

**THE INTERNAL ASPECTS OF THE RIGHT TO SELF-
DETERMINATION AND INTERNATIONAL
OBLIGATION OF HUMAN RIGHTS:
The Case of AJ&K AND Gilgit-Baltistan**

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FINAL APPROVAL

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LIST OF ABBREVIATIONS

AJ&K	--	Azad Jammu and Kashmir
CCI	--	Council of Common Interest
GB	--	Gilgit-Baltistan
GSM	--	Global System for Mobile Communication
HRC	--	Human Rights Committee
IHK	--	Indian Held Kashmir
KANA	--	Ministry of Kashmir Affairs and Northern Areas
KGB	--	Ministry of Kashmir Affairs and Gilgit-Baltistan
LFO	--	Legal Framework Order, 1994
NEC	--	National Economic Council
NFC	--	National Finance Commission
ICCPR	--	International Covenant for Civil and Political Rights, 1966
ICESCR	--	International Covenant for Economic, Social and Cultural Rights, 1966
UDHR	--	Universal Declaration of Human Rights, 1948
UN	--	United Nations
UNCIP	--	United Nations Commissions for India and Pakistan
UNGA	--	United Nations General Assembly
UNSC	--	United Nations Security Council

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AJ&K Interim Constitution Act, 1974	Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked, Members of Armed Forces at Sea, (Aug. 12, 1949)
AJ&K Interim Constitution (Thirteenth Amendments) Act, 2018	Geneva Convention Relating to the Protection of Civilian Persons in Time of War (Aug. 12, 1949).
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UN General Assembly Resolution No. 3034(xxvii), 1972

UN General Assembly Resolution No. A/RES/39/159 dated 17 December 1984

UN General Assembly Resolution No. A/RES/46/51, 67th plenary meeting 9 December 1991

UN General Assembly Resolution No. A/RES/49/60, 84th plenary meeting dated 9 December 1994,

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ABSTRACT

This research work analyzes the theory of Right to Self-determination especially its internal dimension in specific perspective of AJ&K (AJ&K) and Gilgit-Baltistan (GB). In the backdrop of Kashmir Conflict, both of these territories are not constitutional part of Pakistan but are under control of Pakistan since 1947 through their special relationship and constitutional as well as administrative arrangements with Government of Pakistan. This work analyzes the existing constitutional and governance framework of AJ&K and GB and their relationship with Pakistan under International Covenants of 1966 i.e. Civil and Political Rights and Economic, Social and Cultural Rights as well as on the basis of equality and non-discrimination with federating units of Pakistan. It also discusses the obligation of Pakistan under principle of extra-territorial obligation of Pakistan under International Human Rights Law towards AJ&K and GB especially their Right to Self-determination Internal till exercise of Right to Self-determination External by the people of State of Jammu and Kashmir duly acknowledged under various United Nation Resolutions. Moreover, it also deliberates on possible modalities for Federation of Pakistan to extend similar treatment to AJ&K and GB as its provinces under Constitution of Pakistan 1973 in order to ensure their right of non-discrimination and equal treatment. This paper proposes the novation of existing relationship of AJ&K and GB with Pakistan beside broad structural amendments in their prevailing constitutional and governance frameworks to adhere to basic constitutional doctrines in order to comply with the principle of International Human Rights Law without compromising the disputed status of these territories under United Nations Resolutions.

THESIS STATEMENT

Whether in a federal constitution, a state has a constitutional and human rights obligation to realize human rights for people of those geographical units which are not strictly its federating units, particularly when they are part of an internationally recognized disputed area?

INTRODUCTION

At the time of partition of India, British Government terminated its suzerainty over the princely states, which were given option either to join India or Pakistan. Hari Singh, the then Maharaja of Jammu and Kashmir, intended to remain independent and signed a stand-still agreement with Pakistan.¹. Meanwhile, an uprising against the Maharaja had broken out in Poonch due to heavy taxation. The area's population, full of recently lay off soldiers after Second World War, started armed struggle against Maharaja's Army and got control of a large area comprising Azad Jammu and Kashmir (AJ&K) and Gilgit-Baltistan (GB) being part of erstwhile State of Jammu and Kashmir.²

On 21st October, 1947 several thousand tribesmen from North West Frontier Province poured into Jammu and Kashmir in order to liberate it from Dogra Rule. The tribesman liberated Muzaffarabad and Baramula and reached to the vicinity of State capital Srinagar. On 24th of October the Maharaja requested military help from India in order to stop the tribesmen. India in response, conditioned the military help to

¹ Alastair Lamb, *Kashmir A Disputed Legacy 1846-1990*, (Pakistan, Karachi: Oxford Printing Press, 1991), 128.

² Muhammad Yousaf Saraf, *Kashmiris Fight for Freedom*, (Pakistan, Lahore: Feroz Sons Ltd. Volume II, (1947-1978), 1st Edition, 1979), 848-854.

signing of instrument of accession.³ Accordingly the Maharaja signed instrument of accession and Indian troops were airlifted to Srinagar. The Indian troops not only stopped the tribal advancement but also pushed them to back to Chakothi.⁴

On the other side Pakistan sent its troops to the area to help the freedom fighters and to stop advancement of Indian Army. Subsequently, India took the matter to United Nations Security Council, wherefrom, number of resolutions were passed to acknowledge the right of people of the state to decide either to accede to Pakistan or India and holding of the plebiscite for this purpose. United Nations Security Council (UNSC) established United Nations Commission for India and Pakistan (UNCIP)⁵.

On 24 October 1947, to administer liberated territory a revolutionary Government was established which resolved through a declaration⁶ to express authority to administer liberated areas of State and to continue freedom struggle to liberate remaining part of the state and to maintain law and order situation for holding plebiscite under UN auspices.⁷ Later on, in 1949, Karachi Pact was signed between Azad Kashmir Government, Government of Pakistan and All Jammu and Kashmir Muslim Conference, the only political party of people of liberated part existed at that time, in order to regulate and formalize the relationship with Pakistan. Through the pact, defense and foreign affairs including administration of GB were given to

³ “Instrument of Accession signed by Late Maharaja Hari Singh of the State in favor of India on 26th of October, 1947”, <http://jklaw.nic.in/historical.htm>, (accessed on 05.06.2017). Appendix I.

⁴ Saraf, *supra* N.2, 889-891.

⁵ United Nations Commission on India and Pakistan was established by Security Council Resolution, No. 39, dated 20th of January, 1948, comprising three member, one nominated by India, another by Pakistan and third was designated by both the nominated members. The commission was mandated to effectuate ceasefire and reduce the tension prevailing between both countries and to normalize the situation for holding of the plebiscite in the area. The commission was also tasked to proceed to the area and monitor activities along the ceasefire line under supervision of the Security Council.

⁶ Declaration of Azad Government 1947, Appendix II.

⁷ Sardar Muhammad Ibrahim Khan, *The Kashmir Saga*, (Azad Jammu and Kashmir, Mipur: Verinag Publishers, Second Edition, 1992), 116-119.

Government of Pakistan.⁸ Moreover, UNSC and UNCIP has invariably accepted both India and Pakistan as party to the dispute and acknowledged the control of Pakistan on AJ&K and GB and Indian control on remaining part of State of Jammu and Kashmir.

Since then, AJ&K and GB are controlled by Pakistan through special constitutional and administrative arrangements without reflecting such arrangement in its constitution. The only reference to the State of Jammu and Kashmir in the Constitution of Pakistan is Article 257, which speaks about the future relationship of whole of State of Jammu and Kashmir after it accedes to Pakistan. The resolution of the UNSC and UNCIP which call for plebiscite under United Nations auspices for settlement of Kashmir Dispute do not stipulate any particular system of governance for AJ&K & GB till its final disposition. Besides that, the Constitution of Pakistan does not provide any mechanism for inevitable and necessary relationship of AJ&K and GB with federal structure of Pakistan till the holding of the plebiscite. Therefore, the governance of AJ&K and GB and their relationship with Pakistan is left at the discretion of people of these areas. This discretion has earlier been exercised by the people of these areas through Karachi Pact of 1949, which needs novation keeping in view contemporary needs and circumstances.

The Government of Pakistan has always been very skeptical in agreeing with constitutional and administrative dispensation for these territories as it may be detrimental to the official stance of Pakistan before international fora about final disposition of the State in accordance with UN resolutions. Resultantly, in spite of

⁸ Karachi Pact executed between Government of Pakistan and Government of AJ&K, All Jammu and Kashmir Muslim Conference on 28.04.1949, Appendix III.

having status of a distinct state, the people of AJ&K and GB cannot reap the due benefits of democracy, empowerment and greater autonomy even like people living in provinces of Pakistan where significant progress in this respect has been made especially after Eighteenth Amendment in Constitution of Pakistan. AJ&K Interim Constitution Act, 1974⁹ and Gilgit-Baltistan (Empowerment and Self-Government) Order, 2009 is enforced for AJ&K and GB respectively. Under these instruments both of these areas are continuously administered by Government of Pakistan directly through civil or military bureaucracy and in case of GB indirectly as well through GB council (AJ&K Council has now been abolished)¹⁰ without any effective and significant participation of elected representative of people of these areas.¹¹ Good governance always requires accountability apart from rule of law and transparency.¹² In almost all modern constitutions of the world, empowerment and accountability go side by side but conversely neither AJ&K Council nor GB Council is made accountable either to AJ&K/GB Assemblies or to Parliament of Pakistan. Such massive empowerment without accountability has grown resentment leading to the ultimate demand of abolishing the Council altogether and introducing necessary

⁹ After evaluation of thesis by foreign evaluator on June 02, 2018, it is renamed as AJ&K Interim Constitution Act, 1974, through AJ&K Interim Constitution (Thirteenth Amendments) Act, 2018 and number of amendments has been made. For relevant provisions please see Appendix IV.

¹⁰ AJ&K Interim Constitution (Thirteenth Amendments) Act, 2018, Section 16, please see Appendix IV.

¹¹ Snedan Christopher, *The Untold Story of People of Azad Kashmir*, (Pakistan, Karachi, Oxford University Press, 2013), 103-110; Austrian Red Cross, "Pakistan-Administered Kashmir (Azad Kashmir and Gilgit-Baltistan)", Austrian Centre for Country of Origin and Asylum Research and Documentation (ACCORD), COI Compilation, May 7, 2012), www.ecol.net, (accessed on 25.10.2015).

¹² Michael Johnston, "Good Governance, Rule of Law, Transparency and Accountability", unpan1.un.org/intradoc/group/public, (accessed on 09.12.2015); Michael Lockwood, "Good Governance for Terrestrial Protected Areas: A Framework, Principles and Performance Outcomes", <http://www.sciencedirect.com/>, (accessed on 11.03.2016); Thomas Weiss, "Governance, Good governance and Global Governance: Conceptual and Actual Challenges", (Third World Quarterly, Volume 21, issue 5, 2000), <http://tandfonline.com/>, (accused on 11.03.2016).

structural changes for greater autonomy and empowerment of these regions like provinces of Pakistan after 18th Amendment.

This study is based on the right to self-determination which has both external and internal dimensions. The external dimension of self-determination of AJ&K and GB shall be settled on resolution of Kashmir dispute through plebiscite under UN auspices, whereas, internal dimension of self determination refers to political, economical, cultural and social self-determination. The need for this right is multiplied when the time line for resolution of Kashmir Dispute based on right to self determination external is not determined. Therefore, it is an international obligation of all stake holders including Government of Pakistan to ensure internal dimension of right to self determination for people of AJ&K and GB and do not let this right be suppressed on the pretext of disputed status of the State. As Pakistan has ratified both of two major international human rights convention i.e. Civil and Political Rights Covenant, 1966, and International Economic, Social and Cultural Rights Covenant, 1966, wherein Article 1 of both of these Covenants require implementation of right to self-determination.¹³ Pakistan, alongwith AJ&K and GB governments, is under international obligation to provide rights enumerated in the said covenants to the people of these areas. For realization of these rights, the need for effective constitutional and administrative frameworks for AJ&K and GB is required providing all human rights available under International Human Rights Law as well as similar mechanism for rights, empowerment and autonomy as available to the provinces of Pakistan under its constitution so as to ensure equality and avoid any discrimination between citizens of Pakistan and people of AJ&K and GB. Since, political

¹³ United Nations Human Rights, Office of the High Commissioner for Human Rights, <http://tbinternet.ohchr.org/-/layout/TreatyBody/External/Treaty>, (accessed on 07.11.2015).

empowerment cannot be enjoyed without economic empowerment hence it is also required to empower these areas economically in line with empowerment of provinces of Pakistan.

HYPOTHESIS

Under existing constitutional and administrative arrangement of AJ&K and GB with Pakistan, people of AJ&K and GB do not enjoy right to self determination internal in its true spirit, consequently people of these units are having lesser rights and empowerment comparing with their brethren citizens of Pakistan.

SIGNIFICANCE OF STUDY

This study will be beneficial to review the existing constitutional and administrative frameworks of AJ&K and GB in order to make them compatible with internal aspect of the right to self-determination under international law. It will not only be a useful addition to the knowledge on this subject but also it will serve as a model and guideline for similar territories all over the world by introducing a new perspective to the concept of the right to self-determination.

In addition to above, this study will also lay down a foundation in the field of public law i.e. constitutional structure and administrative arrangement at national level. Besides that, the study would also be very helpful for academia to understand the existing constitutional and administrative arrangement of parts of erstwhile State of Jammu and Kashmir under the control of Pakistan. By focusing on the internal aspect of right to self-determination of the people of internationally recognized disputed territories, this study seeks to contribute to the importance of human rights

obligation of a state at international and national levels. The internal aspect of the right to self-determination of territories like AJ&K and GB being internationally recognized disputed area have not received worthwhile scholarly attention. The case studies of Pakistan's AJ&K and GB territories therefore, will enrich the debate on the right to self-determination, notably, the internal aspect of a state's obligation it creates.

LITERATURE REVIEW

This study is based upon the plenty of literature on right to self-determination in order to have deep understanding of the concept and nature of this right. Few of them are mentioned hereinafter being most relevant to the topic alongwith review.

An article titled "*Self-determination in three movements*" by Patrick Macklem,¹⁴ has been studied, wherein, the author argues that due to three conceptual movements, the self-determination has become a tool to promote and advance a just distribution of sovereign power in international legal order. The first movement has its origin in events surrounding Paris peace process in 1919, when beneficiaries of self-determination moved from the population of an existing state to potentially populations within and across the state boundaries. The second movement coincided with the decolonization period after Second World War. The third movement can be understood in the context of self determinations and its relationship with human right law within a state itself. In this movement the right to self-determination moved from international realm to domestic realm. Resultantly, now the right to self-determination not only requires formation of new state for colonized population but it also requires

¹⁴ Patrick Macklem, "Self-Determination in three Movements", <http://papers.ssrn.com/>, (accessed on 18.12.2015).

an existing state to secure effective measures of political representation i.e. right to self-determination internal of all people. If a state fails to grant this right as well as ensure other human rights for its citizens than self-determination external may follow. The author has also deliberated on role customary law for development of this right.

This is one of the latest and comprehensive works on development of the right to self-determination in different stages from customary law to its modern manifestation as a tool for greater autonomy within the state structure or creation of a new state.

This work is beneficial to understand the different stages through which evolution of right to self determination took place in history and consequence of denial of such right by states in today's international legal regime.

Hurst Hannum in his article "*Legal Aspects of Self-determination*"¹⁵ unfolds the concept of self-determination alongwith its internal and external dimensions. He also gives brief description of historical evolution of the concept and adds that principle of territorial integrity of states is always superior to the right to self-determination so long the state comply with the principle of equality and self-determination of all of its peoples and their governments should be representative of whole population of the territory without any discrimination on the basis of race, creed or color etc. However, the author does not highlight the role of customary law for development of right to self determination for laying down the foundation of contemporary international law on the subject.

¹⁵ Hurst Hannum, "Legal Aspect of self Determination", <http://pesd-pricetion.edu/>. (accessed on 10.12.2015).

In this study, this principle is as well applicable because Pakistan exercises control over AJ&K and GB territories without making them its constitutional part. Thus, it becomes an obligation of Pakistan under international law that constitutional and administrative arrangement of AJ&K and GB should ensure protection of human rights alongwith right to self-determination internal of people of these areas, on the basis of equality with the people of Pakistan.

Role of customary law and treaty law in relation to right to self-determination and its manifestations has been dilated upon by Autonio Cassese in his article "*Self-determination of people, A legal reappraisal*".¹⁶ He discusses use of self-determination as an international legal standard in its internal and external dimensions. He gives detailed account of development of this right through customary and treaty based international law. The author says that the internal aspect of self-determination has been used as a vehicle for enfranchisement for citizens against dictation and monarchial regimes by shifting power of rule in a state from monarch to people as reflected in American and French Revolutions and reached its climax to notion of universal suffrage in 20th century. Externally it had been used to challenge the territorial integrity and sovereignty of the states by allowing creation of new states now popularly called as the Third World.

This is a comprehensive book which gives a detailed account of all political and legal event alongwith norms of customary and treaty law for development and transformation of the nature and concept of right to self-determination. The book is also helpful in understanding the relevant treaty and customary developments leading

¹⁶ Cassese Antonio, *Self-determination of People, A Legal Reappraisal*. (USA, New York: Press Syndicate of University of Cambridge, 1995).

to growth of right to self determination alongwith relevant parallel political event. This book was authored in 1995, now the law has been further developed and external aspect of self-determination has been reconciled with notion of states sovereignty and territorial integrity by subjecting to a condition that states continue to respect human rights of all its citizens including rights of minorities and indigenous people.

Allan Buchanan in his article "*Justice, Legitimacy, and Self-Determination, Moral Foundations for International Law*"¹⁷ argues that the justice, legitimacy and self-determination are essentially the moral basis of international law. About self-determination author is of the view that international law should recognize it only as a remedial right to secede but not a general right to self-determination which though include right to secession as last resort in response to serious injustices. He emphasized that international law should encourage alternative to secession by working for better compliance with existing human rights norms prohibiting ethno-national and religious discrimination. He has strongly supported autonomy regimes i.e. arrangements for self-determination short of full sovereignty.

The author is discouraging the right to self-determination external as according to him it is contrary to sovereignty and territorial integrity of state. The author has skillfully dealt the hurdle faced by right to self-determination as sovereign states used to take it as potential threat to their sovereignty and integrity. He has addressed the concern by making secession as remedial right only where states fail to protect rights of marginalized groups by giving them due representation in political governments. He advocated for use of human right approach to address this right in

¹⁷ Allen Buchanan, *Justice, Legitimacy, and Self-Determination, Moral Foundations for International Law*. (USA, New York: Oxford University, 2004).

contemporary world. In case of AJ&K and GB regional autonomy model short of sovereignty is desirable while adhering to internal aspect of right to self-determination with human rights approach. The provision of this right will strengthen the case of right to self-determination external for resolution of Kashmir dispute.

Two important articles which have described the application of right to self-determination in divided societies of Ireland and Nepal are very useful. First is by Christine Bell and Kathleen Cavanaugh titled "*Constructive Ambiguity or Internal Self Determination? Self determination, Group Accommodation, and the Belfast Agreement*"¹⁸, wherein, authors analyzed the Belfast Agreement in light of International law on self determination and minority rights. The authors say that the concept of self-determination involves an evolutionary approach to the principle of self-determination with a focus on finding ways to enable groups to decide their own political status and effective participation in government. They have added that the Belfast Agreement has applied internal aspect of self-determination through language dealing with self-determination, protection for civil, political, social, economic and cultural rights, providing an assembly with power sharing and mutual vetoes and cross border linkages between Northern Ireland and the Republic of Ireland and a regional structure in the British-Irish Intergovernmental Conference.

The provision of cross boarders' linkage and joint assembly through Belfast Agreement has almost eroded the international borders between Northern Ireland and Republic of Ireland. Nonetheless, this agreement is referred as a model for ethnically

¹⁸ Christine Bell and Kathleen Cavanaugh, "Constructive Ambiguity of Internal Self Determination, Group Accommodation and the Belfast Agreement", (Fordham International Law Journal Volume 22, issue 4. Article No. 12, 1998), <http://ir.lawnet.fordham.edu/ihttp://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1016&context=lcplj>. (accessed on 02.10.2015).

divided and diverse societies. Belfast Agreement is an addition to the knowledge relating to self-determination internal and a remarkable contribution to resolve similar conflicts in divided societies though this article is specifically dealing with an ethnically divided society but it is helpful in relation to AJ&K and GB as we may have to devise and tailor an unconventional and unique model that might be against traditional concepts of international law but quite suitable for peculiar status of AJ&K and GB.

Second article is by Surendra Bhandari "*From External to the Internal Application of the Right to Self-determination: The case of Nepal*"¹⁹. This paper examines the case of the right to self-determination and its external and internal dimensions, epistemology and problem connected with its implementation before drafting new constitution of Nepal especially after its post conflict period. The author says that mere federalism cannot address problems of Nepal unless it encompasses empowerment of people, manages competing multiple institutions, designs fiscal equilibrium, institutionalizes peace, stops discrimination and strengthens liberal democracy, growth and development, besides that it should entrench the rule of law and constitutionalism in overall governance. He further says that autonomy or self-government beyond the framework of constitutionalism and civil state might become counterproductive to Nepal. According to him the real issue and challenge of the right to self-determination in Nepal should be fully focused on the institutionalization of constitutionalism and the liberal democracy based on right to self-determination internal as foundations of the political stability, growth and sustainable development. The article is relevant to the study on AJ&K and GB as it is also a model for adhering

¹⁹ Surendra Bhandari, "From External to the Internal Application of the Right to self-determination", (International Journal on Minority and Group Rights), <http://ssrn.com/>, (accessed on 02.11.2015).

to internal aspect of right to self-determination of indigenous people and minorities and incorporating the same not only in constitutional making process but also in constitution itself through principle of non-discrimination, rule of law, fiscal equilibrium, peoples empowerment and institutional mechanism for resolution of competing interests of different ethnic groups etc.

