In exercise of the powers, conferred by this article the President, on the recommendation of the Constituent Assembly of the State of Jammu and Kashmir, declared that, as from the 17th day of November, 1952, the said article 370 shall be operative with the modification that for the Explanation in clause (1) thereof, the following Explanation is substituted namely:-

"Explanation-For the purposes of this article, the Government of the State means the person for the time being recognised by the President on the recommendation of the Legislative Assembly of the State as the "Sadar-i-Rayasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office."

Source: <https://www.legalcrystal.com/act/38338/constitution-of-india-article-370>

Appendix J: Text of Article 35A

AFTER ARTICLE 35, THE FOLLOWING NEW ARTICLE SHALL BE ADDED,
NAMELY:—

“35A. Saving of laws with respect to permanent residents and their rights, —
Notwithstanding anything contained in this Constitution, no existing law in force in
the State of Jammu and Kashmir, and no law hereafter enacted by the Legislature of
the State,—

A) Defining the classes of persons who are, or shall be, permanent residents of the
State of Jammu & Kashmir; or

B) Conferring on such permanent residents any special rights and privileges or
imposing upon other persons any restrictions as respects

1) Employment under the State Government

2) Acquisition of immovable property in the State

3) Settlement in the State; or

4) Right to scholarships and such other forms of aid as the State Government may
provide, shall be void on the ground that it is inconsistent with or takes away or
abridges any rights conferred on the other citizens of India by any provision of this
Part.”

Source:

[//economictimes.indiatimes.com/articleshow/70507788.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst](http://economictimes.indiatimes.com/articleshow/70507788.cms?utm_source=contentofinterest&utm_medium=text&utm_campaign=cppst)

Appendix K: The Delhi Agreement, 1952

The representatives of Kashmir Government conferred with the representatives of Indian Government and arrived at an agreement in order to endorse the main decisions of the Constituent Assembly of the State of J&K. This arrangement was later on known as the "Delhi Agreement, 1952". The main features of this agreement were:

(i) in view of the uniform and consistent stand taken up by the Jammu and Kashmir Constituent Assembly that sovereignty in all matters other than those specified in the Instrument of Accession continues to reside in the State, the Government of India agreed that, while the residuary powers of legislature vested in the Centre in respect of all states other than Jammu and Kashmir, in the case of the latter they vested in the State itself;

(ii) it was agreed between the two Governments that in accordance with Article 5 of the Indian Constitution, persons who have their domicile in Jammu and Kashmir shall be regarded as citizens of India, but the State legislature was given power to make laws for conferring special rights and privileges on the 'state subjects' in view of the 'State Subject Notifications of 1927 and 1932: the State legislature was also empowered to make laws for the 'State Subjects' who had gone to Pakistan on account of the communal disturbances of 1947, in the event of their return to Kashmir;

(iii) as the President of India commands the same respect in the State as he does in other Units of India, Articles 52 to 62 of the Constitution relating to him should be applicable to the State. It was further agreed that the power to grant reprieves, pardons and remission of sentences etc; would also vest in the President of India'

(iv) the Union Government agreed that the State should have its own flag in addition to the Union flag, but it was agreed by the State Government that the State flag would not be a rival of the Union flag; it was also recognised that the Union flag should have

the same status and position in Jammu and Kashmir as in the rest of India, but for historical reasons connected with the freedom struggle in the State, the need for continuance of the State flag was recognised

(v) there was complete agreement with regard to the position of the Sadar-i-Riyasat; though the Sadar-i-Riyasat was to be elected by the State Legislature, he had to be recognised by the President of India before his installation as such; in other Indian States the Head of the State was appointed by the President and was as such his nominee but the person to be appointed as the Head, had to be a person acceptable to the Government of that State; no person who is not acceptable to the State Government can be thrust on the State as the Head. The difference in the case of Kashmir lies only in the fact that Sadar-i-Riyasat will in the first place be elected by the State legislature itself instead of being a nominee of the Government and the President of India. With regard to the powers and functions of the Sadar-i-Riyasat the following argument was mutually agreed upon

(a) the Head of the State shall be a person recognised by the President of the Union on the recommendations of the Legislature of the State;

(b) he shall hold office during the pleasure of the President;

(c) he may, by writing under his hand addressed to the President, resign his office;

(d) subject to the foregoing provisions, the Head of the State shall hold office for a term of five years from the date he enters upon his office; provided that he shall, notwithstanding the expiration of his term, continue to hold the office until his successor enters upon his office"

(e) with regard to the fundamental rights, some basic principles agreed between the parties were enunciated; it was accepted that the people of the State were to have fundamental rights. But in the view of the peculiar position in which the State was

placed, the whole chapter relating to 'Fundamental Rights' of the Indian Constitution could not be made applicable to the State, the question which remained to be determined was whether the chapter on fundamental rights should form a part of the State Constitution of the Constitution of India as applicable to the State;

(vi) with regard to the jurisdiction of the Supreme Court of India, it was accepted that for the time being, owing to the existence of the Board of Judicial Advisers in the State, which was the highest judicial authority in the State, the Supreme Court should have only appellate jurisdiction;

(vii) there was a great deal of discussion with regard to the "Emergency Powers"; the Government of India insisted on the application of Article 352, empowering the President to proclaim a general emergency in the State; the State Government argued that in the exercise of its powers over defense (Item 1 on the Union List), in the event of war or external aggression, the Government of India would have full authority to take steps and proclaim emergency but the State delegation was, however, averse to the President exercising the power to proclaim a general emergency on account of internal disturbance.

In order to meet the viewpoint of the State's delegation, the Government of India agreed to the modification of Article 352 in its application to Kashmir by the addition of the following words:

"but in regard to internal disturbance at the request or with the concurrence of the Government of the State." At the end of clause (1)

Both the parties agreed that the application of Article 356, dealing with suspension of the State Constitution and 360, dealing with financial emergency, was not necessary.

Source:

https://www.satp.org/satporgrp/countries/india/states/jandk/documents/papers/delhi_agreement_1952.htm