



**What is the condition of the  
area occupied by Pakistan?**

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## FOREWORD

**It** is not possible to be neutral but it is quite possible to be fair. **JKCHR established in 1984 is a pre 1990 institution** in the field of human rights.

It is the first NGO that has introduced for the first time the subject of Human Rights in Kashmir at the international forum. It raised the issue of 'Abuse of Power' in Indian administered Kashmir at an International Conference, 18 – 29 May 1987 in Dubrovnik, former Yugoslavia. It has persevered in its commitment.

It is again the first NGO that reported the first killing of 8/9 January 1990 in Srinagar to UN on 10<sup>th</sup> January 1990 and has vehemently argued the rehabilitation of Kashmir on UN Security Council agenda, when Kashmir was deleted from the UN SC agenda under rule 11 of the provisional rules of procedure of the SC in August 1996.

JKCHR's rich catalogue of contribution in attracting the international NGOs to Azad Kashmir, during Resolutions L40 and L21 in Geneva, ex aequo et bono assistance provided to APHC, non APHC and various other schools of opinion to be heard at the UN Human Rights Commission and Sub Commission sessions in Geneva and a robust representation at all important world forums distinguishes it from other NGOs and organisations – supplanted after 1990.

This is the first NGO that launched humanitarian and medical relief work for refugees in various camps in Azad Kashmir in December 1990 and has represented the Unrepresented Peoples and Nations at the UN World Conference on Human Rights in Vienna in June 14-25,1993.

Ideas move the world. The people of Kashmir, for more than one reason, are a foe to their own cause. We agree that India is a party to the dispute and if the dispensation of the referendum goes her way, they shall have no objection to the outcome. However, at the same time we tend to skip over the fact that as a consequence, India has a say in the affairs of Kashmir – and that too in any part of Kashmir.

At the same time, as a consequence, of UN Resolutions, APHC constitution and non APHC schools of politics, one can not rule out the presence of a pro India school or at least its possibility in theory in any part of Kashmir or outside its borders. No school of politics is sacred and all the schools have to co-exist.

If we turn the pages of recent history, we find that Pakistan could not hold on to Stand Still Agreement with the Government of Kashmir. Stand Still Agreement preceded the signing of the Instrument of Accession with India. One can argue in theory, as to whether, the way Pakistan and its subordinate government in Azad Kashmir are interpreting the UNCIP Resolutions, it can hold on to UN path for much longer.

We can equally argue the locus of the Indian Government in the affairs of Azad Kashmir. Does Prime Minister of India have a locus to make a substantive reference to the 'condition', 'democracy', 'rights of the people', 'elections' and transfer of 'power' in the 'area occupied by Pakistan'.

Yes, there is a locus. Prime Minister Vajpayee is a party to the Kashmir dispute and more so every member nation of UN has charter obligations. The condition of a people, the kind of democracy, the rights of the people, elections and the transfer of power are a legitimate concern of any member nation of UN. Indian concern in Azad Kashmir is more direct and immediate, than the general concern under Charter obligations.

United States of America invoked the principle of 'sic utere tuo ut alienum non laedas' in 1891 on the question of Jews in Russia by drawing the Czar's attention to the injury it was suffering as a result of the arrival on its territory of the large numbers of Jewish refugees who were attempting to escape persecution.

Outside UN Charter there is another very important regime of Laws – The Laws of Humanity. Red Cross Movement is based on this regime of laws. The laws of humanity were invoked by Britain and France in Morocco in 1909.

Britain in addition to Charter obligations, could invoke a direct locus, under para 2 of the letter dated 7 January 1848 written by Rt. Hon. Sir Henry Hardinge, Secretary to the Government of India, to Maharaja Gulab Singh. Britain continues to incur the reproach of becoming the instrument of repression of the people of Kashmir.

Our examination of these issues is a first examination of its kind and it is not conclusive. It is a preliminary examination of the habitat called Azad Kashmir and referred to 'area occupied by Pakistan'.

Nevertheless, we sincerely hope, that the reader makes an extra effort to understand the jurisprudence of the Indian argument and our examination.

We remain fully mindful about our reader. He could not be neutral and hopefully to be fair has to combine, his geography, understanding of the case and operational context to understand this report.

It is understandable that refugees settled in Pakistan and settled against a claim on their properties in Kashmir shall have one outlook. Other refugees settled in Pakistan but who have not reconciled to the unlawful separation from their kith and kin shall deduce a different conclusion.

Jammu and Valley refugees have always poised differently on the question of Kashmir and various issues. I scarcely know, whether the examination could evoke an interest from Gilgit and Baltistan.

Post 1990 amalgam and mix of various variables, in Delhi and Islamabad, shall have to go round and round in circles – and make more offerings. They shall have to attempt for a view, in view of their daily interests and many tomorrows.

Outside Kashmir, some are hanging on to P. O. Boxes in the valley. They have to wait for an understanding of the sub postmaster, who shall be eagerly awaiting a nod from the postmaster general.

I would urge for a reading, *ex aequo et bono*, so that the bias of the reader's operational context does not lead him and her astray. And then 'let us stay united and agree to disagree'.

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**Secretary General - JKCHR**

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## **“What is the condition of the area occupied by Pakistan?”**

Dialogue and engagement open up possibilities. When talking stops and shooting starts, the consequences are appalling.

### **West – Sacrifice for change**

Sinn Fein president, Gerry Adams, to break the logjam in the peace process agreed the destruction of Provisional IRA weapons - a “sacrifice for change”. He assured those opposed to the weapons destruction that he had not “sold out” the traditional goal of a united Ireland.