Another work by same author is "*Autonomy, Sovereignty and Self-determination, the Accommodation of conflicting right*".²⁰ The author has divided his work into three parts, in first part he has discussed, in legal context, the concepts of sovereignty, statehood and nationalism viz-a-viz self-determination and human rights including indigenous rights and minority rights. In second part, different case studies i.e. Hong Kong, Indian Punjab, the Kurds, the Atlantic Coast of Nicaragua, Northern Ireland, the Sami (Lapp) People of Norway, Sweden and Finland, Spain the Basque country and Catalonia, Sri Lanka and Sudan have been given wherein autonomy was demanded instead of complete independence. In third part, contemporary and historical "autonomous" entities some of which may serve as model for future autonomy alignments including federal or quasi federal structures i.e. Eritrea, Greenland, Netherlands Antilles, Switzerland and Union of Soviet Socialist Republic have been discussed. The author emphasized that inherent tension between the obligation of every society to recognize pluralism and diversity and the desire of every culture whether majority, minority or indigenous to perpetuate its values and enforce conformity. He further says that the role of the state is to mediate between these competing forces by demarcating boundaries and limits within which the conflict would be resolved.

²⁰ Hurst Hunnum, *Autonomy, Sovereignty, and Self-determination, the Accommodation of conflicting Rights*, (USA: University of Pennsylvania Press, Revised Edition, 1990).

This book was authored in 1990 and since then significant political and legal changes have taken place like Eritrea has obtained complete independence as sovereign state and USSR has been disintegrated into different sovereign countries after cold war. But in spite of that the book provides a solid foundation for further research on similar territories in the world. This book is relevant to upcoming research as it has suggested ways and means wherethrough norms of international law may be utilized to promote and devise different flexible solutions through which conflicts among individuals, groups and state rights can be reconciled. This study also aims to devise an unprecedented, novel and unique structure for AJ&K and GB while encompassing internal aspect of right to self-determination.

Role of great powers in supporting secession has always been prominent in history which has been highlighted by Milena Sterio in her article "*On Right to external Self-Determination; "Selfistan" Secession and Great Power's Roles*"²¹. The author described traditional role of great powers of the world along with factors of oppression, weak central government and international involvement. The author said that distinction between internal versus external self-determination is easy to draw and it can be known as which minority group is deprived of rights and such group is entitled for right to external self-determination. Some minority groups have found strong support of great powers like, East Timor and Kosovo have obtained support of great powers and achieved their secession through right to self-determination external, whereas, Chechnya, South Ossetia and Abkhazia could not succeed in exercising their right because of non recognition of their cause by great powers. This article is exploring a taboo of international legal order i.e. interest of great powers in

²¹ Milena Sterio, *The Right of Self-Determination under International Selfistan, Secession and Great Power Rule*, (London & New York: Routledge Taylor & Francis Group, 2013).

demarcation of international boarders and creation of new states. The initiative of the author is commendable as he has touched the weak aspect of international law. This article establishes relationship between internal and external self-determination which is relevant for AJ&K and GB as both territories are in need of internal self-determination till their right to external self-determination is exercised for which essential support of great powers cannot be ruled out.

About different modes of implementation of right to self-determination, I have gone through “*Law Protecting Rights: Restoring the law of self-determination in the neo-colonial world*” by Amy Maguire.²² The Author says that the law of self-determination and modes of its implementation should be further developed in order to achieve the full potential of this right amongst and alongwith various other rights as claimed in 21st century. She compared the claims of self-determination of Irish nationalists and indigenous people of Australia. This comparison lead her to believe in two notions: firstly, the self-determination retains a mission of decolonization in the twenty first century as well; and secondly, a human rights approach to self-determination presents the best mean of advancing the right of competing claimants while protecting rights of non claimants. She added that in both cases the continued influence of colonialism over the both claims of self-determination is important. Irish nationalists claim self-determination in form of reunited Ireland, thus challenging status of existing frontiers of states, whereas, the self-determination claim advanced by indigenous people of Australia require autonomy as solution within the state structure. She further emphasized on concept of decolonization of law of self-determination itself by breaking down the artificial demarcation between internal and

²² Army Maguire, “Law Protecting Right; Restoring the law of self-determination in the neo-colonial world” (Law Text Culture, Vol. 12, 2008), <http://ssrn.com/>, (accused on 18.12.2015).

external self-determination. As according to her this division is not helpful for promotion of this right rather it is a potential threat being a challenge to states' sovereignty and territorial integrity. She further said that right to self-determination does not elapse with the achievement of independence as many self-determination claims may arise from existing states arrangement.

According to her, right to self-determination cannot be achieved through one time event rather it can be ensured by constitution through an institutional mechanism as an ongoing process. She further stated that it is open to achieve this right through various means so as it could be promoted through a less absolutist approach to sovereignty. If two Irish jurisdictions are united, a less absolutist approach to sovereignty might enable such arrangement which could retain some aspect of northern jurisdiction as a guarantee that all people on the Island will be entitled to express identity as they wish.

In Australian context, the author says that recognition of the right as process could involve the wider community with the notion of indigenous self-determination and create parallel opportunities for reconciliation while avoiding creation of new state for indigenous people. She added that there is no doubt about necessity of respecting the universal application of self-determination but this right must be capable of adaptation to the peculiar circumstances of each claimant people. Moreover, human rights approach to self-determination can help to open international legal discourse to the voices of claimant people so they are no longer marginalized and their equal right to self-determination gains recognition and protection into 21st century.

The author has identified the weakness of international law for enforcement of right to self-determination but did not identify any mode through which this weakness can be addressed. She suggested that the human rights approach as the best mode for realization of right to self-determination but it did not mention that what should be modus *operandi* for implementation of right to self-determination external and who will discharge this responsibility? This paper is helpful for the study as it is intended to encompass the process of ensuring right to self-determination by adopting human rights approach and incorporating the same in constitutional and administrative structure and arrangement of AJ&K and GB with Pakistan.

Solomon Solon says in his article "*The Quest for Self-Determination: Defining International Law's Inherent Interstate Limits*"²³ that the right to self-determination holds pivotal position in contemporary international law and constitutes a normative platform for all other rights, but it has inherent limits which stem from regional approach among different global actors. This article evolves the inherent limits of right to self-determination and focuses on bilateral approach for application of this principle by giving way to dialogue and negotiation with stake holders because a foreign solution may prove to be counterproductive as happened in case of Libya during Arab Spring when North Atlantic Treaty Organization forces tried to implement the UN resolution by using this approach which culminated into further deterioration of situation. This article is a valuable addition to law on right to self-determination as it has introduced new approach to grant right to self-determination i.e. bilateral approach. This means that it the claimant people who would themselves

²³ Solon Solomon, "The Quest for Self-Determination: Defining International Law's Inherent Interstate Limits", (Santa Clara Journal of International Law, Volume 11, issue 2, Article 4, 2013), <http://digitalcommons.Law.Scu.edu/seujil.vol.11/issue.2/4>. (accessed on 26.10.2015).

indicate as the type of self-determination they wish to obtain provided that in case of secession they have to undertake 'principled negotiations' with other stakeholders as well.²⁴

This article is useful as any unilateral approach for right to self-determination of AJ&K and GB without involving all stakeholders may not be successful. For AJ&K and GB, a bilateral approach giving way to negotiation and dialogue based on principles of right to self-determination would be successful.

About existing constitutional and administrative arrangement, "*The Constitution of AJ&K (in the historical backdrop with corresponding provision of Pakistan, India and occupied Kashmir)*"²⁵ by Syed Manzoor Hussain Gillani (Rtd.) Judge Supreme Court of AJ&K is also referred here. He gave historical account of constitutional development and provides collection of all legal documents relating to AJ&K, GB and Indian Held Kashmir (IHK). The collection of important historical documents increases the utility of this book.

The author is advocating his version that AJ&K and GB should be made constitutional part of Pakistan till resolution of Kashmir dispute by incorporation of transitional provision in constitution of Pakistan. This proposal will be detrimental to the principled stance of Pakistan based on right to self-determination of Kashmiries for resolution of Kashmir dispute. This book enables a reader to have an up to date knowledge of the constitutional and administrative arrangements of all of three regions of the State of Jammu and Kashmir including IHK.

²⁴ Judgments of Supreme Court of Canada, *Reference re Secession of Quebec*, <http://scc-csc.lexum.com/scc-csc/scc-csc/en/item/1643/index.do>, (accessed on 15-05-2018).

²⁵ Syed Manzoor Hussain Gillani, *The Constitution of Azad Jammu and Kashmir*, (Islamabad: National Book Foundation, 1st Edn., 2008).

About legal analysis of Kashmir dispute, the book of Dr. Ijaz Hussain titled “*Kashmir Dispute and International law Perspective*”²⁶ is relevant as the author has examined the Kashmir dispute in legal as well as historical perspective keeping in view the right to self-determination and UN resolutions on the subject. He has elaborately discussed the impact of accession of the State of Jammu and Kashmir to India and subsequent ratification by Kashmir Constituent Assembly on exercise of right to self-determination. The author has further discussed the impact of internal autonomy solutions for Kashmir and its role for grant of right to self-determination to Kashmiries. The focus of authors work is on external dimension of right to self-determination.

This book is almost seventeen years old written in 2000. The international law on the subject has significantly been developed during this period. Moreover, this book is written about India specific issues by providing legal analysis of steps taken by India about Kashmir and political development in IHK in relation to autonomy granted by India. This book helps in having deep insight of legal aspects of Kashmir conflict under international law as well as under right to self-determination. Moreover, it is argued that without focusing on human rights including internal aspect of right to self-determination, the argument for external right to self determination can never be strengthened especially when more than seventy has already been passed in status quo.

About the existing political, social and economic condition of AJ&K, the recent work of Christopher Snedden “*Untold Story of the People of Azad Kashmir*”²⁷

²⁶ Dr. Ijaz. Hussain, *Kashmir and International Law Perspective*, (Islamabad: Quaid-e-Azam University, National Institute of Pakistan Studies, 2000).

²⁷ Snedden, *supra* N.11.

is of worth in this regard. This book is about the constitutional, administrative and financial problems of AJ&K, which gives a detail account of political, economical and social issues of Azad Kashmir. It mentions democratic shortcomings and administrative issues alongwith describing influence of Pakistan at all levels and lesser autonomy of the region and flawed political disposition.

This book is very helpful as it gives scholastic and deep insight of the political, economical and social issues faced by AJ&K. It is also beneficial to understand the shortcomings and gaps in existing constitutional framework viz-a-viz right to self-determination. The author has not mentioned the strengths of AJ&K and only he has highlighted weaknesses in existing arrangements. He has underscored achievements of people AJ&K since independence and comparing with citizens of Pakistan living in different provinces.

About GB, article titled "*Liminality and Resistance in Gilgit-Baltistan*" by Caylee Hong,²⁸ is discussing the position of GB which is worse than AJ&K as they are even more marginalized by much lesser and liminal status given to them by their so called Self-governance and Empowerment Order, 2009. The author says that the Order claims to strengthen the locally elected Legislative Assembly but it allocates most important subjects to GB council which is dominated by federal actors as out of total fifteen members, seven are not elected by peoples of GB rather they are nominated by Prime Minister of Pakistan being Chairman of the Council. Moreover, the GB Council has been given jurisdiction over most financially valuable sectors such as tourism, forestry, minerals and mineral wealth, planning for economic

²⁸ Caylee, Hong, "Liminality and Resistance in Gilgit-Baltistan", (Canada: Montreal, Centre for International Sustainable Development Law, Faculty of Law McGill University, 2012), www.cisdl.org, (accessed on 25.10.2015).

coordination, electricity and bulk water storage etc. Author further elaborates that inspite of provincial status it has no representation in federal bodies like Council of Common Interest, Indus River System Authority, National Finance Commission etc.

The author has not mentioned the basic document from where the basic structure of the Order was derived i.e. The AJ&K Interim Constitution Act, 1974. Though it is claimed that complete autonomy has been given to GB but in fact they have been even relegated to a lesser status than AJ&K. This article has given insight into economic, social and administrative issues of GB and their in-between status. After identification of China Pakistan Economic Corridor, it has assumed more importance being a vital link with Pakistan for trade and development of Northern and Western China.

About existing financial and administrative arrangement of Pakistan and AJ&K, a booklet titled "*An Appraisal of Constitutional, Financial and Administrative Agreement between Government of Pakistan and Azad Kashmir*" by Centre for Peace, Development and Reforms²⁹ could not escape my notice. It contains an appraisal of prevailing constitutional, financial and administrative arrangement between Government of Pakistan and AJ&K which states that vesting of powers in AJ&K Council to legislate, levy taxes and perform executive function are not justified altogether because such arrangement lead to the denial of political right of people of the state.

This is a small booklet which also contains views of different scholars about the existing constitutional, financial and administrative arrangement of AJ&K with

²⁹ Centre for Peace, "*An Appraisal of Constitutional, Financial and Administration Agreement between Government of Pakistan and Azad Kashmir*", (Mirpur AJ&K: Development and Reforms, 2011).

Pakistan. This book is not dealing with the complex constitutional, financial and administration issues. Hence, a detailed and in-depth study is required to handle these issues. This booklet is useful for me in understanding views of different scholars about existing issues and their possible resolutions.

From the above discussion it reveals that there are special territories which form part of a sovereign state and certain other special territories which are not part of any sovereign state but they are controlled by a certain sovereign state. A controlling state is under an international obligation to protect rights of the people of such special territories controlled by her.³⁰ This study aims to assess the obligation of Federation of Pakistan viz-a-viz AJ&K and GB under international law and on the basis of equality with its federating units.

The existing material reviewed hereinabove provides a clear foundation to devise a neo-constitutional theory where a constitution should essentially provide a similar mechanism for discharging human rights obligations of the controlling state in relation to people of internationally recognized disputed areas controlled by it.

OBJECTIVES OF RESEARCH

This study is aimed to fill the gap as there is no material which could analyze the existing fundamental laws and AJ&K and GB and their relationship with federation of Pakistan with reference to right to self-determination internal. This study shall examine civil and political rights as well as economic, social and cultural rights. By applying principle of right to self-determination internal, existing rights of the

³⁰ Loizidou V. Turkey (Application no. 15318/89), Judgment, European Court of Human Rights, Strasbourg, 18 December 1996, hudoc.echr.coe.int/app/conversion/pdf/?library=ECHR&id=001-58007 (accessed on 19-05-2018). Please also see Maastricht Principles on Extra-Territorial Obligations of States.

people of AJ&K and GB shall also be evaluated on the basis of equality with similar rights of people residing in different provinces of Pakistan.

RESEARCH QUESTIONS

The objectives of this study can be achieved after detailed investigation of following questions:-

1. What is right to self-determination and its classification into external and internal dimensions?
2. What are the international obligations of states in relation to human rights especially right to self-determination in the context of AJ&K and GB and their relationship with Pakistan?
3. What changes and amendments would be required in the existing constitutional and governance frameworks alongwith relationship of AJ&K and GB with Pakistan keeping in view their Right to Self-determination Internal and on the basis of principle of equality of people of these areas with those residing in provinces of Pakistan?
4. How and to what extent AJ&K and GB should establish their inevitable and necessary linkage with federal structure of Pakistan in order to realize their Right to Self-determination Internal without any detrimental effect on Kashmir conflict under international law or exercise of right to self-determination external for the people of the Jammu and Kashmir?

RESEARCH METHODOLOGY

This study would be based upon different primary sources i.e. UN Charter, Universal Declaration of Human Rights, 1948, International Covenant on Civil and Political Rights, 1966 and International Covenant on Economic, Social and Cultural Right, 1966 for getting deep understanding of nature and concept of the right to self-determination particularly its internal aspect. The study would examine the UN General Assembly Resolutions dealing with self-determination i.e. Colonial Declaration No. 1514³¹ and Friendly Relations Declaration No. 2625.³² Beside that I would also go through Constitution of Islamic Republic of Pakistan 1973, AJ&K Interim Constitution Act, 1974, Karachi Pact, 1948 and GB Empowerment and Self-determination Order, 2009 as well as a number of secondary sources reviewed herein above. Other national and international legal instruments and domestic and international court decisions would also be referred. In addition to that books, journals, published and unpublished documents of governments and electronic sources including web research, shall be frequently used.

This study would be descriptive as international law on right to self-determination would be described alongwith its historical evolution. It would also be analytical in respect of international legal instruments and scholarly work on the subject. It would also be comparative with respect to similar rights available to citizens of Pakistan under its constitution.

³¹ "Declaration on the granting of independence to colonial countries and peoples", (No. 1514 (XV) www.un.org/en/decolonization/declaration.shtml. (accessed on 25.10.2015).

³² 1970 Declaration on Principles of International law concerning Friendly Relations and Cooperation amongst States in accordance with the Charter of United nations (GAR) www.unchr.org (accessed on 03-11-2015).

Chapter I:

RIGHT TO SELF-DETERMINATION

1.1 Introduction

This chapter will explain the self-determination and its development over the history up to its recent modalities and application.

In second section meaning, concept and origin of self-determination shall be discussed. Development of self-determination in normative phase shall be deliberated in third section including its manifestation as; mandate system under League of Nations; core principle of international peace and stability under UN charter; right to democratic governance and de-colonization of colonial people and territories in its first, second, third and fourth subsections. In fourth section the development of self-determination in treaty phase shall be dilated upon including its position as group right under international human rights instruments, different modes of exercise of this group right and determination of people as group in its first, second and third subsections. In fifth section classification of right to self-determination shall be discussed including its internal and external dimensions, rights of indigenous people, rights of minorities, right to culture in first, second, third and fourth subsections. In sixth section application of right to self-determination including human rights approach and bilateral approach in its first and second subsections shall be deliberated. At the end discussion shall be concluded.

1.2 Self-determination: Meaning, Concept and Origin

Self-determination means the process by which a group of people, usually possessing a certain degree of national consciousness, form their own state and chooses their own government.³³ Self-determination is also a right of people to decide and determine their own future and destiny in international society of nations subject to right of other stakeholders including principle of territorial integrity of states.³⁴

The origin of modern concept of self-determination dates back to Declaration of Independence of United States of America (USA)³⁵ which for the first time proclaimed to have derived their just powers from the consent of the governed people. The right of people to retain their power to amend or substitute the form of their government was admitted. This principle was further refined by the leaders of French Revolution who have required annulment of all previous rules of conquest and annexation of territories.³⁶ The annexation of a territory was made conditional to the consent of people of the territory obtained through holding a plebiscite.

³³ Encyclopedia Britannica , <https://www.britannica.com/topic/self-determination>, (accessed on 06-01-2017).

³⁴ Nanda, Ved P., *Self-Determination under International Law: Validity of Claims to Secede*, 1981, Case Western Reserve Journal of International Law, Volume 13, Issue 2, School of Law, Case Western Reserve University, <http://scholarlycommons.law.case.edu/cgi/viewcontent.cgi?article=1871&context=jil>,(accessed on 06-01-2017); M.K. Nawaz, *The Meaning and Range of the Principle of Self-Determination*, 14(1) DUKE L.J. 82, 86-88 (1965); Satpal Kaur, *Self-Determination in International Law*, 10 INDIAN J. INT'L L. 479 (1970).

³⁵ Declaration of Independence, July 04, 1776, “National Archives and Records Administration”, Government of United States of America, http://www.archives.gov/exhibits/charters/declaration_transcript.htm, (accessed on 07-05-2016). Please also see Arnulf Becker Lorca, A “Pre-History” of Self-Determination, 25(2) EUR. J. INT'L L. 497 (2014).

³⁶ Kolla, Edward James, “The French Revolution, the Union of Avignon, and the Challenges of National Self-Determination”, <http://www18.georgetown.edu/data/people/ejk55/publication-73669.pdf>, (accessed on 27-01-2017).

1.3 Development of Self-determination: Normative Phase

The concept of self-determination developed over centuries stretching over number of phases from its origin viz. practice, norm and principle of customary law. This principle was also adopted by Bolshevik Revolution in serving the class conflict and called as social justice.³⁷ During First World War, President Woodrow Wilson of United States implicitly consolidated the principle in his Fourteen Points wherein the concept of self-determination was admitted for different nations of Europe.³⁸

According to President Wilson, self-determination means that people are not subjects of state but they are a sovereign of a state.³⁹ His concern for oppressed ethnic nationalities led to the three elements for post war settlement viz. identifiable peoples were to be accorded statehood; the fate of disputed areas was to be decided by plebiscite; and ethnic minorities shall be entitled to special protection supervised by the council of League of Nations.⁴⁰ Subsequently, it was also acknowledged by a number of plebiscites held by allies in different disputed areas of Europe.⁴¹ In this context it was duly incorporated in UN Charter as a principle for maintaining peace and stability of the world.⁴²

³⁷ Beigbeder, Yves, "International Monitoring of Plebiscites, Referenda and National Elections...Self-determination and Transition to Democracy", 1994, Martinus Nijhoff Publishers, Dordrecht/Boston/London, P-20; S. Chowdhury, The Status and Norms of Self-Determination in Contemporary International Law, in THIRD WORLD ATTITUDES TOWARD INTERNATIONAL LAW: AN INTRODUCTION 87 (Frederick E. Snyder & Surakart Sathirathai eds., 1987).

³⁸ Wilson, Woodrow, Fourteen Points of President Wilson, Government of USA Documents, <https://www.ourdocuments.gov/doc.php?doc=62>. (accessed on 07-05-2016).

³⁹ Anthony Whelan, "Wilsonian self-determination and the Versailles settlements", International and Comparative Law Quarterly 43, no. 1 (1994).

⁴⁰ Ibid, p.100; M.K. Nawaz, *The Meaning and Range of the Principle of Self-Determination*, 14(1) Duke L.J. 82, 86-88 (1965).

⁴¹ Hashmi, H. Sohail, "State Sovereignty: Change and Persistence in International Relations", 1997, Pennsylvania State University Press, University Park, Pennsylvania, pp.81-94.