He advised the republicans opposed to destroying IRA weapons, to ‘stay united and agree to disagree’.

### **East – Enemy images**

It is a daring question, and more so very opportune, as to whether or not the leadership in Kashmir is able to make a ‘sacrifice for change’. And whether the question could be answered by assuring the people that the leadership had not “sold out” the traditional goal of pressing through the free choice of the people of Kashmir.

India and Pakistan are embroiled in a similar situation on the question of Kashmir. Rather than making a “sacrifice for change”, they have upped the enemy images of each other. Prime Minister Vajpayee on 23<sup>rd</sup> October 2001 equaled the tone of President Musharraf’s press statement of 22<sup>nd</sup> October 2001.

Prime Minister Vajpayee made a substantial statement on the ‘condition’, ‘democracy’, ‘rights of the people’, elections and transfer of ‘power’ in the ‘area occupied by Pakistan’. This statement is overwhelming and needs an examination on merits.

Indian Prime Ministers’ reference to ‘opportunistic country’ and other issues around Afghanistan, are equally interesting for an examination.

It goes without dispute, that no single version or view on Kashmir is sacred. Views are planted, pseudo and advocated by many in the circus of Kashmir politics.

## **The tragedy**

The first formal reference to the oppression of the people of Kashmir [J&K] is in para 2 of the letter dated 7<sup>th</sup> January 1848 written by Rt. Hon. Sir Henry Hardinge, Secretary to the Government of India, to Maharajah Gulab Singh, when the former, pointed out that the British Government - "...it never can consent to incur the reproach of becoming indirectly the instrument of the oppression of the people committed to the Princes' charge".

The tragedy of the people of **K**ashmir is that, an honest account of it, continues to suffer another tragedy, of being given by characters, who have remained, akin to circus clowns. The natural reflex is dead and the vestiges of dignity are in ruin.

The Research Institute of India in their publication titled The Kashmir Question, Lucknow, 1950, p.3 make an interesting finding that "The mountainous character of the country and the paucity of communications prevented the growth of anything like a common sentiment of nationality...The different communities continued to live a separate existence till the repercussions of the freedom struggle in India inspired the National Conference to unite the Kashmiri people".

Kashmiris have not emerged aggressive on the sentiment of 'national' pride. The various communities continue to live separate and continue to behave as different variables, in understanding politics, literature, in dress, in diet, in language, in custom, in folk-lores and in folk-heroes. There is only one single source that provides uniformity of a national sentiment and classes the people of Jammu and Kashmir as 'state subjects'. The State Subject Notification of 20 April 1927 identifies and rounds them all into one single legal entity.

## **State for the State's People**

The history of political graduation of the people in Kashmir has remained slow and disjointed. It was after a lapse of 31 years after the Treaty of Amritsar in 1846, that the issue of misgovernment and mal-administration was first raised in a memorandum addressed to Viceroy in 1877.

Second formal move, in pursuit of empowering themselves, came after 44 years in 1921, when the people introduced the principal political phrase – "State for the State's People". It was a radical graduation in understanding and a basic departure from their notorious herd-like behaviour at the time of sale in 1846.

It seems that the people's cause gained speed and it was only after 3 years when in October 1924, the people of Kashmir listed 17 demands in their second memorandum addressed to Viceroy Lord Reading. One of the demands included – "Muslim representation in the State Council according to their ratio in the population". It took them another 8 years, when they made a second important political demand of a – "responsible government" in 1932.

## **Significant addition**

After the signposts of 1846, 1877, 1921, 1924 and 1932, the October 23 2001 statement of the Prime Minister of India asking "What is the condition of the area occupied by Pakistan? There is no democracy, no rights for the people living there. Recently there was an election, but the power was handed over to an Army General", is a significant use of the existing jurisprudence on Kashmir.

## **Pakistan occupied Kashmir**

During an examination of the jurisprudence of the Prime Minister Vajpayee's statement, more so of 'occupation', of 'conditions', 'democracy', 'rights of the people', 'elections' and the transfer of 'power', in the 'area controlled by Pakistan', references may occur in respect of Valley and Gilgit and Baltistan.

The jurisprudence of the Indian control and the jurisprudence of the Pakistani control of various parts of Kashmir, is strikingly at variance with each other. The jurisprudence of Indian control of its part of Kashmir defacto and de jure, stems from the Instrument of Accession. All other agreements and accords are secondary.

Pakistan on the other hand has caused jurisprudence in its favour, in reference to its 'responsibilities under the UNCIP Resolutions'. Let us

examine the merits of this jurisprudence and how it impacts the right of self determination in particular and the 'living conditions', 'democracy', 'rights of the people', 'elections' and the transfer of 'power' in general.

The pre 1990 and the post 1990 approaches of India and Pakistan in the treatment of the people of Jammu and Kashmir, provide sufficient clues, in the sovereign hypocrisy of the two countries. As we are discussing Azad Kashmir, we shall be examining the post 1990 hypocrisy of Pakistani governments.

### **Vires of Pakistan's Claim**

The Azad Jammu and Kashmir Interim Constitution Act 1974 introduces the vires of Pakistan's control over Azad Kashmir in its preamble, as follows:

"And Whereas in the discharge of its responsibilities under the UNCIP Resolutions, the Government of Pakistan has approved of the proposed repeal and re-enactment of the said Azad Jammu and Kashmir Government Act, 1970 and authorized the President of Azad Jammu and Kashmir to introduce the present Bill in the Legislative Assembly of Azad Jammu and Kashmir for consideration and passage."