⁴² Aureliu Cristescu, The Right To Self-Determination: Historical And Current Development On The Basis Of United Nations Instruments, U.N. Doc. E/Cn.4/Sub.2/404/Rev.1 (1981); S. Chowdhury, *The Status and Norms of Self-Determination in Contemporary International Law*, in Third World attitudes

Nonetheless, up to 1960s, it was looked upon and limited in a colonial context.⁴³ Thereafter, it was transformed from principle of customary law to an admitted right of international Human Rights Law as incorporated in several international legal instruments.⁴⁴ In post colonial era, self-determination was classified into internal and external dimensions and made compatible to principle of territorial integrity of states under UN charter.⁴⁵

As external right of self-determination and ultimate cessation in post colonial era was frustrating principle for states' sovereignty and their territorial integrity, hence, human rights approach was adopted for application of this right to a particular group of people i.e. people of an existing state shall not have right to secede unless they are not given political representation in government or they have been subjected to massive human rights violations. In other word cessation shall be available as a remedial measure only. Recently, a bilateral approach has been added for application of this right. Whereunder, the consent or option of the concerned people must be given due weight age. Beside the legal principles, the role of great powers while giving recognition and support has proved to be a decisive factor for realization of this right.⁴⁶

toward International Law: An Introduction 87 (Frederick E. Snyder & Surakiart Sathirathai eds., 1987).

⁴³ Burke, Roland, "Decolonization and the Evolution of International Human Rights", University of Pennsylvania Press, 2010, <http://humanityjournal.org/issue-1/human-rights-and-decolonization-new-perspectives-and-open-questions/>. (accessed on 02-07-2016).

⁴⁴ Weiwei, Li, "Equality and Non-Discrimination Under International Human Rights Law", Centre for Human Rights, University of Oslo, Norway, <http://www.mittendrinundaussenvor.de/fileadmin/bilder/0304.pdf>, (accessed on 02-07-2016).

⁴⁵ Thürer, Daniel and Thomas Burri, "Self-Determination", 2010, Max Planck Institute for Comparative Public Law and International Law, Heidelberg and Oxford University Press . www.mpepil.com. (accessed on 02-07-2016).

⁴⁶ Ibid.

Customary law has been conclusively accepted as one of the basic source of international law.⁴⁷ Treaty law often depends on and codifies the norms of customary law. This law develops from continuous practice of states in relation to their *inter se* relations. The practices which states impliedly consider binding among themselves regarding their mutual interactions are international customs. In North Sea Continental Shelf Case⁴⁸ it has been held that an international custom assumes the status of international customary law when the act amounts to a settled practice and it must be such or carried in a way as to evidence of a belief that this practice is rendered obligatory by the existence of a rule of law requiring it. In Continental Shelf Case between Libyan Arab Jamahiriya and Malta,⁴⁹ it has been held that a strong conviction that it is actual practice and it is to be followed compulsorily and this expected behavior is *opinion juris sive, necessitates (opinio juris)*.

A treaty is void if, at the time of its conclusion, it conflicts with a peremptory norm of general international law. For the purposes of the present Convention, a peremptory norm of general international law is a norm accepted and recognized by the international community of States as a whole as a norm from which no derogation is permitted and which can be modified only by a subsequent norm of general international law having the same character.

In relation to *jus cogens* norm, there exists general obligation of all states to protect it and violation of such obligation is deemed to be offence not only against the state directly affected by the breach, but also against all members of international community.

⁴⁷ Article 38, The Statute of International Court of Justice.

⁴⁸ North Sea Continental Shelf case between Federal Republic of Germany and Denmark; Federal Republic of Germany and The Netherlands, *50 years (1996-1996) Book of the International Court of Justice*, The Hague 1996, Fourth Edition, The Netherlands p.114.

⁴⁹ Ibid pp. 121-24, please also see “Public International law, An Introduction to Public International Law for Students”, <https://ruwanthikagunaratne.wordpress.com/> (accessed on 18-01-2017).

1.3.1 Mandate system under League of Nations

After World War I, a serious effort was made for the first time, by recognizing the fact that forceful annexation of territories is a source of conflict and threat to international peace and stability. The allies wanted to annex Germany's colonies and certain Arab-speaking areas of the Turkish Empire but President Wilson of United States opposed this desire on the basis of his ideas of self-determination.⁵⁰ Hence, it was decided by them not to annex the territories and the colonies of their defeated enemies. Instead, the territories belonging to Germany and the Ottoman Empire, that were considered unable to function as independent states, were placed under international administration supervised by the League of Nations established in 1919. It is worthwhile to mention that mandates were not treated part of the territory of powers administering them but they were given equivalent status of integral territory. In this regard three types of mandates were created for the administration of these territories for nations.⁵¹ The territories in Class A mandates were considered to be ready to get independence within a relatively short time period and all of these territories were located in the Middle East: Iraq, Palestine, and Transjordan, administered by the UK; and Lebanon and Syria, administered by France. On the other hand, Class B mandates covered territories for which the granting of independence was not an immediate option rather it was a distant prospect and all of these territories were in Africa: the Cameroons and Togoland, each of which was divided between British and French administration; Tanganyika, under British administration; and Ruanda-Urundi, under Belgian administration. Whereas, the

⁵⁰ A. Whelan, *supra* N.39, pp. 99-115; Martti Koskenniemi, *National Self-Determination Today: Problems of Legal Theory and Practice*, 43(2) INT'L & COMP. L.Q. 241, 241 n.1 (1994).

⁵¹ The Covenant of League of Nations, 1920, Article 22. Please see as well Malanczuk, Peter, "Akehurst's Modern Introduction to International Law", Seventh Revised Edition, 1997, Routledge, London and New York, pp. 327-28.

territories classified under Class C mandates were having no prospect of even self-government at all and these territories included South West Africa, administered by the Union of South Africa; New Guinea, administered by Australia; Western Samoa, administered by New Zealand; Nauru, administered by Australia (under mandate of the British Empire) and few Pacific islands, administered by Japan.⁵²

The terms of the mandate system provided an admission of the right of the peoples of the colonial territories belonging to defeated states in the World War I to be granted independence if they were believed to have acquired capacity to obtain independence/self-government or not. However, no provision was made in the League Covenant specifying that the countries designated to administer the mandated territories should take steps to prepare these people for eventual self-determination.⁵³ ICJ in an advisory opinion on legal consequences for continued presence of South Africa in Namibia⁵⁴ notwithstanding with Security Council Resolution 276 putting an end to its mandate, declared non members of UN to be under obligation not to enter into any relationship with South Africa concerning territory of Namibia (South West Africa).

Self-determination is a deeply rooted in customary international law as a political principle for ensuring peace and order and subsequently acquired status as a collective and group right as precondition for enjoyment of all other rights.

⁵² Ibid and Matz, Nele, "Civilization and the Mandate System under the League of Nations as Origin of Trusteeship" http://www.mpil.de/files/pdf2/mpunyb_matz_9_47_95.pdf, (accessed on 17-01-2017).

⁵³ Potter, Pitman B., "Origin of System of mandates under the League of Nations", *The American Political Science Review*, Vol. 16, No. 4 (Nov., 1922), American Political Science Association pp. 563-583, <http://www.jstor.org/stable/1943638>, (accessed on 17-01-2017). Please also see 'National Encyclopedia', "The Trusteeship Council, The Mandate System of The League of Nations", <http://www.nationsencyclopedia.com/United-Nations/The-Trusteeship-Council-THE-MANDATE-SYSTEM-OF-THE-LEAGUE-OF-NATIONS.html#ixzz4W8VRtVye>. (accessed on 18-01-2017).

⁵⁴ International Court of Justice, 1970. Legal consequences for States of the Continued Presence of South Africa in Namibia, <http://www.icj-cij.org/en/case>, (accessed 25-05-2018).

1.3.2 Core principle under UN Charter

The principle of self-determination was acknowledged and affirmed during and after World War II and was also incorporated in the Atlantic Charter 1941.⁵⁵ President Roosevelt of the United States and Prime Minister Churchill of the United Kingdom covenanted that no territorial changes would be made that do not accord with the freely expressed wishes of the people of that territory and that they wished to see that sovereign rights and self-government had been restored to those who were forcibly deprived of them. Consequently, the provisions of the Atlantic Charter had a considerable impact on the work of the San Francisco Conference of 1945 wherein the concept of self-determination formulated its shape and was incorporated in the United Nations Charter.⁵⁶

Art. 1 (2) of UN Charter provides that it is one of the purposes of the UN to create friendly relations among nations based on adherence to the principle of equal rights and self-determination of peoples and to take other necessary measures to strengthen universal peace. Moreover, in Chapter IX, on International Economic and Social Cooperation, Article 55 of UN Charter lists several goals to promote in the spheres of economics, education, culture, and human rights with a view to the creation of conditions of peace, stability and well-being which are necessary for friendly relations among nations based on respect for the principle of equal rights and self-determination of peoples. Likewise, in Article 73, it is also implicitly referred to the

⁵⁵ The Atlantic Conference & Charter, 1941, Office of the Historian, Bureau of Public Affairs, United States Department of State, <https://history.state.gov/milestones/1937-1945/atlantic-conf>, (accessed on 06-06-2016).

⁵⁶ 1945: The San Francisco Conference, <http://www.un.org/en/sections/history-united-nations-charter/1945-san-francisco-conference/index.html>, (accessed on 06-06-2016); Please see as well Aureliu Cristescu, "The Right to Self-determination: Historical and Current Development on the basis of United Nations Instruments", U.N. Doc. E/CN.4/Sub.2/404/Rev.1 (1981).

principle of self-determination in the part concerning colonies and other dependent territories. Similarly, Article 76 (b) postulates that one of the basic objectives of the trusteeship system is to promote the progressive development of the inhabitants of the trust territories towards self-government or independence, taking into account, inter alia, the freely expressed wishes of the peoples concerned.

The above mentioned discussion is evident of the fact that the self-determination is entrenched in UN Charter as core principle of political dispensation for maintaining international peace and stability.

1.3.3 Right to democratic governance

The Universal Declaration of Human Rights 1948 (UDHR) is reaffirming the UN Charter and faith in fundamental human rights alongwith dignity and worth of the human person and in the equal rights of men and women in its preamble.⁵⁷ It also resolved to promote social progress and better standards of life in larger freedom.⁵⁸ Besides that, it provides that the will of the people shall be the basis of the authority of government.⁵⁹ This declaration is passed by United Nations General Assembly (UNGA) resolution and it is a nonbinding document, nonetheless, it is not only having a persuasive force but is also a first ever international document to acknowledge the right of people to choose their government. Subsequently, after consistent state practice it has not attained status of customary international law.

⁵⁷ Preamble, Universal Declaration on Human Rights, 1948. UNGA Resolution No. 217A (III).

⁵⁸ Ibid.

⁵⁹ Art. 21., ibid.

1.3.4 Decolonization of colonial people and territories

The first direct contribution made by the UN in developing the concept of equal rights and self-determination was the Declaration on the Granting of Independence to Colonial Countries and Peoples adopted by the UNGA without dissenting votes.⁶⁰ According to this resolution, all peoples shall have right to self-determination wherethrough they freely determine their political status alongwith pursuance of their economic, social and cultural development.⁶¹ The authorities administering any territory in the trust and non-self-governing or all other territories, which had not yet attained independence, were called upon to take immediate steps to transfer, without reservation, all powers to the peoples of such territory in accordance with their freely expressed will and desire.⁶² Besides that, it was also expressed that any attempt to partial or total disruption of the national unity and the territorial integrity of a state is incompatible with the purposes and principles of the Charter of the United Nations, UDHR and this declaration.⁶³

This declaration represents the political policy of the UN for the implementation of which special institutions and procedures were created using plebiscites and elections as modes to determine the will of the people.

⁶⁰ United Nations General Assembly Resolutions No. 1514 [XV] dated 14 December 1960. Dag Hammarskjöld Library Research Guides. <http://research.un.org/en/docs/ga/quick/regular/15>, (accessed on 06-06-2016).

⁶¹ Article 2, *ibid*.

⁶² Article 5, *ibid*.

⁶³ Articles 6 & 7, *ibid*.

1.4 Development of Self-determination: Treaty Phase

In this phase, the development and up gradation of self-determination from a political principle to one of the human rights shall be discussed. It has been duly incorporated as group right of a people in International Human Rights Law in shape of a binding treaty. It has been declared a fundamental human right being pre-requisite for enjoyment of all other rights.

1.4.1 Core group right under International Human Rights Covenants

Another remarkable development of self-determination was the adoption of the International Covenant on Economic, Social and Cultural Rights, 1966 (ICESCR) and the International Covenant on Civil and Political Rights, 1966 (ICCPR). The common Article 1 (3) ICCPR and ICESCR restated the right of all peoples to self-determination, as defined in the Declaration on Granting of Independence discussed above, and call upon the States Parties including those having responsibility for the administration of Non-Self-Governing and Trust Territories, to promote and respect this right. In the same article they also state that all peoples may, freely dispose of their natural wealth and resources without prejudice to any obligations arising out of international economic cooperation, on the basis of principle of mutual benefit and international law, and that people shall not be deprived of their own means of subsistence.⁶⁴

⁶⁴ Arts 1 (2) of International Covenant on Civil and Political Rights, 1966 and International Covenant for Economic, Social and Cultural Rights, 1966. <http://www.ohchr.org/EN/ProfessionalInterest/Pages/>. (accessed on 06-06-2016).

After incorporation in Articles 1 of both ICCPR and ICESCR, the concept of self-determination as a whole was given the characteristic of a core group right or an essential prerequisite for the existence and enjoyment of the individual human rights, as these rights can never be exercised without the realization of the right of self-determination.⁶⁵ Rights under ICCPR and ICESCR provide essential evidence of the meaning and content of the principle of self-determination even for states which are not parties to them. As such International Law Commission has declared right to self-determination as *jus cogen*.⁶⁶

1.4.2 Different modes of exercise of the group right

Henceforth, in spite of practices of customary international law and covenants of Human Rights Law, the manifestation and modalities of this group right not only remained indeterminate but subject to various interpretations. For the first time different modes for exercise of self-determination were consolidated and articulated in Friendly Relations Declaration 1970⁶⁷ adopted by consensus resolution of UNGA which ultimately worked out the most authentic and comprehensive formulation of the right of self-determination.⁶⁸

This document states the principle of equal rights and self-determination of peoples enshrined in the UN Charter as the right of all peoples to freely determine, without outside interference, their own political status and to pursue their economic,

⁶⁵ UNHCR, General Comments No. 12: The right to self-determination of peoples (Article 1) 03/13/1984, <http://www.tebtebba.org/index.php/all-resources/category/139-2b-treat>, (accessed on 14-03-2017).

⁶⁶ International Law Commission, Commentary on "Articles on Responsibility of States for Internationally Wrongful Act. 2001, legal.un.org/ilc/texts/instruments/english/commentaries/9_6_2001.pdf. (accessed on 25-05-2018).

⁶⁷ Friendly Relations Declaration, *supra* N.32.

⁶⁸ *Ibid.*

social and cultural development. Besides that, it is the duty of every State to respect this right under the provisions of the UN Charter. It explicitly declares that alien subjugation, domination and exploitation are violations of right to self-determination which entitles the people to exercise one of the different modes of the self-determination viz. establishment of a sovereign and independent State; or free association or integration with an independent State; or emergence into any other political status, as may be freely determined by the people.⁶⁹ This declaration has not only formally forged the relationship between democratic representation and self-determination but also enlarged the scope of right to self-determination outside the colonial context.⁷⁰

In 1993, UN World Conference on Human Rights issued Vienna Declaration and Program of Action wherein previous documents on self-determination were reaffirmed and it was declared that denial of the right to self-determination as a violation of human rights and emphasized the effective realization of this right.⁷¹

1.4.3 Determination of people for grant of the group right

In spite of broad based agreement on Right to Self-determination as group right and different modes on the basis of which this right is to be exercised, the experts failed to agree on a definition or interpretation of word 'people' associated with the exercise of right to self-determination and being entitled to seek this right as a group. However, in

⁶⁹ Watson, William K., "When in the course of human events: Kosovo's independence and the law of secession", *Journal of International and Comparative Law*, 2008, p. 276.

⁷⁰ Simpson, Gerry J., "Diffusion of Sovereignty: Self-determination in Post-Colonial Age", *Standford Journal of International Law*, 1996, Standford University, California, USA, p.271.

⁷¹ "Vienna Declaration And Programme Of Action", 1993 June 23, The UN World Conference on Human Rights, <http://www.ohchr.org/EN/ProfessionalInterest/Pages/Vienna.aspx>, (accessed on 06-02-2017).

1989 the experts of UNESCO took a lead and interpreted the term 'people'⁷² entitled for self-determination as under:-

"a group of individual human beings who enjoy some or all of the following common features: (a) a common historical tradition; (b) a racial or ethnic identity; (c) cultural homogeneity; (d) linguistic unity; (e) religious or ideological affinity; (f) territorial connection; (g) common economic life."

Apart from the above description, the UNESCO's experts further added that the group must be of a certain number of people which may not be large but it must be more than a mere association of individuals within a state; it must have the resolve as whole to be identified as a people or the conviction of being a people and it must have institutions or other means of expressing its common characteristics and will for its distinct identity."⁷³

1.4.4 Aggression and Right to Self-determination

In 1974, definition of aggression was unanimously adopted by General Assembly even without a vote. The definition contains a generic paragraph providing an illustrative and non-exhaustive list of seven acts being declared as aggression. According to the definition, "use of armed force for the first time by a state in violation of the Charter of the United Nations is a *prima facie* evidence of an act of aggression, but the Security Council may declare it otherwise."⁷⁴

⁷² United Nations Educational, Scientific And Cultural Organization, International Meeting of Experts on further study of the concept of the rights of peoples , Paris 27-30 November 1989, Final Report and Recommendations. <http://unesdoc.unesco.org/images/0008/000851/085152Eo.pdf> (accessed on 05-10-2016).

⁷³ *Ibid.*

⁷⁴ United Nations General Assembly Resolution 3314 (XXIX), <http://hrlibrary.umn.edu/instree/GAres3314.html>. (accessed on 04-03-2017).

Article 3 of the resolution provides that aggression includes the invasion or attack by the armed forces of a state of the territory of another state, or any military occupation, including temporary one, resulting from such invasion or attack or any annexation by the use of force of the territory of another state or part thereof; bombardment by the armed forces of a state against the territory of another state or the use of any weapons by a state against the territory of another state; the blockade of the ports or coasts of a state by the armed forces of another state; an attack by the armed forces of a state on the land, sea or air forces, or marine and air fleets of another state; the use of armed forces of one state which are within the territory of another state with the agreement of the receiving state, in contravention of the conditions provided for in the agreement or any extension of their presence in such territory beyond the termination of the agreement; the action of a state in allowing its territory, which it has placed at the disposal of another state, to be used by that other state for perpetrating an act of aggression against a third state and the sending by or on behalf of a state of armed bands, groups, irregulars or mercenaries, which carry out acts of armed force against another state of such gravity as to amount to the acts listed above, or its substantial involvement therein.⁷⁵

The Article 7 of the resolution provides a safeguard to the right of peoples dominated by colonial, racist or alien regimes to struggle for self-determination⁷⁶ as the definition shall not in any way prejudice the right to self-determination, freedom and independence as enshrined in the Charter about peoples forcibly deprived of the right especially those under colonial and racist regimes or other forms of alien

⁷⁵ United Nations General Assembly Resolution 3314 (XXIX), <http://hrlibrary.umn.edu/instree/GAres3314.html>, (accessed on 04-03-2017).

⁷⁶ Ibid.

domination. Moreover, the right of these peoples to struggle against the occupation and to seek and receive support cannot be denied in accordance with the principles of the UN Charter and in conformity with the Friendly Relations Declaration 1970⁷⁷ and Additional Protocol I to Geneva Conventions of August 12, 1949 Relating to Protection of Victims of International Armed Conflicts of June 8, 1977. Under this protocol armed conflicts have been included the situation in which people are fighting against colonial domination and alien occupation and against racist regimes in the exercise of their right of self-determination.⁷⁸ This clarifies the position that war of national liberation or armed struggle for right to self-determination is not an aggression under international law.

1.4.5 Terrorism and Self-determination

International efforts to curb terrorist acts found their place in the Convention for the Prevention and Punishment of Terrorism 1937 sponsored by League of Nations.⁷⁹ The convention concerned only transnational terrorism by non-state actors and avoided the controversial issue of terrorism by state actors. Besides that, states were required to enact legislation for criminalizing terrorism and certain other related acts. The convention was signed by twenty-four states but was only ratified by India in 1941. This convention could not enter into force and it was overtaken by World War II.

⁷⁷ Friendly Relations Declaration, *supra*, N.32.

⁷⁸ Article 1, Section 4 of Additional Protocol to Geneva Conventions of August 12, 1949 Relating to Protection of Victims of International Armed Conflicts (Protocol I) of June 8, 1977.

⁷⁹ Weigend, Thomas, "The Universal Terrorist: The International Community Grappling with a Definition", *Journal of International Criminal Justice*, <http://jicj.oxfordjournals.org/content/4/5/912.abstract>, (accessed 05-03-2017).

Tokyo Convention on Offences 1963⁸⁰ tried to solve the problem of freedom fighters and state terrorism by using norms of international humanitarian law as tools of distinction. Different resolutions of the General Assembly on terrorism contained express affirmations of the principle of self-determination. In 1972, while addressing the terrorism, the General Assembly through its resolution No. 3034 (XXVII)⁸¹, impressed upon the states to solve the underlying causes leading to the violence. It also reaffirmed the right to self-determination and independence of all peoples and upheld the legitimacy of national liberation movements. In 1984, UNGA passed resolution on inadmissibility of the policy of state terrorism and any actions by States aimed at undermining the socio-political system in other sovereign states.⁸²

In 1991, the General Assembly passed another resolution as "Measures to Eliminate International Terrorism"⁸³ wherein; the relationship between terrorism, colonialism and liberation movements was mentioned in its fourteenth preambular paragraph. Another step of minimizing the tensions created by the different views on the relationship between terrorism and colonialism was taken on 9 December 1994.⁸⁴ Since adoption of the Declaration on Measures to Eliminate International Terrorism, the General Assembly made clear that it does not legitimize the use of terrorism by those seeking self-determination. In Global Counter-Terrorism Strategy, the General Assembly provided that Member States of the United Nations condemn terrorism

⁸⁰ United Nation Office on Drugs and Crime, *Convention on Offences and Certain Other Acts Committed on Board Aircraft, 1963*, *United Nations Treaty Series*, vol. 704, No. 10106, https://www.unodc.org/tldb/en/1963_Convention_on%20Board%20Aircr, (accessed on 05-03-2017).