### **Misunderstood UNCIP Jurisprudence**

Pakistan continues to misunderstand the jurisprudence of its responsibilities under UNCIP Resolutions. This misunderstanding has brought the peoples' movement in Kashmir to a serious harm.

The assumed responsibility in reference to UNCIP resolutions by Pakistan does not conform to the jurisprudence set in Part II Section A (3) of 13 August 1948 UNCIP resolution. It prescribes that "pending a final solution the territory evacuated by the Pakistan troops will be administered by the local authorities under the surveillance of the Commission".

### **Local Authorities**

Under UNCIP resolutions, the area west of cease-fire-line, when evacuated by Pakistani troops should be administered by local authorities – that is, existing District Magistrates or sub-ordinate officers, according to the law and custom of the State as they existed before the dispute arose. Each District Magistrate was to be under the supervision of a United Nations Officer.

## **Northern Areas**

In regard to Northern Areas, it was proposed that Political Agents appointed by the United Nations should administer the territory instead of the present political agents.

## **Discharge or a Breach of Responsibilities**

It is clear that Pakistan has not allowed Azad Kashmir to take a shape as stipulated by the UNCIP resolutions. An assumption of control over these territories, is a principal breach of responsibilities under UNCIP Resolutions. It has carried the Kashmir case far away from a solvable position to a dreadful fate of unending misery.

Pakistan has all along in theory accorded sanctity to UN Resolution on Kashmir. It has ritualized its poise against India and avows to support Kashmiri voices, to further this poise. On the other hand it has refused to allow Azad Kashmir to become a ward of UN. Pakistan needs to have some explanation for its reluctance to allow a de facto and de jure recognition of Azad Kashmir.

Government of Pakistan has 'agreed to withdraw its troops from that State'. The territories vacated by Pakistan troops now called Azad Jammu and Kashmir i.e. Azad Kashmir [AK], would have the supervision of UN Commission on India and Pakistan.

Pakistan's poise in relation to UN Resolutions raises many more questions. Firstly why is it that, Pakistan decided not to allow the UN to take its course in Azad Kashmir.

Why did it fail to make a 'sacrifice for a change', in the over all interest of the people of Kashmir. Why did it disallow UN, to take over the supervision of Azad Kashmir.

Pakistan would not have suffered any prejudice to its interests. Under the Charter obligations, it would have been able to keep its say in the on going affairs. More so the UNCIP Resolutions, had given both India and Pakistan a locus in the matter.

On a second note a non-compliance of A[3] of 13 August 1948 UNCIP resolution, immobilized the Government of Azad Kashmir. Thirdly the UN machinery could not seek to conjoin with its part jurisprudence under clause 6 of the SC resolution of 21 April 1948 for the formation of a representative neutral Government of Kashmir in Srinagar.

Pakistan has to take a full blame in failing to secure a UN supervision in Azad Kashmir and in securing a representative neutral Government

at Srinagar. Somehow, a UN mechanism to empower the people of Kashmir in Muzaffarabad and in Srinagar was frustrated. UN SC resolution of 21 April 1948 empowered the major political groups in Kashmir to form a Government and partake in the arrangements and the conduct of plebiscite. There was no need to supplant political factions and opinions in Kashmir. The people of Kashmir somehow, suffered a sabotage and lost the focus of their power under UN resolutions entitled to form a Government, appoint the plebiscite administrator and to partake in the conduct of plebiscite.

As an adverse consequence, the ultimate three influential elements - the Plebiscite Administrator, the Kashmir Government and the UN Commission in charge of Azad Kashmir could not take a formal shape.

### **Lame Excuse or a Fear without foundation**

Pakistan and its support opinions, have argued that since India had to keep bulk of its forces, so it [Pakistan] could not afford to vacate its forces as stipulated under UNCIP. There is no cogent evidence direct or incidental that sits to support this argument. The question of number and its final disposal should have been a concern of the United Nations and a Charter obligation of all nations. The argument that India had to keep her bulk forces, is partly correct in a provisional context and in part a grossly misunderstood argument.

The non-compliance adds up to a selfish principle of - 'a bird in hand is worth two in the bush'. In this case Pakistan felt convinced to snare two birds - the other in Gilgit and Baltistan [Northern Areas].

### **Final disposal of the Indian and State armed forces**

The argument of fear and bad faith in respect of the Indian security forces has no merit. UN had a plan in place on the question of bulk Indian and the State armed forces. UN resolutions set out the final disposal of the Indian and State armed forces. Section 4 [a] of the 5<sup>th</sup> January 1949 resolution provides for the final disposal of the two armed forces. According to this "After the 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".

A government comprising of major political groups, at Srinagar under clause 6 of the Security Council Resolution 47(1948) of 21 April 1948, a local authority under the surveillance of the Commission in Muzaffarabad, established under Part II section A (3) of 13 August 1948 UNCIP resolution, and the Plebiscite Administrator, were the three important determinants, in the final disposal of the Indian and State armed forces. Pakistan could have been an additional influential factor in pushing through this jurisprudence on the final disposal of Indian armed forces. Pakistan's governments, have to offer an explanation, in regard to the circumstances and compulsions that caused the loss of anchor to the people of Kashmir.

### **Rights movement in Azad Kashmir**

It was after a continuous struggle of 70 years that a Republic of Kashmir was formed on 4<sup>th</sup> October 1947. Unfortunately, it was tampered with under the guise of a 'reconstitution', within 20 days. Prima facie the interference was not so bad and corrupting. The reconstitution on 24<sup>th</sup> October 1947, was a temporary arrangement to restore law and order to enable the people to elect by their free vote a popular legislature and a popular Government. It was to be a non-communal Government with non-Muslim representation in the cabinet.

The declaration on 24<sup>th</sup> October 1947, was comprehensive, far reaching and did mirror the jurisprudence of a nations' wisdom.

It reflected a peoples mood and assured that "The Provisional Government which is assuming the administration of the State is most emphatically not a communal Government. It will include Muslims as well as non Muslims in the provisional Cabinet which will serve the people, the temporary purpose of restoring law and order in the State and enable the people to elect by their free vote a popular legislature and a popular Government".

Pakistan could have aided this establishment around the question of a peoples' movement. The provisional government was never allowed to function according to the tenets of the declaration and later log on to the jurisprudence of the UN resolutions.

Unfortunately the provisional government could not hang on to its corner for long. And the people of Azad Kashmir were driven to launch a 'rights movement'. On certain issues the demand was collective and on others several.

The response of 'military zulm' [as it is locally remembered] to Sudhan defiance in 1950, the treatment of civil and political movement of refugees from 1950 to 1959/60, the push back into Indian administered Kashmir, of refugee political activists and journalists, use of force against Mirpuris in acquiring lands for the construction of Mangala dam in 70s, the play of political musical chairs between, Sardar Muhammad Ibrahim Khan, Ch. Ghulam Abbas, Col. Ali Ahmad Shah, Mir Waiz Muhammad Yusuf Shah and others, highlighted the supremacy of the ruling elite in Islamabad and inefficacy of political dissent.

Arrest and humiliation of K. H. Khurshid a distinguished associate of Quaid-e-Azam, arrest of Maqbool Butt and Chief Justice Muhammad Yusuf Saraf and the victimization of Mir Waiz Yusuf Shah, and many from the new generation is singularly striking evidence of an intolerant political culture. However, refugees had to walk an extra mile, in sun and in shade.

The struggle for the repeal of the Act 1968 and the corresponding oppression is a sad chapter in political intolerance and denial of franchise. In consequence, three workers of the Liberation League, Kh. Ghulam Nabi Pandit, Kh. Abdul Khalique Dar and Kh. Ghulam Muhammad Lala were arrested on 1<sup>st</sup> January 1969 and banished for a month to 7000ft. high Leepa valley. They had to walk on foot to a 11500ft high snow-clad Birthwar pass. Arrests of activists and cancellation of newspaper declarations was the first repressive response from 1950 to 1959/60.

### **Constitutional restraints or denial of rights**

On 24 October 1947, there was no constitutional apparatus in existence in Azad Kashmir. The Rules of Business in place to govern the transaction of government departments were treated as a Constitution. This position was held by the High Court in P.L.D. 1957 A.J.K. 33.

It was a Presidential form of Government. The President enjoyed undefined and unlimited powers. He was the fountain of all authority and answerable to the Working Committee of the Muslim Conference. The latter had to be recognized by the Government of Pakistan.

In March 1948, Ch. Ghulam Abbas Khan came from Indian side of Kashmir and was appointed Supreme Head of the Government over and above the President. There were now two kings in one small kingdom. It was the beginning of a crisis and a conflict.

These Rules were first enforced on 15<sup>th</sup> January 1951. It was provided that the President as well as his Ministers will be nominated by the Supreme Head who was also to determine their portfolios. They were made responsible to him and were to hold office at his pleasure. The rules were revised in October 1952 by which time Col. Sher Ahmad had been installed as President.

### **Control under rule 5 sub rule (a)**

The tenets of 24<sup>th</sup> October 1947 Declaration were wrapped up. Under rule 5 Azad Kashmir leadership agreed to remain nose down at the feet of Ministry of Kashmir affairs. It lost its nerve and plunged low in the conduct of public office.

Rule 5. Sub rule (a) as amended provided: "The President shall hold office during the pleasure of the General Council of the All Jammu and Kashmir Muslim Conference, duly recognized as such by the Government of Pakistan and the Ministry of Kashmir Affairs". These rules were amended on 29<sup>th</sup> November 1958 but the provision of rule 5 remained intact.

### **Refugees Punished**

In October 1961 with the introduction of the Basic Democracies System, Azad Kashmir President was elected by an Electoral College of 2400 Basic Democrats, who were themselves elected on an adult suffrage. It was for the first time that the President was elected by a popular ballot, though indirectly. Refugees enjoyed an equal share in the Electoral College.

Under 1964 Act, the State Council could not undertake any legislation without the prior consent of the Chief Advisor. No law could take effect unless the Chief Advisor directed so by a Notification. He was also empowered to restrict its application to any part of the territory and make any changes. The six members of the State Council elected from Azad Kashmir in 1961 were constituted as State Council, which now existed on paper.

### **Refugee representation restored & share reduced**

In 1968, a new Act known as the Government Act of 1968 was enforced. It again retained the provision in regard to the legislative limitations.

It provided for the setting up of a new State Council consisting of 12 members, with the following distribution:

|                  |         |
|------------------|---------|
| Azad Kashmir     | 8 seats |
| Jammu refugees   | 2 seats |
| Kashmir refugees | 2 seats |

Although the refugee representation was restored under the 1968 Act, but it was reduced from its original one half (1/2) to a one third (1/3).