⁸¹ United Nations General Assembly Resolution No. 3034(xxvii), 1972, [http://www.un.org/documents/ga/docs/27/ares3034\(xxvii\).pdf](http://www.un.org/documents/ga/docs/27/ares3034(xxvii).pdf), (accessed on 05-03-2017).

⁸² United Nations General Assembly Resolution No. A/RES/39/159 dated 17 December 1984, <http://www.un.org/documents/ga/res/39/a39r159>, (accessed on 05-03-2017).

⁸³ United Nations General Assembly Resolution No. A/RES/46/51, 67th plenary meeting 9 December 1991, <http://www.un.org/documents/ga/res/46/a46r051.htm>, (accessed on 05-03-2017).

⁸⁴ United Nations General Assembly Resolution No. A/RES/49/60, 84th plenary meeting dated 9 December 1994, <http://www.un.org/documents/ga/res/39/a39r159>, (accessed on 05-03-2017).

consistently, unequivocally and strongly in all its forms and manifestations.⁸⁵ The provisions of international humanitarian law are applicable whenever there is a situation of an armed conflict. Acts which must be admitted as terrorism under antiterrorism laws are only excluded to the extent that international humanitarian law provides for a specific justification.⁸⁶ The Security Council in 1999 and 2004 has expressed in its resolutions 1269⁸⁷ and 1566⁸⁸ respectively that all acts of terrorism, regardless of their motivation, are unjustifiable.

Special Tribunal for Lebanon, in its interlocutory decisions on applicable law, formulated customary international law definition of terrorism during peace based on *opinio juris* followed by consistent state practice as requiring three elements first, the perpetration of a criminal act (such as murder, kidnapping, hostage-taking, arson, and so on), or threatening such an act; second the intent to spread fear among the population (which would generally result in creation of public danger) or directly or indirectly coerce a national or international authority to take some action, or to refrain from taking it; and third when the act involves a transnational element.⁸⁹

Nonetheless of broad consensus that the threat of terrorism needs to be tackled urgently, the positions taken by different countries alongwith regional and

⁸⁵ Global Counter-Terrorism Strategy, United Nations Counter-Terrorism Implementation Task Force, <https://www.un.org/counterterrorism/ctitf/en/un-global-counter-terroris>, (accessed on 05-03-2017).

⁸⁶ 28th International Conference of the Red Cross and Red Crescent 2-6 December 2003, International Humanitarian Law and the Challenges of Contemporary Armed Conflicts, https://www.icrc.org/eng/assets/files/other/ihlcontemp_armedconflicts, (accessed on 05-03-2017).

⁸⁷ Council on Foreign Affairs Relations, UN Security Council Resolution 1269, Combating Terrorism, *adopted on October 19, 1999* <http://www.cfr.org/terrorism-and-the-law/un-security-council-resolution>, (accessed on 05-03-2017).

⁸⁸ Council on Foreign Affairs Relations, *UN Security Council Resolution 1566, Terrorism, October 8, 2004*, <http://www.cfr.org/international-organizations-and-alliances/un-security>, (accessed on 05-03-2017).

⁸⁹ Interlocutory Decision on the Applicable Law - Special Tribunal for Lebanon, https://www.stl-tsli.org/index.php?option=com_k2&id=2565, (accessed on 27-05-2018).

international organizations have resulted in selected approaches. This is due to diverging views on terrorism and right to self-determination enshrined in the UN Charter and the incompatibility of these views is the main hurdle to formulate the definition of international terrorism.⁹⁰ However, in spite of that, no technical impossibility exists in estimating the essential elements of terrorism which includes a threat or act of violence against a person or property; intention or motive to intimidate a population; create a state of terror; threaten international security.⁹¹

1.4.6 ICJ Jurisprudence on Self-determination

ICJ in Barcelona Traction case⁹² declared that Human Rights instruments do not confer upon states the capacity to protect the victims of infringements of such rights irrespective of their nationality. In advisory opinion of Western Sahara case⁹³ ICJ declared that historical ties cannot prevail on right to self-determination of people and in case of Kosovo⁹⁴ it opined that unilateral declaration of independence in exercise of right to self-determination is not a violation of international law. In a similar way, the ICJ in the East Timor case⁹⁵ took notice of the fact that both parties to the dispute agreed that the people of East Timor had the right to self-determination and thereby underscored that the population of East Timor is a people. Even outside the context of

⁹⁰ Saul, Ben, "Defining Terrorism: A Conceptual Minefield", <https://www.ssrn.com/abstract=2664402>, (accessed on 27-05-2018).

⁹¹ United Nations Action to Counter Terrorism, <http://www.un.org/en/counterterrorism/>, (accessed on 05-03-2017).

⁹² Barcelona Traction, Light and Power Company, Limited (Belgium v. Spain) (1962–1970), Second Phase, Judgment, <http://www.icj-cij.org/>, (accessed on 06-06-2016).

⁹³ International Court of Justice, Western Sahara Advisory Opinion of 16 October 1975, <http://www.icj-cij.org/en/case/61>, (accessed 25-05-2018).

⁹⁴ International Court of Justice, Kosovo Advisory Opinion, www.icj-cij.org/en/case/141, (accessed 25-05-2018).

⁹⁵ International Court of Justice, East Timor Case, <http://www.icj-cij.org/docket/index.php?sum=430&p1=3&p2=3&case=8>, (accessed on 06-06-2016).

decolonization, where it is not self-evident that the right to self-determination applies the existence of a people is sometimes accepted without further argument.

Israel is a party to both the ICCPR and ICESCR and also to the 1989 Convention on the Rights of the Child. With this background ICJ was requested⁹⁶ to give an advisory opinion about legal consequences arising from the construction of the wall being built by Israel, in the Occupied Palestinian Territory, including in and around East Jerusalem. The Court opined on the bases that it infringes upon the right of the Palestinian people to self-determination as laid down in Article 1 to the UN Charter.⁹⁷ The Court rejected Israel's assertion that the wall is a temporary security barrier without any political significance, which can be taken down at any time as part of a political settlement. Rather, the Court came close to saying that the construction of the wall is a preliminary to the annexation by Israel of the closed area situated between the Green Line and the wall. The Court considered that the construction of the wall would create a *fait accompli* on the ground that it could become permanent and tantamount to *de facto* annexation. The opinion further noted that the route of the wall has less to do with the security of Israel; rather it is aimed at to include as many settlers as possible within the closed area. ICJ observed that the existence of a 'Palestinian people' is no longer in issue and that the rights of the Palestinian people include the right to self-determination. The ICJ considered that the protection offered by human rights conventions did not cease in case of armed conflict save where

⁹⁶ General Assembly Resolution No. ES-10/14 of 8 December 2003, <https://unispal.un.org/DPA/DPR/unispal.nsf/0/F3B95E613518A0AC852>, (accessed on 06-06-2016).

⁹⁷ Legal Consequences of the Construction of a Wall in the Occupied Palestinian Territory (Advisory Opinion), www.icj-cij.org/docket/index.php?p1=3&p2=4, (accessed on 07-03-2017).

derogation is itself permitted, and that it would have to take into consideration both Human Rights Law and international humanitarian law.⁹⁸

The Court also concluded that in constructing the wall, Israel has breached the Fourth Geneva Convention on the Protection of Civilians Persons in Time of War, because the destruction or requisition of property in order to make way for the wall is contrary to Article 53 of the Convention, which says that any destruction by the Occupying Power of real or personal property belonging individually or collectively to private persons, or to the State, or to other public authorities, or to social or cooperative organizations, is prohibited, except where such destruction is rendered absolutely necessary by military operations. As for the consequences for other States, the ICJ observed that certain obligations violated by Israel were obligations *erga omnes*, namely the right of the Palestinian people to self-determination and certain obligations under international humanitarian law.⁹⁹

1.5 Right to Self-determination: Classification

As discussed earlier that initially self-determination was only viewed as secessionist model in colonial context only. Thereafter, different models of self-determination were also recognized including indigenous, nationalist, democratic and devolutionary self-determination models. These models emerged as challenge to the classical secessionist mode under colonial self-determination.¹⁰⁰ Devolutionary self-determination refers to the various institutional arrangements and empowerments used

⁹⁸ Ibid.

⁹⁹ Ibid.

¹⁰⁰ Simpson, *supra* N.70, P. 274; For a critical Third World perspective on internal self-determination, see Kalana Senaratne, *Internal Self-Determination in International Law: A Critical Third-World Perspective*, 3(2) ASIAN J. INT'L L. 305 (2013).

by states to advance reconciliation and consociation with national or indigenous groupings. These arrangements include the constitutional models introduced in Canada, the judicial forms and the process undertaken in Australia, the system of tribal self-government and autonomy supported in the United States, and regionalism made applicable in Spain.¹⁰¹ This model has also been named as federal right of self-determination¹⁰² or political self-determination¹⁰³ that may take any form as all are less disturbing than secession. There exists another classification of self-determination, dividing the right into two aspects; internal and external. Internal self-determination means people's self-determination to live with other peoples in a state or seek autonomy inside the state. External self-determination is people's decision to establish independent and sovereign state, create free.¹⁰⁴

After end of colonial era, right to self-determination is being more focused on internal self-determination keeping in view of principle of territorial integrity of states. Increasingly, emphasis is made on *intra-state* relations and on the internal aspects of the principle allowing for a variety of options but they all are within the framework of state constitution. Self-determination has thus acquired a new constitutional dimension of federalist character based on territorial integrity of states. On this basis self-determination is continuously being re-construed and developed to encompass the right to democratic and representative governance in a nation State including various types of autonomy regimes.

¹⁰¹ Ibid. p. 258.

¹⁰² Tomuschat, Christian, "Self-determination in a post-colonial world", in Modern Law of Self-determination, 1st edition, Springer, 1993. P.13.

¹⁰³ Ibid. P.14.

¹⁰⁴ Ibid.

1.5.1 Internal and external dimensions

Self-determination internal is right to authentic self-government, i.e. right of people really and freely to choose their own political and economical regime¹⁰⁵. It is also said that internal dimension of the right concerns the right of people within a state to choose their political status.¹⁰⁶ It is also asserted that internal aspect of self-determination is democracy,¹⁰⁷ i.e. right of the people to have a representative and democratic government. Moreover, internal self-determination is alternatively called democratic self-determination.¹⁰⁸ Self-determination internal is a continuing right and self-determination external is once-for all right.¹⁰⁹ Unlike external self-determination, the right to internal self-determination is neither destroyed nor diminished by its having already once been invoked and put into effect.¹¹⁰

For the first time, Helsinki Final Act made internal and external classification of self-determination and stated that due to principle of self-determination and equal rights, all people always have right to determine their internal and external political status.¹¹¹ The formal application of this classification is evidenced by Commission of the Conference on Yugoslavia i.e. Badinter Commission set up by the Council of Ministers of the European Economic Community on 27 August 1991, formulated important legal opinions, *inter alia* Opinion No 2 on the right to self-determination of

¹⁰⁵ Cassese, *supra* N.16, p. 111.

¹⁰⁶ McCorquodale, "Self-determination: A Human Rights Approach", *International and Comparative Law Quarterly* 43, 1994, P.864.

¹⁰⁷ Hannum, *supra* N.15, p. 30.

¹⁰⁸ Crawford, James R., "The Creation of States in International Law", Second Edition, Oxford University Press, 2007, USA, P. 114.

¹⁰⁹ Simpson, *supra* N.70, p. 257.

¹¹⁰ Solomon, *supra* N.23; Allen, Buchanan, *supra*, N.17.

¹¹¹ Conference on Security and Co-operation in Europe, Final Act, Helsinki 1975, <http://www.osce.org/helsinki-final-act?download=true>, (accessed on 27-02-2017).

the Serbian population in Croatia and Bosnia-Herzegovina.¹¹² However the impact of the principle of self-determination in the dismemberment of both the Soviet Union and Yugoslavia was relatively low; these processes seem to have been factual rearrangements of power that were taking place outside the formal structures of international law and that were recognized as *ex post facto* position.¹¹³

The Commission while applying the right to self-determination to people of former Yugoslavia held that they are entitled to both internal and external self-determination, but indigenous people and minorities are entitled only to internal self-determination.¹¹⁴ In other words, the right to external self-determination does not vest in minorities and indigenous peoples. Self-determination is very much part of modern international law. Its legal character, after its inclusion in the UN as principle, has been confirmed, developed, and given more tangible form by consistent state practice and was embodied among the core principles of international law in the Friendly Relations Declaration.

Self-determination, as a result of the practice initially emerged as the legal foundation of the law of decolonization. As expressly affirmed by the ICJ in Western Sahara (Advisory Opinion) (1975)¹¹⁵, it became applicable to non-self-governing territories, trust territories and mandates, notwithstanding the differences and the qualifications of the respective constituent instruments. As such, it includes the right of the population of a territory freely to determine its future political status.

¹¹² Widell, Jonathan, "The Breakup of Yugoslavia and Premature State", October 22, 2004, Recognition <http://www.serbianna.com/columns/widell/001.sh>, (accessed on 22-02-2017).

¹¹³ *Ibid* and Friendly Relations Declaration, *supra* N. 32.

¹¹⁴ *Ibid*.

¹¹⁵ Western Sahara (Advisory Opinion) (1975), www.icj-cij.org/docket/index.php?sum=323, (accessed on 07-06-2016).

Furthermore, the Friendly Relations Declaration¹¹⁶ recognized that the territory of a colony or other non-self-governing territory, under the UN Charter, possessed a status separate and distinct from the territory of the State administering it. As a consequence of this qualification, it is generally concluded that the use of force by colonial powers including their assistance by third parties to prevent the exercise of self-determination of a colonized people, has become unlawful.

Likewise, the Independent International Commission on Kosovo, author of one of the most authoritative documents on Kosovo, assumed that people of Kosovo as people are entitled to right to self-determination and strong moral and political duty on the part of the international community extended to the realization of the right to self-determination for the people of Kosovo who has taken control over the running of their affairs.¹¹⁷ In other words the *ex post facto* recognition of their unilateral exercise of Right to Self-determination was accorded to the Kosovo by international community.¹¹⁸

The Supreme Court of Canada in its landmark judgment *Reference re Secession of Quebec*¹¹⁹ followed this approach when it was asked whether Quebec had a right to secede from Canada. It pointed out that the recognized sources of international law established that the right to self-determination of a people is normally fulfilled through exercise of internal self-determination. In addition, the principle of self-determination would enable people to separate from a state only

¹¹⁶ Friendly Relations Declaration, *supra* N.32.

¹¹⁷ American Society of International Law, “Kosovos-declaration-independence-self-determination-secession”, <https://www.asil.org/>, (accessed on 07-06-2016).

¹¹⁸ Cvijic, Srdjan, “Self-determination as a Challenge to the Legitimacy of Humanitarian Interventions: The Case of Kosovo” https://germanlawjournal.squarespace.com/s/GLJ_Vol_08_No_01_Cvijic.pdf, (accessed on 22-02-2017).

¹¹⁹ Quebec Advisory opinion, *supra* N. 24.

exceptionally, when the rights of the members of the people are violated in a grave and massive way. The Friendly Relations Declaration¹²⁰ does not authorize any action which would dismember independent states conducting themselves in compliance with the principle of self-determination of peoples and thus possessed of a government representing the whole people without distinction as to race, creed or color.

1.5.2 Rights of indigenous people

Self-determination for indigenous people was also viewed as secession from existing sovereign state and creation of a new state for indigenous people. This notion could not get support of international community due to principle of territorial integrity and strong opposition from great powers. Therefore, after considerable deadlock over decades, the advocates of indigenous movement shifted their focus on various internal autonomy solutions instead of secession and right to statehood. The indigenous peoples of Africa Coordinating Committee handled the African Union's recent opposition to the Declaration on the rights of Indigenous Peoples by saying that it had no intention of taking self-determination in perspective of allowing indigenous people to secede.¹²¹ Similarly, the Martinez Cobo Report¹²² provides that self-determination for indigenous peoples, in its different forms of autonomy within a state must be recognized as the prerequisite to their fundamental rights and the determination of

¹²⁰ Friendly Relations Declaration, *supra* N.32.

¹²¹ Brahm, Eric, "Self-Determination Procedures", *Beyond Intractability*, September 2005, <http://www.beyondintractability.org/essay/self-determination>. (accessed on 20-01-2017); Zainab Qureshi. Self Determination, International Law & the Indigenous. 1(3-4) PAK. J. INT'L L. 121, 123 (2011).

¹²² Introduction of The Martinez Cobo Report, commissioned by the UN in 1971 and published in 1984, <https://www.un.org/development/desa/indigenouspeoples/publications/2014/09/>. (accessed on 25-02-2017).

their own future. The report defined self-determination for indigenous people as under:-

Self-determination constitutes the exercise of free choice by indigenous peoples who must, to a large extent, create the specific context of this principle, which [does] not necessarily include the right to secede. This right may in fact be expressed in various forms of autonomy within the State.¹²³

This was radical change adopted by advocates of indigenous people which enabled them to muster support of international community and lead to the Declaration of Indigenous People Rights 2007.

Until September 2007, when the UNGA passed the Declaration on the Rights of Indigenous Peoples, there were no internationally accepted documents or instruments that applied the language of self-determination to indigenous peoples. Although the ILO reconsidered its integrationist approach toward indigenous peoples in the 1980s but states refused to agree to a Convention that included the term “self-determination”. Article 3 of the newly adopted Declaration on the Rights of Indigenous Peoples repeats the language of common Article 1 of the International Covenant on Civil and Political Rights and the International Covenant on Economic, Social and Cultural Rights, stating: “Indigenous 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”.¹²⁴ The earlier conventions had declared this right belonged to “all peoples”¹²⁵ The Declaration placed indigenous peoples among those entitled to self-determination by replacing the word “all” with “indigenous”.

¹²³ Ibid.

¹²⁴ Declaration on the Rights of Indigenous Peoples 2007: Art. 3.

¹²⁵ ICCPR 1966: Art. 1; ICESR 1966: Art. 1.

1.5.3 Rights of minorities

For grant of Right to Self-determination to minorities, the separation of a minority from parent state and its incorporation into another state can only be considered an exceptional and remedial solution as a last resort especially when a state lacks either the will or the power to enact and apply just and effective guarantees.¹²⁶ Permanent Court of International Justice provided remarkable jurisprudence on minority rights. In Polish Upper Silesia Case¹²⁷, it was held by the court that minorities were entitled to equality in fact as well as in law and their self-identification was only acceptable method of association. Similarly in Minority Schools in Albania Advisory Opinion¹²⁸ it was opined by the court that special need and equality in fact were closely interlocked and there is no true equality between majority and a minority if minority is deprived of its own institutions because differentiation for objective reason did not amount to discrimination.

A principle of democratic governance can only be considered as legitimate, if it is rooted in the will of the people.¹²⁹ This should be freely developed, genuinely expressed, and fairly recognized in accordance with the standards provided for in Art. 21 of UDHR, 1948 and in Article 25 of ICCPR.

Distinction between internal versus external self-determination is easy to draw and it can be known as which minority group is deprived of rights and such group is

¹²⁶ Report presented to the Council of the League of Nations by the Commission of Rapporteurs. <https://www.ilsa.org/jessup/jessup10/basicmats/aaland2.pdf>. (accessed on 07-06-2016).

¹²⁷ International Court of Justice, Series A: Collection of Judgments (1923-1930). www.icj-cij.org/en/pcij-series-a, (accessed on 28-05-2018).

¹²⁸ Permanent Court of International Justice, Thirty four (Ordinary) Session, Minority School in Albania, Advisory Opinion. www.worldcourts.com/pcij/eng/decisions/1935.04.06_albania.htm. (accessed on 28-05-2018).

¹²⁹ Ijezie, Chinonso, "Right of peoples to self-determination in the present international law", www.academia.edu/, (accessed on 07-06-2016).

entitled for right to external self-determination. Some minority groups have found strong support of great powers like, East Timor and Kosovo have obtained support of great powers i.e. United States and European Union and they achieved their secession through right to self-determination external, whereas, some other minorities groups like Chechnya, South Ossetia and Abkhazia could not succeed in exercising their right because of non recognition of their cause by great powers.¹³⁰

It is no doubt that selective and discriminatory application of right to self-determination is a weak aspect of international law especially when it is highly motivated by interest of great powers and politics in this regard. Thus demarcation of international borders and creation of new states cannot be ruled out on the basis of these interests though apparently on the guise of right to self-determination.

UDHR makes no explicit mention of minority rights. Though, preliminary draft of the Declaration proposed enshrining rights to minority educational, religious and cultural institutions as well as minority linguistic protection. But, due to opposition of many states, these provisions were omitted from the final version adopted by the UNGA in 1948.¹³¹ Instead, the UNGA transferred the matter of minority protection to the Sub-Commission on Prevention of Discrimination and Protection of Minorities, instructing it to undertake a detailed study of the problem of minorities.¹³²

In comparison to the UDHR, the ICCPR, which came into force in 1976, refers explicitly to minorities, but it provides minority rights in primarily

¹³⁰ Sterio, *supra*, N.21.

¹³¹ Macklem, Patrick, "Minority rights in international law", *International Journal of Constitutional Law*, July-October 2008: <https://doi.org/10.1093/icon/mon019> (accessed on 25-02-2017).