The members from Azad Kashmir were to be elected by Basic Democrats, while the refugees were to be nominated by the Chief Advisor, on the recommendation of the Azad Kashmir President. One of the members was to be elected as Chairman of the Council who was also to function as ex-officio President of Azad Kashmir.

### **Discrimination against refugees**

The Act was unfair to Refugees. It introduced an undemocratic mechanism of refugee representation. The refugees were to be nominated by the Chief Advisor on the recommendation of the Azad Kashmir President. Their representation therefore, became a choice of two masters – i.e. the President and the Chief Advisor.

The refugee representation in the Assembly and AJ & K Council to this day has remained non-representative. It is fixed by the government in power in Pakistan and the manner in which it is done is most corrupt.

### **1974 Constitution**

Then came the Government Act of 1970 and the 1974 Constitution. The Act of 1974 was a consequence of an agreement made at a meeting of party leaders in Islamabad on 10<sup>th</sup> June 1974, chaired by Prime Minister Bhutto.

The Act 1974, recognizes a Legislative Assembly of **48** people.

**40 are elected** - **28** from Azad Kashmir and **12** from the refugees in Pakistan.

**5 women** are to be elected by the directly elected members,

**1 member** from Ullm-e-Din or Mushaikh is to be elected by the directly elected members,

**1 member** to be elected from amongst the Jammu and Kashmir State Subjects, residing abroad, by the directly elected members and

**1 member** to be elected from amongst technocrats and other professionals by the directly elected members.

The **12-member** refugee representation in a house of **48 members** has an ineffective and unimpressive history in the protection of rights. These representations continue to damage the Jurisprudence of the Kashmir case. They have never represented vox populi in the Assembly.

***[Article 48 of The Constitution of Jammu and Kashmir [Indian administered], relates to the territory of Azad Kashmir [Pakistan administered]. Under this article 24 seats are reserved for the people living in these territories].***

### **Azad Jammu and Kashmir Council**

Act 1974 recognizes the constitution of an 11 member [5 nominated and 6 elected] Azad Jammu and Kashmir Council, with Prime Minister of Pakistan as its Chair and the President of Azad Kashmir as the vice Chairman.

Prime Minister of Pakistan nominates five members from time to time from amongst Federal Ministers and members of Parliament. The other six members are elected by the Assembly from amongst the State Subjects in accordance with the system of proportional representation by means of the single transferable vote. The Federal Minister of State for Kashmir Affairs and Northern Affairs is the ex-officio member of the Council.

### **Corrupt and Unjust**

AJ & K Council is corrupt and unjust. The ministry of Kashmir affairs, may have moved from the guilt of causing a 'guard of Honour', yet the inherent psychology sits behind the desk.

Although it is based on an idea of an energizing interaction, it has suffered neglect and has turned into a sterile institution. Prime Minister of Pakistan has a heavy schedule of State affairs in Pakistan. It is for this reason and more out of a lack of interest that he/or she as Chairman never accord any importance to the business of the Council.

As a consequence the idea of an energizing interaction has been wasted.

It has turned into a sterile and corrupt structure, from its composition to the conduct of business and dispensation of budget. Like the Legislative Assembly, it too, has an ineffective and minimal representation of refugees.

### **Restraining legislation hostile to UN route**

Assuming that Pakistan has a title under the UNCIP Resolutions to discharge responsibilities in regards to Azad Kashmir. It has to have corresponding legal limits as well. It has to be exercised reasonably and in good faith, for the proper purposes only and in accordance with the spirit as well as the letter of the empowering Act – in this case UNCIP Resolutions.

We see that the Powers exercised by the government of Pakistan, in the discharge of its responsibilities under UNCIP Resolutions, have not remained subject to the principle of control. It is also important that the Pakistan governments exercise this power reasonably, in good faith and on correct grounds. It is also examinable, to find where a decision is bad for unreasonableness and where it has failed to exercise its discretion at all.

### **Four Restraints**

Pakistan governments in relation to Azad Kashmir and Northern Areas, have continuously erred, to practice a multi-layered policy of double standards. Their policy in regards to Valley and other parts under Indian control, has always lacked the sensitivity and inclusiveness.

The policy in practice on the one hand is far removed from realism and on the other is reprehensible. On the one hand Pakistan seems to convince its people, the people of Kashmir, Muslim world and the United Nations, that it respects the Kashmiris right to self-determination and that it is conscious of its obligations under the UN resolutions and on the other the record of its policies in Azad Kashmir and Northern Areas, is abysmally hypocritical and colonial. It does not add up to its avowed poise on the rights of the people of Kashmir.

### **Restriction on the Transfer of Free Will**

Participation in the conduct of public affairs is a basic human right and is increasingly prized by people throughout the world.

Article 21 (3) of the Universal Declaration of Human Rights holds that "The will of the people shall be the basis of the authority of government; this will shall be expressed in periodic and genuine elections which shall be by universal and equal suffrage and shall be held by secret vote or by equivalent free voting".

Pakistan government has restrained the transfer of free will in Azad Kashmir.

Sections 4(7) (2) of the 1974 constitution, is a negative restraint on the freedom of association and freedom to vote. This restraint does not add up to Pakistani claim of its trust in UN Resolutions and a free and impartial plebiscite. It makes Pakistani criticism of 'elections' in Indian administered Kashmir, less impressive.

According to this restraint, "No person or political party in Azad Kashmir shall be permitted to propagate against, or take part in activities prejudicial or detrimental to, the ideology of the State's accession to Pakistan".

This is a pre-determination. It violates the principles of UNCIP Resolutions and stands repugnant to article 257 of the constitution of Pakistan. This provision of the constitution of Pakistan relating to the State of Jammu and Kashmir assures that – "When the people of the State of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and that State shall be determined in accordance with the wishes of the people of the State".

The restraint under Sections 4(7) (2) of the 1974 constitution offends the provisional government declaration of 24<sup>th</sup> October 1947, that there shall be a 'free vote', a 'popular legislature' and a 'popular government'.

### **54 years and political maturity**

All is not lost in Azad Kashmir. The area and its political leadership, has graduated through most difficult and turbulent times, over the last 54 years.

It is no more the same political set up, as in 1952 when an administrative officer, just above the rank of an office superintendent, Mr. Afzal from the Ministry of Kashmir Affairs, was given a Guard of Honour at Muzaffarabad, by a detachment of the Azad Kashmir Police. Nor the like of, when during a telephone call from Karachi, the joint secretary of Kashmir Affairs Ministry Mr. Fazili asked the President of Azad Kashmir, Col. Sher Ahmad to sit outside in the office of his P.A.

till he had gone through the call. The government of Azad Kashmir does not anymore need, the clearance of the MKA over a sum of Rs.100,000=00 [one lakh].

The admirable dynamism of Sardar Mohammad Abdul Qayyum Khan has played a very important role in securing a marked detachment from the early political orphanage. He was conjoined by the trust and sagacity of Sardar Sikandar Hayat Khan, in causing a sea change. The two leaders are highly respected for their commitment and humane qualities by the local population and the refugees. Chief Justice [Rtd] Majeed Mallick is another local leader, with whom the refugees find it much easier than many others to identify. He has made a singular and positive contribution to the jurisprudence of the case. General Hayat Khan, is unassuming and has always been humble in contributing to the cause.

There is a crop of young politicians and distinct among them are Sardar Khalid Ibrahim Khan, Sardar Attique Ahmad Khan, Abdur Rashid Turabi and among the refugees Shah Ghulam Qadir. Khawaja Abdus Samad Wani, is a senior member of Kashmiri community. His services to journalism and politics distinguish him from others.

It is an irony that the refugees could not cultivate another leader like, K. H. Khurshid, or of a calibre of Sardar Mohammad Abdul Qayyum and Sardar Sikandar Hayat Khan during the last 54 years. They are doomed to survive on a mediocre political class, that continues to live on 'political take-away's' and 'hand-outs'.

### **Double standards**

Kashmir policy of Pakistan government seems to have lost moral, legal and common sense moorings. It is forced to live on 'double standards' on the question of rights, in particular the freedom of expression.

A striking double standard, is its support of All Parties Hurriet (Freedom) Conference in Srinagar and its shadow representation in Pakistan. Under Chapter II Section 2 (i) of the constitution adopted on 31/7/93, APHC vows – "to make peaceful struggle to secure for the people of the State of Jammu and Kashmir the exercise of the right of self-determination in accordance with the U. N. Charter and the resolutions adopted by the U. N. Security Council however the exercise of the right to self-determination shall also include the right to independence".

The restraint under Sections 4(7) (2) of the 1974 constitution in Azad Kashmir is at war with Chapter II Section 2 (i) of the APHC

constitution. Pakistans policy on Kashmir is replete with these double standards.

### **Disrespect of Institutions**

The hypocrisy in Kashmir policy, travels further up, to Northern Areas. The governments in Pakistan and the governments in Azad Kashmir, continue to hold warring stands on Northern Areas.

In regard to Northern Areas, it was proposed that Political Agents appointed by the United Nations should administer, the territory instead of the present political agents. In utter disregard of UN edict on these areas, Government of Pakistan, concluded on 28 April 1949 an agreement, with President of Azad Kashmir Government, Mohammad Ibrahim and President All Jammu and Kashmir Muslim Conference, Ghulam Abbas and secured under the title – "Matters Within The Purview of Pakistan Government" eight subjects, including "All affairs of the Gilgit and Ladakh areas under the control of Political Agent at Gilgit".

In Azad Kashmir Pakistan assumed to act in the discharge of its responsibilities under UNCIP Resolutions and in Northern Areas, just after over eight months of UNCIP Resolutions, it violated the tenets of UN Resolutions.

Pakistan governments have no problem, in treating the highest judiciary of Azad Kashmir with a passive regard. Government in Pakistan has so far ignored to comply with the High Court Order on Writ Petition No. 61 of 1990, to the following effect:

204. We accordingly accept the petition and direct:

- i. (a) the Azad Government to immediately assume the administrative control of the Northern Areas and to annex it with the administration of Azad Jammu and Kashmir;
- (b) the Government of Pakistan to provide an adequate assistance and facility to the Azad Government in attainment of the said objective.
- ii. the residents (State Subjects) of the Northern Areas shall enjoy the benefit of the fundamental rights conferred by the Act 1974. They shall be provided representation in:
  - (a) the Government
  - (b) the Assembly
  - (c) the Council

- (d)the Civil Services and  
 (e)other national institutions, in due course of law.
- iii. Azad Government shall take steps to establish administrative and judicial set up in the Northern Areas within the framework of the Interim Constitution Act. [Judgement announced by Chief Justice on 8.3.1993 at Muzaffarabad].

Sections 19 (2), 31 (3) and 56 of the Constitution Act 1974, also restrict and restrain the government of Azad Kashmir. Section 56 provides the Big Brother a conclusive reach to trouble the serene waters and fish.