¹³² *Ibid.*

individualistic terms not as group rights. It contains Article 27, which provides that persons belonging to ethnic, religious or linguistic minorities would not be denied the right in community with other members of their group, to enjoy their own culture, profess and practice their own religion, or use their own language. The text of Article 27 thus provides that minority rights are individual rights to engage in particular activities in community with others, not collective rights of a minority population to a measure of autonomy from the larger society in which it is located. The individualistic character of Article 27 is highlighted by the fact that it can be made the basis of a complaint before the ICCPR's supervisory body and the Human Rights Committee (HRC) is empowered to hear only individual rather than collective claims. Therefore, right to self-determination being group right cannot be agitated through complaint before the HRC.¹³³

The UN Declaration on the Rights of Persons Belonging to National or Ethnic, Religious and Linguistic Minorities, proclaimed by the UNGA in 1992, have also interpreted the Article 27 of the ICCPR and its preamble explicitly refers to the article. It declares that minorities possess rights to enjoy their own culture, to practice their own religion, and to use their own language. Moreover, minorities have also right to participate in cultural, religious, social, economic and public life. They are also entitled to participate in decisions on the national and regional level and to associate with other members of their group and persons belonging to other

¹³³ Batalla, Ms. Anna. "The Right of self-determination – International Covenant for Civil and Political Rights and the jurisprudence of the Human Rights Committee", 29 September – 1 October 2006, The Hague, Netherlands. <http://www.unpo.org/downloads/AnnaBatalla.pdf>. (accessed on 25-02-2017).

minorities. But, like Article 27 of the ICCPR, this Declaration too provides these rights in individualistic terms vesting in people belonging to minorities.¹³⁴

1.5.4 Right to culture

The advocates of self-determination for indigenous people and minorities gradually shifted their focus to right to culture. It is worthwhile to mention that in 1966, when the UN adopted the ICCPR, it explicitly adopted language on cultural rights that was more specific than that in the UDHR. Article 27 of the ICCPR read as under:

“In those States in which ethnic, religious or linguistic minorities exist, persons belonging to such minorities shall not be denied the right, in community with the other members of their group, to enjoy their own culture, to profess and practice their own religion, or to use their own language.”

Although this language was an achievement for advocates of minorities and indigenous people rights, but the language was not fulfilling their needs. In the 1980s, indigenous and minorities advocates began to see the value of the right to culture models. This move was reinforced by various decisions by the HRC. The advocates brought a number of indigenous and minority rights claims to the HRC under Article 1’s self-determination provisions. The Committee denied admissibility under this provision, stating that self-determination could not provide the basis for a claim.¹³⁵

It is important to note that even mere federalism or autonomy in a state cannot address problems of a multicultural and multi-ethnic society especially in relation to its minorities and indigenous people, unless such federalism or autonomy

¹³⁴ Macklem, *supra* N. 131.

¹³⁵ Shikelman, Vera, “Geopolitics and Culture in the United Nations Human Rights Committee”, Chicago Law School, Chicago, USA, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2616026. (2001-2017) (accessed on 14-01-2017).

encompasses empowerment of people, management of competing multiple interests, designs fiscal equilibrium, institutionalizes peace, stops discrimination and strengthens liberal democracy, growth and development, besides that it should entrench the rule of law and constitutionalism in overall governance. Any mechanism for autonomy or self-government beyond the framework of constitutionalism might become counterproductive.¹³⁶

It is true that international law neither recognizes a federal form of right to self-determination nor a right to autonomy as such but heterogeneous and pluralistic composition of most states compels us to admit that the essence and spirit of self-determination could only be satisfied if a certain measure of cultural and political autonomy is given within the state.¹³⁷ The inherent tension between the obligation of every society to recognize pluralism and diversity and the desire of every culture whether majority, minority or indigenous to perpetuate its values and enforce conformity. In this context the role of a state is to mediate between these competing forces by demarcating boundaries and limits within which the conflict would be resolved.¹³⁸

1.6 Application of Right to Self-determination

The development of the right to self-determination into a rule and principle of international law requires interpretation and application of this principle for resolution of all political disputes in international legal order. Nonetheless, the interpretation and application of this principle in isolation and without consultation with the people, to

¹³⁶ Bhandari, *supra*, N.19.

¹³⁷ *Ibid.*

¹³⁸ Hunnum, *supra* N.20.

whom this right is to be given, has proved to be ineffective. International practice has proved that human rights approach as well as bilateral and consensual approach are essential and basic not only for application of this principle but also for getting the consent of a particular group of people about their desired mode of attainment of right to self-determination.

1.6.1 Human Rights Approach: Journey from the internal to external dimension

International Commission of Jurists in its report on separation of Bangladesh opined that if one constituent peoples of a state is denied equal rights and discriminated against, than their right to self-determination external would revive. Peoples in non-colonial situations are entitled to remedial secession from the existing independent state, where they suffer serious human rights violations including persistent oppression, targeted killings, domination, discrimination, marginalization, and other grave injustices in the state to which they belong.¹³⁹

Human rights approach to self-determination presents the best mean of advancing the right of competing claimants while protecting rights of non claimants.¹⁴⁰ It is now evident that the inherent limits of right to self-determination focuses on bilateral approach for application of this principle by giving way to dialogue and negotiation with other stakeholders.¹⁴¹

¹³⁹ International Commission of Jurists, *The Events in East Pakistan , 1971* available at icj.wpengine.netdna-cdn.com/.../1972/.../Bangladesh-events-East-Pakistan-1971-them, (accessed on 12-05-2016).

¹⁴⁰ Maguire, *supra*, N.22.

¹⁴¹ Solomon, *supra*, N.23; Buchanan, *supra* N.17.

In the case of *Kantangese Peoples' Congress v. Zaire*,¹⁴² the African Commission on Human and People Rights, while recognizing the right of the Katanga people of Zaire to secession, held that in the absence of concrete evidence of violations of human rights, the territorial integrity of Zaire should not be called to question and that the people of Katanga are denied the right to participate in Government as guaranteed by Article 13(1) of the African Charter, the Commission held the exercise of self-determination of the people must be compatible with the sovereignty and territorial integrity of Zaire. If there had been concrete evidence of extreme violations of human rights of the Katangese, the Commission would have held otherwise. Similar reasons were given by the Supreme Court of Canada in the case of *Reference Re Secession of Quebec*.¹⁴³

1.6.2 Bilateral Approach: Choice of people to the mode of their group right

All self-determination quests have proved to be successful where bilateral approach has been adopted and choice of people to the particular mode of their group right was obtained. Kosovo's unilateral declaration of statehood though got support of a large part of the international community but it was not the product of a bilateral coordination with the mother-state of Serbia; hence, Kosovo inherited problems of fighting. Moreover, it appeared unable to control parts of its territory, especially in districts where Serbians constituted the majority. Although unilaterally created, Kosovo had to grapple with issues of its sovereignty only through a bilateral track.

¹⁴² African Commission on Human and Peoples' Rights, Comm. No. 75/92 (1995), available at <http://www1.umn.edu/humanrts/africa/comcases/75-92.html> (accessed on 12-05-2016).

¹⁴³ Quebec Advisory Opinion, *supra* N. 24.

involving talks with Serbia and the signing of an EU brokered bilateral agreement between the two sides.¹⁴⁴

South Sudan declared its independence in 2011, seceding from the state of Sudan. In this case there was an attempt for the both Sudan and South Sudan to engage in a bilateral approach.¹⁴⁵ As such, independence came under an agreement with the mother-state of Sudan. In fact, Sudan's support was deemed critical. Still, even these bilateral steps did not ultimately put an end to differences with Sudan regarding the border demarcation in an oil-rich frontier-territory.

A Palestinian state has been endorsed by the UN and the wider international community but this should be the start and not the end of the Palestinian statehood journey.¹⁴⁶ UNSC has rejected the Palestinian bid for statehood and end to Israeli occupation.¹⁴⁷ Self-determination should always be coupled with peace and stability and not anymore based just on the assertion of the classical Montevideo statehood criteria¹⁴⁸ but also on other factors such as political and economic viability parameters. In the case of Palestinian statehood, this is shared by all interested

¹⁴⁴ Borgen, Christopher J, "Of Law and the Practice of Politics: Great Powers and the Rhetoric of Self-Determination in the Cases of Kosovo and South Ossetia", St. John's University School of Law, 8000 Utopia Parkway Queens, Ny 11439, <http://ssrn.com/abstract=1472068>. (accessed on 09-06-2016); Please see as well Dinah Shelton, "Self-determination in Regional Human Rights Law: From Kosovo to Cameroon", American Journal of International Law 105, No. 1 (2011).

¹⁴⁵ Dersso, Dr Solomon A. , "International law and the self-determination of South Sudan", Institute for Security Studies, Paper 231, February 2012. www.issafrica.org, (accessed on 10-06-2016).

¹⁴⁶ Committee on the Exercise of the Inalienable Rights of The Palestinian People, "The Right to Self-Determination of the Palestinian People", United Nations New York, 1979, https://www1.umn.edu/humanrts/Espiell_1978.pdf, (accessed on 10-06-2016).

¹⁴⁷ The Guardian International Edition, December 30, 2014. <https://www.theguardian.com/.../un-security-council-rejects-palestinian-statehood-bid>

¹⁴⁸ Under Article. 1 of the Montevideo Convention of 1933 On Rights and Duties of States, the essential attributes of a state as a person under International Law are: a permanent population; a defined territory; a Government; and a capacity to enter into relations with other States.

parties.¹⁴⁹ The international community has provided financial aid to the Palestinians and has long documented the economic growth in the West Bank and Gaza. Israeli politicians have underlined the role of economic prosperity in stability of Middle East, and economic cooperation between Israel and the Palestinian Authority was included in the Oslo accords signed between the parties.¹⁵⁰

Nevertheless, self-determination is limited by the assertion that any secession quests must be based on a bilateral and dialectic platform. Thus, in the case of Quebec, the Canadian Supreme Court affirmed these limits, ruling in favor of secession only in case of a failure of bilateral approach the closing of all channels of dialogue with the central government.¹⁵¹ In cases like Quebec and Canada, where secession is being asked in the framework of a democratic state respecting human rights and the rule of law, even a pro-secession majority in a referendum cannot unilaterally lead to such secession. Rather, if it materializes, it must be the fruit of a dialectic process with the main government. The latter is expected to respect the people's will and facilitate the process. Similar are the cases of Catalonia, Scotland, Gibraltar, and Puerto Rico, where any pleas of independence or autonomy acknowledge the fact that they have to be agreed by the central government through a bilateral process, engaging the central government's ultimate consent.¹⁵²

¹⁴⁹ Young, *Self-determination as non-domination Ideals applied to Palestine/Israel Iris Marion*, 2005 SAGE Publications (London, Thousand Oaks, CA and New Delhi) 1468-7968, Vol 5(2): 139-159;052112, www.sagepublications.com, (accessed on 10-06-2006).

¹⁵⁰ Hever, Shir, "How Much International Aid to Palestinians Ends Up in the Israeli Economy?", Aid Watch, September 2015, www.aidwatch.ps/sites/.../InternationalAidToPalestiniansFeedsTheIsraeliEconomy.pdf, (accessed on 10-06-2006).

¹⁵¹ Quebec Advisory Opinion, *supra*, N.24.

¹⁵² Betancor, Fernando, "Catalonia: A Flawed Strategy", February 26, 2015, <http://www.fdbetancor.com/2015/02/26/catalonia-a-flawed-strategy/> . (accessed on 10-06-2016).

This approach has been further strengthened by recent experience expedition in Libya. The fact that in the case of Libya, the Security Council endorsed for the first time the “responsibility to protect” doctrine, demonstrates the international community’s resolution not to tolerate mass atrocities, even if that means that a military intervention has to take place. This was an attempt to solve the crisis through resort to unilateral measures, such as Security Council resolutions and a military intervention. Once military operations began, all waiting disagreements regarding the strategy that should be followed towards the Qaddafi regime came to the surface. This in turn damaged the legal grounds and efficiency of the expedition on an international and domestic level.¹⁵³

In Egypt the dictatorial regime was overthrown and succeeded by military take over. The rise of Islamist powers posed the question of whether democracy is indeed feasible in all states and whether the overthrowing of a despot equals necessarily brings the inauguration of a period of more freedom or ultimately serves the interests of the West.¹⁵⁴ Likewise, in Tunisia, after the ouster of President Ben Ali, the country has been tormented by violence and high unemployment rates. As past experience has demonstrated in regions like Eastern Europe, enthusiasm for democracy embodied in unilateral self-determination initiatives such as demonstrations, riots, and ultimately the overthrowing of a ruling cast, is positive and necessary for change. Yet, it is not enough on its own to bring that change. It has to be followed by bilateral and dialectic concrete steps, aimed at strengthening, as in the cases of Egypt and Tunisia, civil

¹⁵³ Kuperman, Alan J., “A Model Humanitarian Intervention?: Reassessing NATO’s Libya Campaign”, *International Security*, Volume 38, Number 1, Summer 2013 pp. 105-136, <https://muse.jhu.edu/article/511627/pdf>, and Payandeh, Mehrdad, “The United Nations, Military Intervention, and Regime Change in Libya”, http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1930993, (accessed on 10-06-2016).

¹⁵⁴ Solomon, *supra* N.23.

society voices. This aspect is also termed as the inherent limits of self-determination which have been evolved by the international community out of their experience.¹⁵⁵

After experience of Libya, the international community has appeared to be less willing to intervene in Syria.¹⁵⁶ The United States, France and the United Kingdom all have acquiesced to the Syrian people's self-determination pleas and have acknowledged the Syrian opposition as the sole legitimate representative of the Syrian people. Their reluctance to intervene directly through military expedition or more actively diplomatically has made it clear that self-determination has limits.¹⁵⁷ The unlimited fragmentation of states may lead to non-viable new states and this cannot be condoned by international law. Similarly, secession of Somaliland from Somalia has not been received positively due to the fact that such secession would deprive Somalia of a region and it could function as a stimulating factor against Somalia's stability and economic viability.¹⁵⁸ The above cases make it clear that mere application of self-determination is not enough rather; the international community has to be convinced that the creation of a new state is the only way to end a civil war, human rights abuses, or an occupation and to foster peace and stability.

1.7 Conclusion

Self-determination means that people are entitled to make their own state and government and they have right to determine their own future and destiny subject to

¹⁵⁵ Ibid.

¹⁵⁶ Williams, Paul R, Ulbrick, J. Trevor, & Worboys, Jonathan, *Preventing Mass Atrocity Crimes: The Responsibility to Protect and the Syria Crisis, Case Western Reserve Journal Of International Law*, Vol. 45-2012, <http://ssrn.com/abstract=2174768>, (accessed on 11-06-2016).

¹⁵⁷ Ibid.

¹⁵⁸ Chonka,Peter,“Performance, protest and ‘postindependence nationalism in Hargeysa, capital city of the Republic of Somaliland”’, www.open.ac.uk/.../p-chonka-performance-protest-post-independence, (accessed on 11-06-2016).

right of other stakeholders including principle of territorial integrity of states. Its origin dates back to Declaration of Independence of USA, 1776 and in French revolution where it was adopted as a principle of annexation of territories replacing old practice of forceful occupation. In normative phase it developed and was attributed in mandate system under League of Nations, as core principle under UN charter for maintain international peace and stability and as right to democratic governance and for decolonization of people and territories. In treaty phase it was further developed as a fundamental group right on which all other human rights depend and was duly incorporated in various international human rights declarations and instruments. Besides that, its different modes were identified alongwith determination of the people qualified to make group to seek the Right to self-determination. Even the armed struggle of people entitled for right to self-determination was specifically exempted and safeguarded from the term of "Aggression" under the international law. However, terrorism cannot be resorted for waging war of liberation movement and rules of International Humanitarian law are applicable in this regard. ICJ has enough jurisprudence on Right to Self-determination. Alongwith all other human rights, it has now attained status of *jus cogen*.

Right to Self-determination has been admitted to different classification including its internal and external dimensions, minority and indigenous people rights as well as right to culture. In contemporary era, it has been deduced that the application of right to self-determination requires human rights approach and bilateral approach otherwise the very objective of right to self-determination cannot be achieved.

Chapter II:

HUMAN RIGHTS OBLIGATION OF STATES

2.1 Introduction

This chapter will discuss the Human Rights obligation of states under international law including obligation for the right to self-determination.

Nature and extent of the human rights obligations shall be discussed in second section. In third section tripartite typology of obligations shall be deliberated including obligations to respect, protect and fulfill in its first, second and third subsections respectively. Obligation of conduct and obligation of result shall be explained in fourth section. In fifth, sixth and seventh sections territorial and extra-territorial obligations of states, obligations of non-state actors and occupying powers shall consecutively be explained. In eighth section the obligation to promote equality and non-discrimination shall be discussed. Obligations of international community shall be dilated upon in ninth section alongwith obligations of developed and developing states in its first and second subsections. Human rights and self-determination as *erga omnes* obligations shall be explained in tenth and eleventh sections respectively. In last section the discussion shall be concluded.

2.2 Nature and Extent of the Obligations

Obligation means to follow the engagement and commitments of a nation state under International Human Rights Law.¹⁵⁹ The applicability and binding nature of

¹⁵⁹ Anthony D' Amato, "Concept of Human Rights in International Law". (Columbia Law Review, 82, No. 6, October 1982), 1112; please also see "Human Rights Advocacy and History of International

international human rights treaties to ratifying states is beyond any doubt and there is no ambiguity as well regarding the obligation of states and accountability for discharge their respective obligations.

The distinct nature of human rights requires that they must have an impact on relations between both the individual and the state and individuals among themselves. The relationship of individual-state is known as the vertical effect of human rights and it is the primary purpose of human rights to establish rules for relations between the individual and the state.¹⁶⁰ Nonetheless, several of these rights also have certain implications for relations among the individuals called as horizontal effect of human rights.¹⁶¹ It means that a government has an obligation to refrain from violating human rights as well as duty to protect the individual from any infringement by other individuals. The right to life, for example, implies that the government must take action to protect people against homicide by their fellow human beings.¹⁶² Similarly, Article 17(1) and (2) of the ICCPR obliges governments to protect people against unlawful interference with their privacy.

A state's potential to abuse its position of authority to the detriment of an individual's interests is the basis for Human Rights Law to insulate and protect the

Human Rights Standards: Government Obligations",
<http://humanrightshistory.umich.edu/accountability/obligations-of-governments/>, (accessed on 08.04.2017).

¹⁶⁰ Icelandic Human Rights Centre, "Definitions and Classifications", <http://www.humanrights.is/en/human-rights-education-project/human-rights-concepts-idea>, (accessed on 08.04.2017).

¹⁶¹ Mark Tushnet, "The issue of state action/ horizontal effect in comparative constitutional law", <http://icon.oxfordjournals.org/content/1/1/79.full.pdf+html>, (accessed on 08.04.2017).

¹⁶² Gonçalo de Almeida Ribeiro, "Direct And Indirect Effects of Fundamental Rights" <https://www.wzb.eu/sites/default/files/personen/herman.simon.20771/ribeiro>, (accessed on 08.04.2017).

later against state interference and abuse of power.¹⁶³ In this context, human rights are basically exercisable against the state which has the primary responsibility to respect, protect and fulfill human rights. All organs of the state whether executive, legislative and judicial and other public or governmental authorities, at national, regional or local level etc., are in a position to incur the responsibility of a state party with respect to human rights violations irrespective of the fact that whether these are economic, social and cultural rights or civil and political rights.

Since, human rights are based on a relation between two parties and two parties are the claimant of a right, hence, the entity that has an obligation is supposed to ensure that the claim is judiciously addressed. It is important to identify the beneficiaries of a right and the corresponding obligations of the entity that would address that claim. The ICCPR and ICESCR and related treaties provide the individual and community with a number of guarantees related to the rights. Each of these rights carries corresponding obligation by the state. Human rights standards need to be guaranteed by law, which can only be done by states. It is the essence of human rights to put obligations on states for certain minimum norms of conduct vis-a-vis not only vulnerable persons but for all persons.

2.3 Tripartite Typology of Obligations

It has been established that the goal of full realization of rights depends on the 'Tripartite Typology of Obligations'¹⁶⁴ that has established the goal of full realization

¹⁶³ Robert J. Delahunty, and John Yoo, "Against Foreign Law", (USA: Harvard Law School), http://www.law.harvard.edu/students/orgs/jlpp/Vol29_No1_Delahunty_Yoo.pdf, (accessed on 02-07-2016).

¹⁶⁴ Human Rights impose three different types of obligations on States: the obligations to respect, protect and fulfill and failure to perform any one of these three obligations constitutes a violation of

of human rights, into three types or levels of multi layered state obligations i.e. the obligations to respect, protect and fulfill as under:

2.3.1 Obligation to Respect

The obligation to respect entails obligations not to interfere with the enjoyment of the rights. It requires states to refrain from interfering directly or indirectly with the enjoyment of all human rights and freedom of the individual to use material resources exclusively or inclusively i.e., in association with others to satisfy basic needs or enjoyment of the right in question. States should respect rights-holders, their freedoms, autonomy, resources and liberty of action. Respecting rights obliges states parties, *inter alia*, not to adopt laws or other measures, and to repeal laws and rescind policies, administrative measures and programs that do not conform to the rights protected by the human rights treaties.¹⁶⁵ For example, to respect the right to social security, a state should avoid from engaging in any practice or activity that denies or limits equal access to adequate social security; arbitrarily or unreasonably interferes with self-help or customary or traditional arrangements for social security; or arbitrarily or unreasonably interferes with institutions that have been established by individuals or corporate bodies to provide social security.

such rights'. Theo van Boven, Cees Flinterman, and Ingrid Westendorp (eds), "The Maastricht Guidelines on Violations of Economic, Social and Cultural Rights", (SIM, Utrecht, 1996), para. 6; Committee on Economic, Social and Cultural Rights, "General comment No. 12: Right to Adequate Food (Art. 11)", (UN Doc. E/C.12/1999/5, Twentieth Session, 12 May 1999), Para. 15; Committee on Economic, Social and Cultural Rights, "General Comment No. 13: the Right to Education (Article 13 of the Covenant)", (UN Doc. E/C.12/1999/10, Twenty-first Session, Volume 94 Number 885, Spring 2012, 8 December 1999), paras. 46-47.

¹⁶⁵ Office of the United Nations High Commissioner for Human Rights, "The Right to Health Fact Sheet No. 31", <http://www.ohchr.org/Documents/Publications/Factsheet31.pdf>, (accessed on 02.07.2016).

2.3.2 Obligation to Protect

The obligation to protect requires states to take measures that prevent third parties including individuals, groups, corporations and other entities as well as agents acting under their authority from interfering in any way with the rights. Both the Inter-American Court of Human Rights and the European Court of Human Rights have also interpreted the relevant regional human rights treaties as imposing positive obligations upon states to ensure the enjoyment of civil and political rights. The same principle applies to the rights, especially for vulnerable individuals and groups. The obligation to protect, therefore, generally entails the creation and maintenance of an atmosphere or framework by an effective interplay of laws, regulations and other measures to enable individuals and groups to realize their rights and freedoms freely.¹⁶⁶

This requires that the state should protect against harmful activities carried out by such non state actors and prevent violations by such actors by creating and implementing the necessary policy, legislative, regulatory, judicial, inspection and enforcement measures and frameworks. If violations by any non state actor occur, the state must not acquiesce in such violations. It is obliged to take appropriate measures or to exercise due diligence to prevent, punish, investigate the harm caused by such actors and provide effective remedy. This might be in the form of monetary compensation or restitution of property; rehabilitation i.e. legal, psychological, medical and social measures; satisfaction i.e., truth commissions, criminal prosecution

¹⁶⁶ Professor Andrew Clapham and Mariano Garcia Rubio, "The Obligations of States with Regard to Non-State Actors in the Context of the Right to Health", (Geneva: Graduate Institute of International Studies, Health and Human Rights Working Paper Series No 3, 2002), http://www.who.int/hhr/Series_3%20Non-State_Actors_Clapham_Rubio.pdf. (accessed on 02.07.2016).

of perpetrators etc; and guarantees of non-repetition i.e., amendment of laws, abolition of certain institutions.¹⁶⁷

To prevent such abuses an effective regulatory system must also be established including framework legislation, independent monitoring, genuine public participation and imposition of penalties for non-compliance. One example of the violation of the right to social security is the failure to regulate the activities of individuals or groups so as to prevent them from violating this right to social security.

2.3.3 Obligation to Fulfill

The obligation to fulfill requires states to adopt appropriate legislative, administrative, budgetary, judicial, promotional and other measures including relevant national policies to ensure the full realization of the rights of those who cannot secure rights through their personal efforts. The obligation to fulfill can be subdivided into the obligations to facilitate, promote and provide. The obligation to facilitate requires states, *inter alia*, to take positive measures that enable and assist individuals and communities to enjoy their rights. The obligation includes according sufficient recognition of the rights enshrined in human rights treaties within the national, political and legal systems, preferably by way of legislative implementation; adopting a national strategy and plan of action to realize the rights; ensuring that systems relevant to the rights will be adequate, and accessible to everyone. This also includes

¹⁶⁷ Dinah Shelton, "Protecting Human Rights in a Globalized World", (Boston College Law School, Student Publications), https://www.bc.edu/content/dam/files/schools/law/lawreviews/journals/bciclr/25_2/06_FMS.htm, (accessed on 02-07-2016).

obligation to promote which requires states to undertake actions that create, maintain and restore the realization of all of the rights.¹⁶⁸

2.4 Obligations of Conduct and Result

The primary sources of international law include international treaty law, international customary law and the general principles of law wherefrom human rights obligations for states can be derived.¹⁶⁹ An obligation to achieve certain specific target is called obligation of result.¹⁷⁰ It means the obligation to attain a particular outcome through active implementation of policies and programs. Non achievement of target cannot necessarily put the state in question under blame and therefore cannot always be called a violation of human rights. Certain obligations of result may be mere missions that can be politically important for the human right, but do not help us to determine a violation. A state has to carry out this action, or it has to abstain from that action. These obligations are called obligations of conduct and to discharge such obligation, a state has to undertake a specific step i.e., acts or omission. The concepts of obligation of conduct and obligation of result provide an effective tool for monitoring the implementation of the rights.¹⁷¹

¹⁶⁸ Office of the United Nations High Commissioner for Human Rights, "Handbook for National Human Rights Institutions", (New York: United Nations and Geneva, Professional Training Series No. 12, 2005), <http://www.ohchr.org/Documents/Publications/training12en.pdf>. (accessed on 02.07.2016).

¹⁶⁹ G S Goodwin-Gill, "Obligations of conduct and result", in P. Alston and K. Tomasevski (eds), *The Right to Food*, Utrecht, (The Netherlands Institute of Human Rights and Martinus Nijhoff, 1985), 111-118; International Law Commission, "Responsibility of States for Internationally Wrongful Acts 2001" supra N. 66.

¹⁷⁰ Human Rights Watch, "Discrimination, Inequality, and Poverty-A Human Rights Perspective", accepted under the "Addressing Inequalities", (Global Thematic Consultation, 2012), <https://www.hrw.org/news/2013/01/11/discrimination-inequality-and-poverty-human-rights>, (accessed on 08.04.2017).

¹⁷¹ "Circle of Rights Economic; Social and Cultural Rights Activism: A Training Resource, Obligations of States and Nonstate Actors", (Module 9), <http://hrlibrary.umn.edu/edumat/IHRIP/circle/modules/module9.htm>, (accessed on 08.04.2017).

There is an internationally wrongful act of a state when conduct consisting of an action or omission is attributable to the state under international law and it constitutes a breach of an international obligation of the state. There is a breach of an international obligation by a state when an act of that state is not in conformity with what is required from it by that particular obligation, regardless of its origin or character.¹⁷² It follows that to constitute breach by a state, of an international obligation, requires adopting a particular course of conduct which is otherwise not in conformity with what was required by that obligation.

On the other hand, with respect to the obligation of result, there is a breach by a state of an international obligation requiring it to achieve, by means of its own choice, a specified result if, by the conduct adopted, the state does not achieve the result required of it by that obligation.¹⁷³ In other words it can be said that in case of obligation of conduct of a state the action and *modus operandi* of that state is required to be in accordance with international law of Human Rights but in case of obligation of result the action or *modus operandi* is not relevant at all rather the outcome or realization of these rights must be compliant to the international law.

Another classification in this behalf is classic and social rights. Classic rights are often seen to require the non-intervention of the state i.e., negative obligation and social rights as requiring active intervention on the part of the state i.e., positive obligations.¹⁷⁴ In other words, classic rights require an obligation for the state to

¹⁷² United Nations General Assembly Resolution 56/83 of 12 December 2001, and corrected by document A/56/49(Vol. I)/Corr.4. “Responsibility of States for Internationally Wrongful Acts, 2001” <https://www.ilsa.org/jessup/jessup17/Batch%201/Articles%20of%20Responsibility%20of%20States%20for%20In>, (accessed on 08.04.2017).

¹⁷³ Ibid.

¹⁷⁴ Malcolm Langford, “Domestic Adjudication and Economic, Social and Cultural Rights: A Socio-Legal Review”, <http://www.surjournal.org>, (assessed on 08.04.2017).

abstain from certain actions, while social rights require it to provide certain guarantees. Classic rights are also described in terms of a duty to achieve a given result i.e. obligation of result and social rights in terms of a duty to provide the means obligations of conduct. Classic rights such as civil and political rights often require considerable investment by the state. The state does not merely have the obligation to respect these rights, but must also guarantee that people can effectively enjoy them. Hence, the right to a fair trial, for instance, requires well-trained judges, prosecutors, lawyers and police officers, as well as administrative support. Another example is the organization of elections, which also entails high costs.¹⁷⁵

On the other hand, most social rights contain elements that require a state to abstain from interfering with the individual's exercise of the right. The right to food includes the right for everyone to procure their own food supply without interference; the right to housing requires the right not to be a victim of forced eviction; the right to work encompasses the individual's right to choose his/her own work and also requires the state not to obstruct a person from working and to refrain from measures that would increase unemployment; the right to education requires the freedom to establish and direct educational establishments; and the right to the highest attainable standard of health requires the obligation not to interfere with the provision of health care.¹⁷⁶

¹⁷⁵ Human Rights Council, "Promotion and Protection of all Human Rights, Civil, Political, Economic, Social and Cultural Rights, including the Right to Development, Protect, Respect and Remedy: a Framework for Business and Human Rights", (Eighth Session, Agenda Item 3), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/8session/A-HRC-8-5.doc>, (accessed on 08.04.2017).

¹⁷⁶ Demelash Shiferaw and Yonas Tesfa, "Theories of Human Rights and Justification", (Abyssinia Law, September 04, 2012), <http://www.abyssinialaw.com/study-on-line/item/943-theories-of-human-rights-and-justification>, (accessed on 08.04.2017); please also see Iceland Human Rights Centre, *supra* N.160.

2.5 Territorial and Extra-Territorial Application

Under Article 2(1) of the ICCPR, States Parties undertake to respect and ensure these rights to all individuals within their territory and subject to their jurisdiction. The HRC interprets it to mean that the State party must respect and ensure these rights to all individuals within its power or effective control of that State Party, even if they are not within the state party's territorial jurisdiction under its constitution.¹⁷⁷

HRC has most widely discussed the concept of the power or effective control in relation to deployment of security forces by States beyond their borders, particularly when such forces engage in peace keeping operations under UN auspices. The concept applies whenever the forces of a state party exercise power or effective control over individuals outside the state party's territory irrespective of the mode of acquisition of such power or the effective control.¹⁷⁸ In thirteen different cases, the Committee has upheld the extraterritorial application of the ICCPR.¹⁷⁹

Similarly, the ICJ has upheld the obligation of states to adhere to the rights given in the ICCPR while exercising their jurisdiction outside their own territories. In its advisory opinion about Legal Consequences of the Construction of a Wall in the

¹⁷⁷ Human Rights Committee, "General Comment 31", (UN Doc. CCPR/C/74/CRP.4/Rev.629, March 2004), para. 10.

¹⁷⁸ Ibid., and "University of Minnesota Human Rights Library", <http://hrlibrary.umn.edu/gencomm/hrcom31.html>, (accessed on 15.03.2017).

¹⁷⁹ Please see: *Ng v. Canada*, 5 November 1993, (UN Doc. A/49/40, Vol. II), 189; *Kindler v. Canada*, HRC 31 July 1993, (UN Doc. A/48/50), 138; *López Burgos v. Uruguay*, HRC 6 June 1979, (UN Doc A/36/40), para. 12.1; *Celiberti de Casariego v. Uruguay*, (UN Doc. CCPR/C/13/D/52/1979), paras. 12.1-12.3; *Concluding Observations on Cyprus*, (UN Doc. CCPR/C/79/Add.88); *Concluding Observations on Israel*, (UN Doc. CCPR/C/79/Add.93), para. 10, and (UN Doc. CCPR/CO/78/ISR), para. 11; *Concluding Observations on Belgium*, (Doc. CCPR/C/79/Add.99), para. 14; *Concluding Observations on Croatia*, (UN Doc. CCPR/C/79/Add.15), para. 10; *Concluding Observations on Moldova*, (UN Doc. CCPR/CO/75/MDA), para. 4; *Concluding Observations on Bosnia-Herzegovina*, (UN Doc. CCPR/C/79/Add.14), paras. 4-5; *Concluding Observations on Croatia*, (UN Doc. CCPR/C/79/Add.15), para. 6; *Concluding Observations on Serbia-Montenegro*, (UN Doc. CCPR/C/79/Add.16), paras. 4-7; *Concluding Observation on Lebanon*, (UN Doc. CCPR/C/78), para. 12.

Occupied Territories¹⁸⁰, the ICJ followed the jurisprudence and reasoning of the HRC in declaring the Israeli government's obligation to fulfill its obligations under the ICCPR in the occupied territories while rejecting Israel's claim that it did not exercise effective control in those areas. On the other hand the ICESCR, unlike the majority of other human rights treaties including the ICCPR, under Article 2(1), does not make any explicit reference to territory or jurisdiction hence scope of its application is not specified.¹⁸¹

In above referred advisory opinion on the Wall, the ICJ implicitly treated the rights contained in the ICESCR that their obligations are exclusively territorial altogether.¹⁸² But in its landmark judgment in case titled “Democratic Republic of Congo v Uganda”¹⁸³ ICJ confirmed that international human rights as instruments are applicable in respect of acts done by a state in the exercise of its jurisdiction outside its own territory, particularly in occupied territories.

About extraterritorial scope, Committee on ICESCR concluded that obligation to respect is clearer and more firm whereas, the obligation to protect and fulfill in different situations i.e. sanctions, occupation, trade, development cooperation and action of international organizations are still indeterminate and undefined and as such they are weak.¹⁸⁴

¹⁸⁰ See Construction of a Wall, *supra* N. 97.

¹⁸¹ Marko Milanović, “From Compromise to Principle: Clarifying the Concept of State Jurisdiction in Human Rights Treaties”, <http://ssrn.com/abstract=1139174>, (accessed on 02.07.2016).

¹⁸² Construction of a Wall, *supra* N. 97.

¹⁸³ International Court of Justice, “Case Concerning Armed Activities on the Territory of the Congo (Democratic Republic of the Congo v. Uganda)”, (Judgment, 19 December 2005), <http://www.icj-cij.org/docket/index.php?p1=3&p2=3&k=51&case=116&code=co&p3=4&lang=en>, (accessed on 02.07.2016).

¹⁸⁴ Coomans, Fons, “The Extraterritorial Scope of the International Covenant on Economic, Social and Cultural Rights in the Work of the United Nations Committee on Economic, Social and Cultural

The European Court of Human Rights has also ruled in affirmative on the question of whether state parties to the European Convention on Human Rights and Fundamental Freedoms must respect and ensure rights under that Convention extraterritorially. The Court has pronounced that in certain circumstances states can be held responsible for extraterritorial violations.¹⁸⁵ One of the instances applied by the Court is where the state has “effective control” over a particular territory or individual and it applies the European Convention.¹⁸⁶ Hence, states obligations under international Human Rights Law in particular are not territorially limited.

2.6 Obligations of Non State Actors

As discussed earlier that international human rights obligations have been devised with states as duty holders and primarily responsible.¹⁸⁷ Hence, these obligations are tailor-made for states and they correspond to the method in which states function and capable to discharge these obligations. Placing human rights obligations to non state actors cannot be based on a similar notion that all NSAs possess same features as states have that make them capable to incur human rights obligations.¹⁸⁸ Therefore, principle of due diligence has been evolved which can be restrictively or expansively

Rights” Human Rights Law Review, 2011, Oxford University Press, www.corteidh.or.cr/tablas/r26506.pdf, (accessed on 20-05-2018).

¹⁸⁵ Council of Europe, “Case-law of the European Court of Human Rights”, (Updated: June 2015), www.echr.coe.int, (accessed on 02.07.2016).

¹⁸⁶ Ibid, *Drozd & Janousek v. France and Spain*, (ECtHR, Case No. 21/1991/273/344, Judgement of 27 May 1992), para. 91; “Loizidou v. Turkey” supra N.30, para. 62; *Ilascu and others v. Moldova and Russia*, (Application no 48787/99, ECtHR, Judgement of July 2004), para. 311; *Issa & others v. Turkey*, (Application no 31821/96; admissibility decision, ECtHR, 30 May 2000), 55; *Öcalan v. Turkey* (Application No. 46221/99, ECtHR, Judgement of 12 May 2005), paras 91, 190.

¹⁸⁷ Please see Section 2.2.

¹⁸⁸ Philip Alston, “The “Not-a-Cat” Syndrome: Can the International Human Rights Regime Accommodate Non-State Actors?”, (Philip Alston (ed.), Oxford 2005), 3-36, <http://www.ivr.uzh.ch/dam/jcr:ffffffff-abae-0dd7-ffff-fffffd5220c3b/03%20-%20Not%20a%20> (accessed on 07.04.2017).

interpreted, as the particular facts and circumstances of a case may require in order holding relevant entity responsible for their actions or omissions.¹⁸⁹

In order to determine as to the extent of human rights obligations on non-state actors, it is necessary to first know the capacity of an entity enabling us to impose human rights obligations on it. Extraterritorial obligations under international Human Rights Law¹⁹⁰ have provided insight into key elements on which the imposition of international obligations rests. First and foremost, obligations are caused by the exercise of effective territorial control, in line with principle that power comes with responsibility.¹⁹¹ There is difference of opinion on the exercise of effective control over a territory and exercise of particular governmental functions is enough to attract the human rights obligations.¹⁹² Under Common Article 3 of the Geneva Conventions already imposes certain obligations on non-state actors being parties to a conflict irrespective of territorial control.¹⁹³ Nonetheless, the primacy of effective territorial control or formal authority in attracting human rights obligations exists even when that formal authority itself is grounded in international law.

¹⁸⁹ The Due Diligence Principle Under International Law, https://www.researchgate.net/publication/228176970_The_Due_Diligence_Principle_Under_International_Law. (accessed on May 29, 2018).

¹⁹⁰ Joana Abrisketa and María Nagore Casas, "Extraterritorial Application of Human Rights Treaties", <http://www.oxfordbibliographies.com/view/document/obo-9780199796953/obo-9780199796953-0136.xml>; Marko Milanovic, "Extraterritorial Application of Human Rights Treaties Law, Principles, and Policy", (Oxford University Press), <https://global.oup.com/academic/product/extraterritorial-application-of-human-rights-treaties>; Michael J. Dennis, "Application Of Human Rights Treaties Extraterritorially To Detention Of Combatants And Security Internees: Fuzzy Thinking All Around?", <http://nsuworks.nova.edu/cgi/viewcontent.cgi?article=1545&context=ilsajournal>. (all accessed on 07.04.2017).

¹⁹¹ *Al-Skeini v. United Kingdom*, (App. No. 55721/07, HUDOC, 74– 80 July 7, 2011), <http://hudoc.echr.coe.int/sites/eng/pages/search.aspx?i=001-105606>, (accessed on 07.04.2017).

¹⁹² Yael Ronen, "Human Rights Obligations of Territorial Non-State Actors", (Cornell International Law Journal Volume 46, Issue 1, Winter 2013), Article 2, <http://scholarship.law.cornell.edu/cilj>, (accessed on 07.04.2017).

¹⁹³ Geneva Convention for the Amelioration of the Condition of the Wounded and Sick in Armed Forces in the Field, art. 3, (Aug. 12, 1949); Geneva Convention for the Amelioration of the Condition of Wounded, Sick and Shipwrecked; Members of Armed Forces at Sea, (Aug. 12, 1949); Geneva Convention Relative to the Treatment of Prisoners of War, art. 3, (Aug. 12, 1949); and Geneva Convention Relative to the Protection of Civilian Persons in Time of War, art. 3, (Aug. 12, 1949).

2.7 Obligations of Occupying Powers

As discussed above, there is strong jurisprudence to support extraterritorial human rights obligations in a wide range of situations,¹⁹⁴ but again there are certain circumstances in which extraterritorial applicability is not clear.¹⁹⁵ In spite of that, military occupation is perhaps one of the least controversial circumstances that the occupying power must abide by International Human Rights Law. This has been confirmed by numerous international bodies, including the ICJ.¹⁹⁶ The reason for this to rest on the premise that the territorial occupying power¹⁹⁷ is acting as the administrator of the territory and as such, must abide by human rights obligations in its dealing with individuals in the territory under its control.

The European jurisprudence, in particular, has provided more than one mode to the finding of extraterritorial applicability of Human Rights Law, as seen in the differing tests advanced most explicitly in the case law of *Al-Skeini v. UK*.¹⁹⁸ The

¹⁹⁴ Noam Lubell, *Extraterritorial Use of Force Against Non-state Actors*, (Oxford: Oxford University Press, 2010), 8. Please see as well report of International Committee of Red Cross, “Occupation and Other Forms of Administration of Foreign Territory” <https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>. (accessed on 29-05-2018).

¹⁹⁵ Marko Milanovic, *Extraterritorial Application of Human Rights Treaties: Law, Principles, and Policy*, (Oxford: Oxford University Press, 2011).

¹⁹⁶ ICJ, Construction of a Wall case, *supra*, N. 97, paras 107–112; ICJ, *DRC v. Uganda*, *supra*, N.183, paras 216–220; Please also see Human Rights Committee, “Concluding Observations of the Human Rights Committee: Israel”, (18 August 1998, CCPR/C/79/Add.93); Committee on Economic, Social and Cultural Rights, “Concluding Observations of the Committee on Economic, Social and Cultural Rights: Israel”, (31 August 2001, E/C.12/1/Add.69); Mr. Walter Kalin, “Report on the Situation of Human Rights in Kuwait under Iraqi Occupation”, (Special Rapporteur of the Commission on Human Rights, in Accordance with Commission Resolution 1991/67, E/CN.4/1992/26, 15 January 1992), paras. 55–59; European Court of Human Rights (ECtHR), *Loizidou v. Turkey*, *supra* N.30, paras. 62–64; ECtHR, *Cyprus v. Turkey*, (Application No. 25781/94, Judgment of 10 May 2001), para.442.

¹⁹⁷ Occupying power is also termed as “Territorial Non-state Actor”.

¹⁹⁸ *The Queen ex parte Al-Skeini and Others v. Secretary of State for Defense*, (England and Wales Court of Appeal [2005] EWCA Civil 1609, 21 December 2005); Opinions of The Lords of Appeal for Judgment, *Al-Skeini and Others v. Secretary of State for Defense*, and *Al-Skeini and Others (Appellants) v. Secretary of State for Defense (Respondent)*, (Consolidated Appeals), (13 June 2007, [2007] UKHL 26); ECtHR, *Al-Skeini and Others v. the United Kingdom*, (Application No. 55721/07, Judgment of 7 July 2011); *Ibid*.

first test is that of ‘state agent authority’, and the European Court of Human Rights (ECtHR), using the term ‘state agent authority and control’,¹⁹⁹ Another test is that of ‘effective control over an area’, referring to situations ‘when, as a consequence of lawful or unlawful military action, a State exercises effective control of an area outside that national territory’. The Court has created a significant difference between the two tests i.e., the ‘state agent authority’ test creates obligations only with regard to the rights relevant to the situation of that individual, whereas under the ‘effective control over an area’ test, the controlling state has the responsibility under Article 1 to secure, within the area under its control; all the rights set out in the Convention and those additional protocols which it has ratified.²⁰⁰ At first sight, situations of military occupation appear to be a prime example in which the ‘effective control over an area’ test is satisfied; indeed, it was a previous case dealing with occupation that at least in part formed the basis for the approach in the above case.