### **Jurisprudence of the Restraint**

Prima facie the jurisprudence of Section 4(7)(2) is an exercise of the right to self- determination in Azad Kashmir and in utter disregard of the unexpressed views of rest of the people of Jammu and Kashmir and the UN package. The Government of Azad Kashmir under Section 4(7)(2) has caused itself a limitation and a **Loss of Potestas**.

It has brought Azad Kashmir to a legal cul de sac under the jurisprudence of UN resolutions. It has lost the title to represent the people under Indian administration and the people in Gilgit and Baltistan. It has caused an offence to UN jurisprudence on the right of self - determination. The settlement of the Kashmir dispute is not a good news for many politicians in Azad Kashmir and more so to vested interests in Pakistan as well.

### **Invisible People**

Unfortunately, over 2 million refugees continue to remain invisible, in all spreads of authority in Azad Kashmir and Pakistan. In a house of 48, their strength of 12, is subjected to an engineered electoral superiority. This loss of potestas is reflected in the Council as well.

The Assembly and the Council are structured in such a wicked way that the offices of the President, Prime Minister or Speaker, in the Government of Azad Kashmir are far remote from their reach. Five generations of refugees have very little to show, in pari materia in other spreads of social, judicial, economic, administrative and diplomatic field.

## **Role of Azad Jammu And Kashmir Government**

Azad Jammu And Kashmir Interim Constitution Act 1974, affirms that 'the future status of the State of Jammu and Kashmir is yet to be determined in accordance with the freely expressed will of the people of the State through the democratic method of free and fair plebiscite under the auspices of the United Nations as envisaged in the UNCIP Resolutions adopted from time to time' and that 'a part of the territories of the State of Jammu and Kashmir already liberated by the people are known for the time being as Azad Jammu and Kashmir', and that 'it is necessary to provide for the better Government and administration of Azad Jammu and Kashmir until such time as the status of Jammu and Kashmir is determined'.

The jurisprudence of the constitutional discipline in Azad Kashmir has to log on to the jurisprudence of UN resolutions. But in effect the Azad Kashmir Government has failed to wear upon the jurisprudence of the UN SC & UNCIP Resolutions.

### **First failure**

Government of Azad Kashmir has failed in its duty under section 8 of AJ&K Government Act 1970 and under section 11 of AJ&K interim constitution 1974. The two stipulations charged it with the 'principal duty' of a 'constitutional and formalized' work 'in relation to the holding of a plebiscite in the State of Jammu and Kashmir in terms of the UNCIP Resolutions'.

These two stipulations are the only jurisprudence on the constitutional work on plebiscite under UNCIP resolutions. Governments in Azad Kashmir have continued in the non-compliance of this duty for the last 29 years. The underwriters of a constitutional insurance in Pakistan have failed in their duty on this constitutional Jurisprudence on Plebiscite.

### **Second failure**

Governments in Azad Kashmir, too, have a passive disregard for its Judiciary at Muzaffarabad. On the one hand the leadership of Kashmir has driven a generation to the slaughter in the Indian administered Kashmir and on the other the behaviour of the Government of Azad Kashmir and the Government of Pakistan in regard to the people's movement as discussed by the High Court of Azad Kashmir, in its decision dated 02 April 1999, on a pro bono publico writ No.122/1992

as follows, raises many more doubts in regard to the seriousness on the issue of Kashmir:

44. The argument of the learned advocates for the respondents that financial position of the government does not allow to bear expenses of the plebiscite advisor is also devoid of any force. A list is placed before the court of advisors, special assistants etc appointed by the government, besides about one and a half dozen ministers, of which we take judicial notice. It is not becoming of the respondents to avert the constitutional and national responsibility under section 11 of the constitution by putting up the lame excuse of lack of funds in the presence of a chain of advisors, special assistants and cabinet ministers for running the administration and political affairs of only about five thousand sq. miles area and ignoring the rights and interests of the people spread over eighty thousand sq. miles, for whose sacrifices this system is running.
45. In view of above, it is declared that president/government is bound to appoint a plebiscite advisor under section 11 of the constitution, who shall be a man of caliber of plebiscite administrator as visualized by the truce agreement i.e; "a personality of high international standing and commanding general confidence". It is accordingly directed. [Judgement dated 02 April 1999].

This public interest petition was filed by Jammu and Kashmir Council for Human Rights [JKCHR] in 1992, , under section 44 of the AJ & K Interim Constitution, and argued by its Secretary General demanding a court direction to the Government, president, prime minister of AJ &K and chairman AJ & K Council [prime minister of Pakistan] along with the Government of Pakistan for constitutional action on plebiscite.

One can see that all the successive governments for the last 29 years (since 1970) and more so since October 1947 Declaration, have continued to nudge pass 'a fundamental duty', to the people of Kashmir.

### **Third serious failure**

Governments of Pakistan have co-habited with the Governments of Azad Kashmir in the practice of this serious variance in their word and action. Government of Pakistan, on the one hand has immobilized the Government of Azad Kashmir in this regard by usurping for itself under sections 19 (2) and 31 (3), all the substantial authority – in particular,

the responsibilities under UNCIP Resolutions and external affairs and on the other subscribes to the implementation of UN Resolutions on Kashmir. This control and denial of self-rule also violates the article 357 of the constitution of Pakistan.

One can see that Pakistan controls the substantive part of authority in relation to any action on the question of Kashmir and leaves the unimportant residue for the Azad Kashmir Government.

This treatment of Azad Kashmir is a violation of the UNCIP edict on Kashmir. Azad Kashmir governments are not entitled in full to act in the interest of the people of Kashmir. The incapacitation of refugees in the corridors of authority accounts for an absence of enduring check and balance.

### **Prime Minister Vajpayee's questions**

India and Pakistan as members of UN under charter obligations as parties to the dispute and under the principle of 'sic utere tuo ut alienum non laedas' can trade dissent and interest in any part of Kashmir. United States of America invoked the principle of 'sic utere tuo ut alienum non laedas' in 1891 on the question of Jews in Russia by drawing the Czar's attention to the injury it was suffering as a result of the arrival on its territory of the large numbers of Jewish refugees who were attempting to escape persecution.

In the present instance, Prime Minister Vajpayee, has raised a legitimate question on the 'condition', 'democracy', 'rights of the people', 'elections' and transfer of 'power' in the 'area occupied by Pakistan'. The basic tenet of human rights cause is – that human rights are for all, we should know them, demand them and defend them.

We can equally argue the locus of the Indian Government in the affairs of Azad Kashmir. Does Prime Minister of India have a locus to makes a substantive reference to the 'condition', 'democracy', 'rights of the people', 'elections' and transfer of 'power' in the 'area occupied by Pakistan'.

Yes, there is a locus. This locus is interchangeable between India and Pakistan. India is a party to the Kashmir dispute and more so every member nation of UN has charter obligations. The condition of a people, the kind of democracy, the rights of the people, elections and the transfer of power are a legitimate concern of any member nation

of UN. Indian concern in Azad Kashmir is more direct and immediate, than the general concern under Charter obligations.

Outside UN Charter there is another very important regime of Laws – The Laws of Humanity. This regime of laws also provides a locus for any intervention and interest. Red Cross Movement is based on this regime of laws. The laws of humanity were invoked by Britain and France in Morocco in 1909.

Britain in addition to Charter obligations, could invoke a direct locus, under para 2 of the letter dated 7 January 1848 written by Rt. Hon. Sir Henry Hardinge, Secretary to the Government of India, to Maharaja Gulab Singh. Britain continues to incur the reproach of becoming the instrument of repression of the people of Kashmir.

Although the issues of - 'condition', 'democracy', 'rights of the people', 'elections' and transfer of 'power' in the 'area occupied by Pakistan' [Azad Kashmir], have been examined in general in relation to the jurisprudence of UNCIP, formation of Azad Kashmir Government, restraint on the transfer of free will and the restraint under section 56, yet a separate report is required in detail.

The question of Pakistan as an 'opportunistic country', although referred in reference to Afghanistan, needs to be examined in relation to Kashmir. These two areas would be examined in the next report.

## **Way Forward**

The basic right of the people of Kashmir continues to tangle the two sovereign nations. India and Pakistan have to stop the deadly and futile walk on the tried paths of proxy politics and proxy war. On both counts Kashmiris have become a casualty.

Pakistan has to correct its imbalance of word and deed on the question of Kashmir and correct the major negatives in its de facto control and bring its constitutional practice in Azad Kashmir in line with the jurisprudence of the provisional declaration of 24<sup>th</sup> October 1947 and UNCIP Resolutions. The foremost would be to re-consider the legislative inferiority [minority] of the refugees and restore the lost equilibrium, in the two houses. A freely expressed will of the refugees should be allowed to form the basis of an elected member in the discharge of a public trust. The practice of non-Kashmiris' turning up in huge municipal trucks, under the supervision of local administration, to vote, unless done away with, shall breed more ills.

Pakistan has to match its words with its practice in Kashmir policy. Without prejudice to its sovereign interests it has to accept the over all and the tolerant jurisprudence of the UNCIP Resolutions. Its role has to remain in line with its Charter obligations in relation to the basic right of the people of Kashmir, and in relation to UNCIP Resolutions. The sovereign interests may run concurrent but Pakistan has to wait until the point in time identified under article 357 of its constitution is achieved. Until that, it has to accept the full round of UN jurisprudence on Kashmir and accept the presence, if not in practice, at least in theory of the other competing political interests.

Pakistan government has to flick over the pages of its history of Kashmir policy, from the point it failed to hang on to the Stand Still Agreement with the government of Kashmir. With it go a cognizance of the pro-active interest of the international community at the UN on Kashmir and the reasons of a cooling down of this interest. The patch work to etch in constitutional restraints in Azad Kashmir and the undemocratic agreements for the control of Northern Areas, need to be examined in the light of a non-compliance of UN resolutions and the harm caused to the people of Kashmir.

It should also consider the non-interest and unimaginative approach of the network put in charge of Kashmir. Kashmir is also, strapped on the Tashkent Declaration, Shimla Agreement, Lahore Agreement and was put on fire to roast at Agra. This terrain of bilateral understanding also is a useful jurisprudence on the subject.

Pakistan failed to learn a lesson, when Kashmir was deleted from UN Security Council Agenda in August 1996, just for procedural reasons, under rule 11 of rules of procedure. The issue of Kashmir sits on the UN SC agenda in a different shape and shall be there only under a 1-year 'reminder' rule. Pakistan's history of Kashmir policy is full of neglects and arrogance but the one under UN SC rules of procedure, causing its deletion, is a gigantic sloth and without a parallel. More, so a Kashmir policy sans an over all, and plural welfare of the people is not an enduring policy. Carrying a few eggs in the basket does not hatch a people.

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