After all, the essence of occupation revolves around the Occupying Power’s control of the area, as is clear from Article 42 of the Hague Regulations that a territory is considered occupied when it is actually placed under the authority of the hostile army and the occupation extends only to the territory where such authority has been established and can be exercised. Accordingly, one could be forgiven for assuming that a military occupation might automatically be considered a situation in which human rights obligations are applicable as a result of effective control over the area.

In particular, the United Kingdom assumed authority and responsibility for the maintenance of security in South East Iraq. In these exceptional circumstances, the

¹⁹⁹ ECtHR, *ibid Al-Skeini*, paras. 133-137.

²⁰⁰ *Ibid.*, Para. 138; ECtHR, *Cyprus v. Turkey*, *supra* N.196, Para.442.

Court considers that the United Kingdom, through its soldiers engaged in security operations in Basra during the period in question, exercised authority and control over individuals killed in the course of such security operations, so as to establish a jurisdictional link between the deceased and the United Kingdom for the purposes of Article 1 of the Convention.²⁰¹

An occupying power cannot abstain from its responsibilities under the Fourth Geneva Convention towards protected persons even through agreement with the relevant authorities of the occupied territories.²⁰² The formal authority of the occupying power, which originates from its effective control under the law of occupation giving rise to its status as an occupying power entailing to a presumption of effective control as far as international Human Rights Law is concerned.²⁰³

If the local authorities of the occupied territory exercise powers granted to them under an agreement with the occupying power in a manner which violates the rights of individuals under its control, it may be inferred that the occupying power is responsible for that violation. Whereas, if the local authorities are capable of acting at their own discretion, practically than imposing the responsibility to the occupying power beyond the mere obligation to protect would not serve any purpose. Independence of a territory does not substitute the exclusivity of control of the occupying power. For example the Transnistrian²⁰⁴ authorities are though responsible

²⁰¹ ECtHR, *Al-Skeini*, supra 198, Para. 149.

²⁰² Geneva Convention Relating to the Protection of Civilian Persons in Time of War, August 12, 1949.

²⁰³ International Committee of Red Cross, "Occupation and Other Forms of Administration of Foreign Territory", (Switzerland: Geneva, Report prepared and edited by Tristan Ferraro Legal adviser), <https://www.icrc.org/eng/assets/files/publications/icrc-002-4094.pdf>, (accessed on 07.04.2017).

²⁰⁴ Transnistria is a tiny country wedged into the West of Moldova, bordering Ukraine. It has its own currency, flag and Government, but not known much. They declared their independence from Moldova in 1990, and fought a war until 1992. Most countries refuse to recognize their independence but they remain close friend of Russia.

under Human Rights Law; but it does not necessarily absolve the responsibility of the Russia for her own acts within the region.²⁰⁵ Another theory propounded by Alston²⁰⁶ in this behalf is that international Human Rights Law binds a group with a known political structure exercising effective control over territory and population. He suggested that in certain contexts it is appropriate to address the activities of such groups within the human rights regime. He further emphasizes that in an era when NSAs are getting ever more significant in world affairs, the HRC risks handicapping itself considerably if it does not respond in a realistic and principled manner. He clarified that criticism of such groups and insisted that they should respect international Human Rights Law, should not be taken them at par with states or gives them legitimacy. Thus, addressing such occupying powers within the human rights context could mean sending complaints to them regarding executions and calling for them to respect relevant norms.²⁰⁷

In Somalia, the State government failed to exercise effective control over any part of the state's territory and was succeeded by various occupying powers. In other areas, breakaway entities exercise effective territorial control independent of the state government, e.g. Transnistria in Moldova²⁰⁸, the Turkish Republic of Northern Cyprus in Cyprus,²⁰⁹ and, the LTTE in Sri Lanka until 2009.²¹⁰ Occupying powers of a

²⁰⁵ Supreme Court of USA, *Cherokee Nation v. Georgia*, (US: US Law, LII, Legal Information Institute, Cornell University Law School), <https://www.law.cornell.edu/supremecourt/text/30/1>, (accessed on 05.07.2016).

²⁰⁶ Philip Alston, "Special U.N. Rapporteur on Extrajudicial, Summary or Arbitrary Executions", (Human Rights Council, Fourteenth Session, Agenda item 3), <http://www2.ohchr.org/english/bodies/hrcouncil/docs/14session/A.HRC.14.24.Add6.pdf>, (accessed on 05.07.2016).

²⁰⁷ *Ibid.*

²⁰⁸ Transnistria, *supra* N. 204.

²⁰⁹ Anastasios A. Antoniou, "The Cyprus Conflict in the Context of International Law as a Discipline of Crisis", (Working Papers on Public International Law, March 3, 2014), <https://ssrn.com/abstract=2404102> or <http://dx.doi.org/10.2139/ssrn.2404102>, (accessed on

different character altogether include the Palestinian Authority in the West Bank and the Hamas regime in the Gaza Strip. The Palestinian Authority operates in non-sovereign territory under Israeli occupation but in many respects independently of it, while the Hamas regime exercises effective territorial control to the exclusion not of a state but of the Palestinian Authority, which is recognized as the representative of the Palestinians' right to self-determination.²¹¹ Therefore, it cannot be denied by any stretch of arguments that human rights obligations extend to a state who has acquired control over a disputed territory through a formal agreement or otherwise.

2.8 Obligation to Promote Equality and Non-Discrimination

One of the basic components of obligations of states is non-discrimination.²¹² The principle of non-discrimination for the implementation and enforcement of human rights underscore the fact that everyone is entitled to the enjoyment of human rights irrespective of gender, religion, ethnic, color, social or national origin, political or other opinion, property, birth or any other status. This principle also prohibits distinctions, exclusions, restrictions and limitations etc., in the discharge of a state's obligations.²¹³ Moreover, states are also obligated to eradicate discrimination by abolishing any discriminatory laws or regulations and eliminate discrimination by

15.04.2017); Tamkoc Metin, "The Turkish Cypriot State: The Embodiment of Right to Self-determination", K. Rustom & Brothers, London, 1988, 41-44.

²¹⁰ Mapping Militant Organizations, "Liberation Tigers of Tamil Elam", <http://web.stanford.edu/group/mappingmilitants/cgi-bin/groups/view/225>, (accessed on 05.07.2016).

²¹¹ Lubell, *supra*, N. 194.

²¹² Committee on Economic, Social and Cultural Rights, "General Comment no. 20: Non-discrimination in economic, social and cultural rights", Art. 2, Para 2, of the International Covenant Volume 94, Number 885, Spring 2012, on Economic, Social and Cultural Rights, (Forty-second session, 2 July 2009, E/C.12/GC/20); Committee on Economic, Social and Cultural Rights, "General Comment no. 14", above note 60, paras. 12(b), 18-19.

²¹³ Office of High Commissioner for Human Rights, "The Right to Equality and Non-discrimination in the Administration of Justice", <http://www.ohchr.org/Documents/Publications/training9chapter13en.pdf>, (accessed on 08.04.2017); please also see Li Weiwei, *supra* N.44.

refraining from discriminatory practices in implementing laws, regulations and programs without delay.

Since all human beings are born free and equal in their dignity and rights, all human rights are emphatic on the principles of non-discrimination and equality which are included in various international human rights instruments. Non-discrimination and equality are key factors of human rights protection which states must respect, irrespective of their legal traditions and domestic law.²¹⁴

The rights under ICCPR and IESCR are based on the principle of non-discrimination. Therefore, non-discrimination alongwith equality constitutes a basic and general principle relating to the protection of human rights. These two principles apply to all of the rights guaranteed under the both of the Covenants as well as in other international human rights instruments. It is true that the principles of equality and non-discrimination can be differentiated but there is no doubt that prohibition of non-discrimination is taken as the negative restatement of the principle of equality. In other words it can be said that equality and non-discrimination are positive and negative statements of the same principle as the goal of equality is usually achieved in the first instance through a prohibition on discrimination.²¹⁵

It is appropriate to mention that the concept of principle of equality does not mean the blind equality as expounded by Permanent Court of International Justice in

²¹⁴ Christopher McCrudden, "The New Concept of Equality", (UK: Academy of European Law, ERA Congress Centre, Oxford University, 2003).
http://www.eracomm.eu/oldoku/Adiskri/02_Key_concepts/2003_McCradden_EN.pdf, (accessed on 05.07.2016).

²¹⁵ Office of the United Nations High Commissioner for Human Rights, "The Right to Equality and Non-Discrimination in the Administration of Justice", in "Human Rights in the Administration of Justice: A Manual on Human Rights for Judges, Prosecutors and Lawyers", <http://www.ohchr.org/Documents/Publications/training9chapter13en.pdf>, (accessed on 05.07.2016).

its advisory opinion on Minority Schools in Albania.²¹⁶ It was stated that equality in law precludes discrimination of any kind but it may involve the necessity of differential treatment in order to attain a result which establishes equilibrium between different statutes.

2.9 Obligations of International Community

Article 2(1) of ICESCR acknowledges that certain steps required from states will be initiated through co-operation and international assistance especially in economic and technical fields. This has been interpreted to give birth to the right to international assistance and co-operation. The origins of this right can be found in Article 1 of the UN Charter, which states that one of the purposes of the UN is to achieve international cooperation for solving international problems of economic, social, cultural or humanitarian character alongwith promotion and encouragement of respect for human rights and fundamental freedoms.²¹⁷ The provision of this right is further contemplated through Articles 55 and 56 of the Charter as well as Articles 22 and 28 of the UDHR. According to Article 22 of the UDHR, every person is entitled to attain through national effort and international cooperation for realization of the economic, social and cultural rights vital for his self-respect and free development of his personality. Article 28 of the UDHR reinforced the requirement of social and international order to be restructured to make possible the equal enjoyment of human rights throughout the world.

²¹⁶ Permanent Court of International Justice, “Minority Schools in Albania”, (Advisory Opinion dated 6th of April 1935), http://www.worldcourts.com/pcij/eng/decisions/1935.04.06_albania.htm, (accessed on 11.04.2017).

²¹⁷ Emily A Mok, “International Assistance and Cooperation for Access to Essential Medicines”, (Georgetown University Law Center, 2010), <http://ssrn.com/abstract=1776070>. (accessed on 02.07.2016).

Under Article 23 of the ICESCR, states parties agree that international action for the attainment of the rights includes such methods as the conclusion of conventions, the adoption of recommendations, the provision of technical assistance and the holding of regional and technical meetings for the purpose of consultation and study. This provision specifically acknowledges the role of not only the ratifying state but also of other states in securing the rights. This is because of the fact that every state party has a legal interest in the discharge of obligation by all other state parties of their human rights obligations as *erga omnes* obligations and UN Charter obligation to promote universal respect for and adherence to human rights and fundamental freedoms as envisaged in the fourth preambular paragraph of both the ICESCR and the ICCPR.

There is no provision in ICESCR on its scope of application as explicable by the fact that it guarantees rights which are essentially territorial. However, it is quite evident that it applies to both the territories over which a state party has sovereignty and to those over which that state exercises territorial jurisdiction and control. In case where an attention is drawn to possible breaches of the ICESCR obligations by other states parties, the same should not be regarded as an unfriendly act but as a reflection of legitimate concern of the international community.²¹⁸

2.9.1 Obligation of Developed States

It has been generally observed that most of the developed states readily give assistance to developing states but they consistently deny the existence of any clear legal obligation to transfer their own resources to developing states. Although there is

²¹⁸ Committee on Economic, Social and Cultural Rights, "General Comments No. 3", (UN Doc. E/1991/23, 1990), Annex III.

an explicit obligation to cooperate internationally but it is not evident whether this means that wealthy states parties are obliged to provide assistance in the realization of the rights of people in other countries. In debates prior to the drafting of an optional protocol to the ICESCR, the representatives of the United Kingdom, the Czech Republic, Canada, France and Portugal assumed that international co-operation and assistance is though an important moral obligation but not a legal development assistance or give a legal title to receive such aid.²¹⁹

If we assume that there is no legal obligation for supporting the human rights responsibility of international assistance and co-operation on developed states, then admissibility of all international assistance and cooperation fundamentally comes down to charity only without any binding legal obligation. The committee on the ICESCR suggests that the economically developed states parties to the Covenant are under an obligation to assist developing states parties to fulfill their core obligations with respect to the realization of these rights.²²⁰

2.9.2 Obligation of Developing States

Where a developing state party to the ICESCR resolves to take measures for realizing core obligations in respect of the rights that are beyond its maximum available resources, it is quite appropriate for such state to properly seek international assistance to fulfill its core obligations. To allow the developed states and other institutions in a position to help in rendering the necessary assistance, states must

²¹⁹ Anup Shah, "Foreign Aid for Development Assistance", (2014), <http://www.globalissues.org/article/35/foreign-aid-development-assistance>, (accessed on 03.07.2016).

²²⁰ Diane A. Desierto, and Colin E. Gillespie, "Integrated Paradigm for International Responsibility Arising from Violations of Economic, Social, and Cultural Rights", (Cambridge Journal of International and Comparative Law, 2014), https://scholarspace.manoa.hawaii.edu/bitstream/10125/35186/1/Desierto_3CambridgeJIntlCompL556.pdf, (accessed on 03.07.2016).

desist from hindering other states and actors in their legitimate efforts to help in the enjoyment of these rights. Besides that, states should not decline offers of resources from the international community for the purposes of implementing the provisions of the ICESCR without adequate grounds not only being warranted but also compatible with international law. Moreover, every attempt should be made by states in need of international aid to meet the terms to obtain such aid.²²¹

With regard to developing states getting such assistance, the Committee on the ICESCR has instructed the states about the utilization of transferred resources by those in need. The Committee instructed so because the Covenant obliges states to use available resources for the maximum fulfillment of the obligations. Accordingly, the necessary governmental obligation is to give precedence to human rights in resource distribution at national level. This means that states which get international aid and assistance must clearly devote a substantial part of that aid to human rights. In addition to that a mechanism should also be devised to ensure that all beneficiary states are obligated to spend these resources for purposes of the Covenant only.²²²

2.10 Human Rights as *Erga Omnes* Obligations

International Law Commission makes a difference between breaches of bilateral obligations and obligations in nature of a collective interest including obligations towards the international community as a whole. Breaches of a bilateral nature include situations where the performance of an obligation pertains to two individual states in spite of the fact that the treaty framework or customary rule in question

²²¹ Ibid.

²²² Ibid.

establishes obligations applicable to all states.²²³ In such case, the nature of the obligations arising from the multilateral treaty or customary rule can be called as of bilateral obligations like Article 22 of the Vienna Convention on Diplomatic Relations of 1961, where the obligation to guard the premises of a diplomatic mission is owed by the very receiving state specifically to the sending state.

Breaches of a collective nature are a substance of apprehension for obligations that have been established for the protection of the collective interest of the international community as a whole i.e. *erga omnes*. Solid examples of *erga omnes* obligations can be found in human rights treaties particularly. Obligations arising out regional or universal human rights treaties would have *erga omnes* impact towards other States parties, as well as to the extent that they have been accepted as customary international law. The same would be relevant to the obligations uttered in the Statute of the International Criminal Court about its jurisdiction over the heinous crimes concern to the international community as a whole namely genocide, crimes against humanity and war crimes.²²⁴ These included the ban of unilateral use of force, genocide and the prohibition of slavery and racial discrimination.²²⁵ Hence, these prohibitions are widely regarded as being of a peremptory nature i.e. authoritative, it means that when an obligation is accepted as one from which no derogation is allowed due to its primary nature and all states, besides other subjects of international law, are bound to protect them. At the same time it cannot be understood that the opposite also applies i.e. that all *erga omnes* obligations necessarily also have *jus cogens* status. For example, the human rights obligations contained in the ICCPR and

²²³ International Law Commission, *supra* N.66.

²²⁴ "Rome Statute of the International Criminal Court", <https://www.icc-cpi.int/>, (accessed on 05.07.2016).

²²⁵ *Ibid.*

ICESCR would arguably have *erga omnes* effect to the extent that they have acquired customary international law status. Their collective interest nature gives the international community as a whole an interest in their performance and reflects that they amount to more than mere bilateral obligations. At the same time, this fact does not raise all *erga omnes* human rights obligations to peremptory norms. The peremptory character of the prohibition of, for example genocide and torture resulted from their specific recognition and consistent practice as such by a large majority of states as binding dictates of international law.²²⁶

2.11 Right to Self-Determination as *Erga Omnes* Obligation

The implication of *erga omnes* position for the enforcement of *jus cogens* obligations having determined that *jus cogens* obligations possess *erga omnes* status. In particular, the legal interest that all states would have in the protection of the *jus cogens* obligations could contribute to their more effective enforcement.²²⁷

Right to Self-determination is first common article in both ICCPR and ICESCR which has been admitted expressly as basic and fundamental right without which all other rights cannot be realized. Hence, obligation for adherence and realization of this right not only becomes basic but also manifold. In East Timor Case²²⁸, between Portugal and Australia, there was implicit inference that the ICJ may have broadened its understanding of the legal interest, despite of the fact that it declined to declare whether Australia had behaved illegally in concluding a treaty

²²⁶ M. Cherif Bassiouni, "International Crimes: Jus Cogens And Obligatio Erga Omnes"; <http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=1016&context=lcp>, (accessed on 05.07.2016).

²²⁷ Ibid.

²²⁸ "East Timor case between Portugal and Australia, 1995", <http://www.icj-cij.org/>, (accessed on 06.06.2016).

with Indonesia pertaining to the East Timorese continental shelf. Although, in accordance with Article 36(2) of the ICJ Statute, Portugal and Australia had accepted its compulsory jurisdiction and Indonesia had not consented to the ICJ's jurisdiction but nonetheless, the ruling had impacted on lawfulness of behavior of the Indonesia. In reaching the above conclusion the ICJ had invariably acknowledged the *erga omnes* status of the right to self-determination particularly the right to self-determination of the East-Timorese people. Thus Portugal's legal interest or *locus standi* was accepted by ICJ for protection of the right to self-determination of the East-Timorese people only on the basis of the *erga omnes* character of that right.

2.12 Conclusion

Human rights are primarily viewed as being exercisable against the states which has primary obligation to respect, protect and fulfill human rights obligations. The source of obligation is international treaty law, international customary law and general principles of law. The human rights are also classified as obligation of conduct and obligation of result. In relation to obligation the human rights, the territorial limit of states is irrelevant as they are not responsible and owes obligation for human rights in their own territory as well as in the territory under their occupation or effective control. Likewise non-state actors and occupying powers are also obliged to follow Human Rights Law.

The developed states are bound to provide financial assistance to developing states and the developing states are also obligated not to refuse such assistance unless there are compelling reasons not to do so. Moreover, in relation to discharge the human rights obligations, states are also bound to guarantee non-discrimination and

promote equality. All human rights obligations are *erga omnes* obligations including right to self-determination which is basic and mother right of all other rights. In case of breach of any of these obligations every state has a *locus standi* to enforce remedial measures.

Chapter III:

CONSTITUTIONAL AND GOVERNANCE FRAMEWORKS OF AJ&K AND GB

3.1 Introduction

In this chapter establishment of governments of AJ&K and GB including different phases of development of their constitutional and governance set up shall be discussed.

First of all establishment of provisional self government in AJ&K shall be discussed in second section. The Karachi Pact shall be explained in third section and in fourth section evolution of AJ&K Constitutional framework including the normative phase with different rules of businesses as skeleton constitution, dawn of democratic era through Governments Acts framed from time to time, presidential form of government and parliamentary form of government in first, second, third, and fourth subsections respectively shall be analyzed. In fifth section, the evolution of GB governance framework shall be deliberated including interim local government, governor general rule through Political Agent and imposition of FCR, Government of Pakistan direct rule through appointment of Resident under Kashmir Affairs and Northern Affairs (KANA), dawn of democratic era: Northern Areas Advisory Council, formal governance structure: Legal Framework Order, 1994, province like status through Gilgit-Baltistan (Empowerment and Self Government) Order 2009 in first to seven subsections respectively. In sixth section structural flaws of both frameworks including non adherence to principle of trichotomy of powers, empowerment without

accountability, inherent culture of impunity, no common forum would be dilated in first to four subsections respectively.

3.2 Establishment of Provisional Self-Government

On 24th of October, 1947, an interim revolutionary government of whole of the liberated area was formally established at Pallandri, a small town in Poonch along the River Jehlum. Sardar Muhammad Ibrahim Khan was unanimously selected by the working committee of All Jammu and Kashmir Muslim Conference as the founder president of the liberated area named as AJ&K. The government was consisting of six ministers i.e. Syed Ali Ahmad Shah as Defence Minister, Ch. Abdullah Khan Bahalli as Revenue Minister, Kh. Ghulam Din Wani as Home Minister, Syed Nazir Hussain Shah as Finance Minister, Mir Waiz Muhammmad Yousaf Shah as Education Minister and Kh. Sanaullah Shamim as Civil Supplies Minister.²²⁹

No written constitution was adopted for governance of the liberated area on immediate basis as the government worked as war council with president acted as head of government and state. The above mentioned ministers were given six portfolios and rests of them were kept by the president himself. The ministers were accountable to the President.

Recognition of new states has been subject of great debate between constitutive and declaratory school of thoughts.²³⁰ Constitutive school of thought is of the view that states are created by recognition. Whereas the declaratory school of

²²⁹ Sneddan, *supra* N.11, 115-117; Alastair Lamb, *Birth of a Tragedy Kashmir 1947* , (Karachi, Lahore, Islamabad: Oxford University Press, 1994), 73-74; Saraf, *supra*, N.2, 1288-90.

²³⁰ Worster, William Thomas, "Law, Politics, and the Conception of the State in State Recognition Theory": www.bu.edu/law/journals-archive/international/volume-27n1/documents/worster.pdf, (accessed on 30-05-2018).

thought asserts that state is a state because it meets all international legal criteria for statehood i.e. permanent population, defined territory, government and capacity to enter into relationship with other states.²³¹ Its recognition is the confirmation of its existence and it is independent of statehood.²³² Nonetheless, the recognition or non-recognition of the state has a great impact on the statehood and its survival or otherwise.

The declaration issued in this behalf was a formal expression of the fact that AJ&K had acquired complete status of a state under international law on 24th of October 1947 prior to the signing of Instrument of Accession by Maharaja of the state in favor of India on 26th of October 1947. AJ&K as a state possessed all attributes of a sovereign state²³³ because it was having permanent population, specified territory, government and capacity to enter into relations with other states. Moreover the declaration was an official pronouncement of Provisional Self-Government being representative of will of people of Jammu and Kashmir State. The declaration acknowledged the freedom movement from 1929 and vowed to establish a non communal Government and to maintain the friendly relations with Pakistan and India while maintaining identity of Jammu and Kashmir as political entity. It was further pledged that accession of State shall be determined by free will of people through referendum to be arranged by the provisional government.²³⁴

The declaration was also a formal expression of display of authority over specified territory and population with a resolve to maintain friendly relations with

²³¹ Please see Article 1 of Montevideo Convention, *supra* N. 148.

²³² Please see Article 3, *ibid*.

²³³ Please see Montevideo Convention *supra* N. 148.

²³⁴ Lamb, *supra* N. 1; Mohammad Hafizullah, *Towards Azad Kashmir*, (Lahore: *Bazam-i-Frough-i-Adab*, 1948).

India and Pakistan. The declaration also claimed to be representative of whole state including GB although no cabinet member was nominated from that area. Moreover it was also pledged that identity of Jammu and Kashmir as political entity shall be safeguarded and democratic government was aimed at for which it was undertaken that the law and order in State will be restored for enabling people to elect, by their free vote, a popular legislature and popular Government.²³⁵

3.3 Karachi Pact, 1949

The nascent state found itself heavily dependent on Pakistan in respect of almost all of its needs. There were three main stakeholders at that time i.e. Government of AJ&K, All Jammu and Kashmir Muslim Conference and Government of Pakistan and their increasing interaction and dependency arouse need of a formal documentation for regulation of powers and distributions of functions among them. After cease fire on 5th of January 1949, the three stakeholders entered into an agreement on 28-04-1949 called 'Karachi Pact' for regulation and distribution of their functions and power. The agreement not only divided powers and functions among the three stakeholders but also worked as rules of business for the Government as well because it not only provided mode of posting of lent officers in AJ&K from Pakistan but also established different departments and provided working procedure of the government.²³⁶

The agreement comprised of three parts. First part whereof was about civil administration of Azad Kashmir Area which was entirely entrusted to Government of AJ&K including the day to day administration through executive officers viz. heads of departments who shall also be secretaries to government besides Secretary Finance

²³⁵ Ibid.

²³⁶ Please see Karachi Pact Appendix III.

and Cabinet Secretary. It established eight department viz. Law and Order, including jails and police, Food and Civil Supplies, Revenue (including Forests, Customs and Public Works), Finance, Rehabilitation, Medical and Health, Education and Cabinet and Plebiscite work. It also provided a procedure for disposal of business by Azad Kashmir Government and its different departments.

Second part of the agreement dealt with financial arrangements between Government of Pakistan and Government of AJ&K and the third part distributed subjects and fixed areas of responsibilities of the three stakeholders. The subjects of defense (Complete control over Azad Kashmir forces), negotiations with UNCIPI, foreign policy of Azad Kashmir Government, publicity in Pakistan and foreign countries, coordination of arrangement for relief and rehabilitation of refugees, all activities within Pakistan itself with regard to Kashmir such as procurement of food and all affairs of Gilgit and Ladakh area including the control of political Agent at Gilgit were given to Government of Pakistan.²³⁷

This distribution of subjects has some nexus and resemblance with the resolution of general council of All Jammu and Kashmir Muslim Conference which unanimously demanded from the *Maharaja* complete internal autonomy for people of state with *Maharaja* as constitutional head and accession with Pakistan to the extent of foreign policy, defense and communication.²³⁸

Here it would not be out of place to mention that *de facto* control of GB was already taken by Government of Pakistan through its political agent on 16-11-1947.²³⁹

²³⁷ Ibid.

²³⁸ Saraf, N. 2, Vol. II, pp. 711-12.

²³⁹ See section 3.5.3 of this chapter.

Therefore, the administration of Government of AJ&K on this area remained *de jure* only till conclusion of Karachi Agreement.²⁴⁰ Anyhow in other respects as well, the Karachi Pact transformed status of AJ&K from sovereign state into a protectorate²⁴¹ by entrustment of vital subjects to Government of Pakistan especially defense and foreign affairs.²⁴²

3.4 Evolution of Aj&K Constitutional Framework

As discussed above, after Karachi Pact, the defense and foreign affairs of AJ&K were to be managed by Pakistan; therefore, all subsequent constitutional and administrative frameworks would be deemed to be based on the Karachi Pact, which acts as a convention for constitutional framework of AJ&K and GB including their relationship with Pakistan.

3.4.1 Normative phase: Rules of Business as skeleton constitution

After the Declaration of 24th October, 1947 and Karachi Pact of 1949, the third document bearing constitutional character was Rules of Business promulgated on 28th of December, 1950 by Ch. Ghulam Abbas as Supreme Head of Azad Kashmir Movement.²⁴³ This document was pronounced to be a skeleton constitution by High Court²⁴⁴ and Supreme Court of AJ&K.²⁴⁵ It was declared as such because it covered legislative, secretarial, financial, recruitment and judicial aspects of the state. All powers of the state stemmed out from this document. It provided presidential form of

²⁴⁰ Please see Karachi Pact Appendix III.

²⁴¹ A protectorate state is sovereign in itself but its some subjects like defense, foreign affairs etc are controlled and managed by certain other country e.g. Bhutan is protectorate of India, Sierra Leone and Falkland Islands are protectorate of United Kingdom etc.

²⁴² Please see Karachi Pact Appendix III.

²⁴³ Gillani, *supra* N. 25, pp.7-10 (Appendices).

²⁴⁴ PLD 1957 AJ&K 33.

²⁴⁵ PLJ 2002 SC (AJ&K) 46.

government with President as head of government aided by council of ministers having executive and legislative powers. Supreme Head was authorized to appoint President and other ministers of his council alongwith Chief Justice and judges of High Court of Judicature. President was head of Government and was answerable to Supreme Head. No concept of voting or democratic governance was given by the Rules of Business.

The Rules of Business were revised in 1952²⁴⁶ and the Supreme Head was divested of his power to appoint President. The president was declared to hold office during pleasure of the General Council of All Jammu and Kashmir Muslim Conference duly recognized by the Government of Pakistan through KANA. A joint secretary at Ministry of Kashmir Affairs was made incharge of all affairs of AJ&K who was also declared final appellate authority against orders of secretaries to government and head of departments of AK Government.

On 29th of November, 1958, the Rules of Business were again revised²⁴⁷ and the Chief Advisor was introduced instead of Joint Secretary who was also a bureaucrat. The Chief Advisor was also to be appointed by Ministry of Kashmir Affairs. Legislative powers of the council of ministers were again made subject to advice of Chief Advisor whose advice could not be disregarded except with prior consultation of Ministry of Kashmir Affairs and who was also given powers of supervision of policy and general administration of Government of AJ&K. Besides that, the Chief Advisor retained its power as appellate authority in service matters.

²⁴⁶ Reported by Gillani, *Supra* N.25, pp. 77-103(Appendices).

²⁴⁷ *Ibid.*

Though the first Rules of Business lacked democratic representation but kept intact the indigenous character of executive authority as all powers were vested in Supreme Head who was senior most leader of the only political party at that time. Subsequently, the indigenous character was replaced by direct and indirect rule of Government of Pakistan. This had not only relegated the status of the Government of AJ&K but also undermined its executive authority in sheer violation of the Karachi Pact.

3.4.2 Crawling Towards Democratic Era: AJ&K Government Acts, 1964 & 1968

In 1960 Basic Democracies Act, 1960 was introduced and election of basic democrats was held thereunder. Under AJ&K Government Act, 1964,²⁴⁸ the basic democrats, elected through adult franchise, were authorised to elect members of state council comprising eight members. Office of the Chief Advisor was retained and the council was not competent even to elect its chairman out of its members rather it was to be nominated by the Chief Advisor alongwith the term of office of the chairman. Legislative powers of the council were also subject to approval of the Chief Advisor but even than the Legislative powers were not extended to the extent of defense, evacuee property and amendment in AJ&K Government Act, 1964. The chairman nominated by the Chief Advisor was also declared as ex-officio President.

The Act 1964 was replaced by AJ&K Government Act, 1968²⁴⁹ that was almost replica of Act, 1964. Nonetheless, the membership of state council was

²⁴⁸ Department of Law, Justice, Parliamentary Affairs and Human Rights, *the Azad Jammu and Kashmir Laws Code*, (Muzaffarabad: Azad Government State of Jammu and Kashmir, Vol. II, Second Edition, 2008), 19-22.

²⁴⁹ Ibid, 68-75.

increased from eight to twelve and the four seats were given to refugees of Jammu and Kashmir settled in Pakistan who were to be nominated by the Chief Advisor. The Chief Advisor was also authorized to dissolve the council and issue proclamation of emergency. Legislative powers were continuously to be exercised subject to prior consent of the Chief Advisor. Both of these Acts introduced the democratic culture in AJ&K but did not restore the notion of self-rule and indigenous and representative character of the government. The elected government was lacking requisite powers and authority to run the affairs of the state. This was again altogether contrary to the explicit terms of the Karachi Pact.

3.4.3 Presidential Form of Government: AJ&K Government Act, 1970

Under the AJ&K Government Act, 1970²⁵⁰ the President was to be directly elected by vote of adult franchise and the state council was renamed as Legislative Assembly comprising twenty four elected members and one woman elected by members of Assembly. The terms of the Assembly was fixed for four years. Ministers were to be appointed by President from persons other than members of the Assembly. The Assembly was competent to make laws for all state subjects and for territories of AJ&K. The Judicial board was highest court of appeal and all judges of superior courts were to be appointed by President.

The Government of Pakistan was given overriding powers only to take any action for discharging its responsibilities under UNCIP Resolutions, defense and currency. All residue subjects were generously given within executive and legislative

²⁵⁰ Ibid, 113-122.

domain of GOVERNMENT OF AJ&K and AJ&K Assembly respectively. In 1971, for the first time in history the fundamental rights were provided to citizen of AJ&K through an amendment in the said Act.²⁵¹

This Act was comparatively more nearer to the Karachi Pact and is one of the best constitutional framework of AJ&K by then which not only restored the representative character of Government of AJ&K but also gave full internal autonomy and right of self-government to people of AJ&K, however, the UNCP Resolutions, currency, defense and security were kept with Government of Pakistan. During enforcement of the Act, AJ&K had seen not only indigenous self-rule but also made unprecedented development in almost all sectors of governance especially in education, health and power infrastructure.

3.4.4 Parliamentary Form of Government: AJ&K Interim Constitution Act, 1974

AJ&K Interim Constitution Act, 1974, (hereinafter referred to as the Interim Constitution) has provided parliamentary form of governance for the first time in history of AJ&K. It was enforced on 24th of August 1974 and has created three executive authorities i.e. Government of Pakistan, Government of AJ&K and Council and four legislative authorities i.e. Government of Pakistan, Council, Assembly and Joint Sitting. The AJ&K Council has been given dual executive and legislative authority²⁵² over 52 subjects.²⁵³ Instead of direct election on the basis of adult franchise, the indirect election by members of AJ&K Assembly is provided. This Act

²⁵¹ Department of Law, Justice, Parliamentary Affairs and Human Rights Department. *The Azad Jammu and Kashmir Laws Code*, (Muzaffarabad: Azad Government State of Jammu and Kashmir, Vol. III, Second Edition, 2009), 19-25.

²⁵² Ibid, Vol. IV, pp.75-114.

²⁵³ AJ&K Interim Constitution Act, 1974, Schedule III.

once again reduced the status of AJ&K from an internally autonomous self-government to a dependent one. AJ&K has performed well in few sectors like education, public awareness and strengthening democratic institutions but still lagging behind in rest of areas.

The preamble²⁵⁴ is referring to UNCIP Resolutions regarding recognition of right of self-determinations. It is aimed that the constitution shall bring better governance and administration to AJ&K. The Government of Pakistan has approved it in discharge of its responsibilities under UNCIP Resolutions. It is an interim arrangement because future of the state is yet to be determined under UN Resolutions. It has provided fundamental rights²⁵⁵ viz. security of persons, safeguard as to arrest and detention, prohibition of slavery and forced labour, protection against retrospective punishment, freedom of movement, freedom of assembly, freedom of association, freedom of trade, business or profession, freedom of speech, freedom of religion, safeguard against taxation purposes of any particular religion and safeguard as to educational institution in respect of religion, provision as to property, protection of property, equality of state subject, non-discrimination in respect of access of public places, safeguard against discrimination in service and abolition of untouchability.

3.4.4.1 Legislature: AJ&K Council and Assembly

The AJ&K Council also headed by the Prime Minister Pakistan who is ex-officio Chairman of the council and President AJ&K is its Vice-Chairman. Other members are Prime Minister AJ&K or his nominee, Federal Minister Kashmir Affairs, five members are nominated by Prime Minister of Pakistan and six members are elected

²⁵⁴ Please see preamble, *ibid.*

²⁵⁵ Interim Constitution, *supra*, N. 253, Section 4.

by the Assembly.²⁵⁶ Council is having its secretariat in Islamabad and it has both legislative and executive authority over 52 subjects which have been derived from erstwhile federal and concurrent lists of Constitution of Pakistan (before 18th Amendment).²⁵⁷

Legislative Assembly has legislative powers over residuary subjects i.e. other than those which are in Council's purview and those of Government of Pakistan.²⁵⁸ AJ&K Assembly is headed by speaker and comprises 49 members.²⁵⁹ The joint sitting is a legislative body that is only meant for amendment in Interim Constitution, election of president and to approve or disapprove proclamation of emergency.²⁶⁰ Government of AJ&K has over all executive authority of AJ&K including executive power of laws made by Legislative Assembly subject to the condition that exercise of executive authority shall not be used to impede responsibilities of Government of Pakistan under Section 31(3) and to secure compliance with laws made by the Council.²⁶¹

3.4.4.2 Executive: Government of Pakistan, AJ&K Council and Government

The Government of Pakistan has both executive and legislative powers for its responsibilities under UNCIP Resolutions, defense and security, currency and foreign affairs including foreign aid and trade. The Government of Pakistan is having non-derogatory power in regard to its abovementioned responsibilities and it may take any

²⁵⁶Ibid, Section 21.

²⁵⁷Ibid, Schedule III.

²⁵⁸Ibid, Section 31.

²⁵⁹Ibid, Section 22.

²⁶⁰Ibid, Sections 5, 33 and 53.

²⁶¹Ibid., Section 19.

action in discharge of those responsibilities. AJ&K Council²⁶² is exercising dual authority as executive and legislature in relation to its 52 subjects mentioned in the Third Schedule of the Interim Constitution. Moreover, the executive authority of the Council is to be exercised by the Chairman directly or through Secretariat of the Council of which a Federal Minister nominated by the Chairman from amongst members of the Council and not more than three advisors appointed by the Chairman as incharge.²⁶³ The advisors may be appointed from elected members of the Council or Assembly.²⁶⁴ Though the President is appointing authority for judges of superior judiciary, Chief Election Commissioner, Auditor General, Advocate General but he can do so on advice of Council²⁶⁵ only except in case of Advocate General where he is bound to follow the advice of Prime Minister under Section 7 of the Interim Constitution. On the other hand, Government of AJ&K exercises its executive authority over other subjects within legislative competence of the Assembly.²⁶⁶ The president is only empowered to issue proclamation of emergency on advice of Chairman of the Council if the security of AJ&K is threatened by war or external aggression or by internal disturbances where grave emergency exists.²⁶⁷

3.4.4.3 Judiciary: Supreme Court and High Court

Supreme Court of AJ&K is the highest court of appeal headed by Chief Justice and comprising two permanent judges with an option to appoint an adhoc judge as well. It has appellate and advisory jurisdiction only and judges are appointed by President on

²⁶² Supra N. 9, now role of Council is reduced to an advisory body only and its legislative and executive authority has been abolished. Please see AJ&K Interim Constitution (Thirteenth Amendments) Act, 2018, Appendix IV.

²⁶³ Ibid., Section 21(7).

²⁶⁴ Ibid., Section 21(8).

²⁶⁵ Ibid., Sections 42, 43, 50 and 50-A.

²⁶⁶ Ibid., Section 19.

²⁶⁷ Ibid., Section 53.

advice of AJ&K Council whereas adhoc Judge is appointed by President on recommendation of the Chief Justice.²⁶⁸ The High Court comprises Chief Justice and six judges and has appellate and original writ jurisdiction. Chief Justice and Judges of High Court are also appointed by President on advice of Council after consultation of Chief Justice AJ&K and High Court.²⁶⁹

President is only constitutional head²⁷⁰ of the state and acts on advice of Council or Prime Minister of AJ&K. He has powers to make Ordinance,²⁷¹ give assent²⁷² to bills passed by the Assembly and to summon and prorogue²⁷³ sessions of Assembly.

3.5 Evolution of GB Governance Framework

The GB and Ladakh are part of State of Jammu and Kashmir but not AJ&K.²⁷⁴ Both AJ&K and GB stand on similar footing as far as their position towards Pakistani system is concerned.²⁷⁵ They were administrative part of Frontier Province/ region of the State of Jammu and Kashmir since its occupation by Dogra dynasty in the nineteenth century and it was administratively divided into Gilgit Wazarat²⁷⁶ and Ladakh Wazarat. British government took control of Gilgit Agency from the Kashmir State Government through a lease agreement for 60 years on March 29, 1935 amidst

²⁶⁸ Ibid., Section 42.

²⁶⁹ Ibid., Section 43.

²⁷⁰ Ibid., Section 7.

²⁷¹ Ibid., Section 41.

²⁷² Ibid., Section 36.

²⁷³ Ibid., Section 27.

²⁷⁴ *Federation of Pakistan v. Malik Muhammad Muskeen*, 1995 SCR 43.

²⁷⁵ *Mst. Nsim Akhtar v. Director General Immigration and Passports*, PLD 2006 Lah. 465.

²⁷⁶ The word “Wazarat” was used for a district by the former Government of the State of Jammu and Kashmir prior to 1947.

the threat of emerging power of Russia.²⁷⁷ British Government soon after its decision to leave the subcontinent returned back the area to the State Government on August 1, 1947. Even during the lease of Gilgit Agency the areas was jointly controlled by British and ruling Dogras.²⁷⁸

3.5.1 Interim Local Government

In 1947, at the time of termination of lease of Gilgit Agency by British Government, the Gilgit Scouts, local armed groups under the command of local Rajas and Mirs²⁷⁹ alongwith Muslim officers of the Jammu and Kashmir State Army, revolted against the Governor of State of Kashmir and the considerable part of the area was liberated on November 1st, 1947.²⁸⁰ An interim self-government was established under Raja Shah Rais Khan of Gilgit as head of the State but it could only survive for sixteen days due to different administrative issues and thus the territory was handed over to Government of Pakistan by the interim government voluntarily.²⁸¹

3.5.2 Governor General Rule: Political Agent and Imposition of FCR

The self-government, soon after its establishment, approached to the Government of Pakistan for assistance in running affairs of the newly established Government of GB. Responding to the request, a junior non-commissioned officer Sardar Muhammad

²⁷⁷ Lamb, Supra N.1, pp. 60-61.

²⁷⁸ K. Warikoo, *The Other Kashmir Society, Culture and Politics in the Karakoram Himalayas*, 2014 in *The Making of a Frontier, The Relationship between Kashmir and its Frontier Territories*, (India, New Dehli: Institute For Defense Studies and Analysis), 105-107.

²⁷⁹ Raja and Mir were the titles used by the local rulers of the area.

²⁸⁰ Sikandar Khan Baloch, *In the Wonderland of Asia Gilgit & Baltistan*, (Lahore: Sang-e-Meel Publication, 2004), 135-160; Pak Army General Headquarters, *The Kashmir Campaign 1947-48*, (Pakistan, Rawalpindi: Services Book Club, 2006-07), 8; Dr. Ahmad Hasan Dani, *History of Northern Areas of Pakistan*, (Lahore: Sange-e-Meel Publications, 2001), 348.

²⁸¹ Altaf Hussain, "Gilgit-Baltistan Empowerment and Self-Governance Order 2009" in "The Gilgit-Baltistan Reforms 2009, (The Forum of Federations project in Pakistan funded by the German Ministry of Foreign Affairs), <http://www.civiceducation.org/wp-content/uploads/2010/08/Gilgit-Baltistan-Reforms.doc>, (accessed on 01.09.2016).

Alam, a Naib Tehsildar, was sent to Gilgit on November 16, 1947 as political agent by Government of Pakistan who had replaced the interim government.²⁸² The political agent was made answerable to the Resident Commissioner based in Peshawar and advisor to Governor General of Pakistan for tribal areas bordering Afghanistan.²⁸³

After taking over of the control of GB, the colonial law of Frontier Crimes Regulations²⁸⁴ (FCR) already enforced for the tribal areas, were also enforced for GB. Here it will not be out of place to mention that before November 1947, under the State of Jammu and Kashmir, the area had an independent judicial system with right to appeals before the Jammu and Kashmir High Court²⁸⁵ and Maharaja through his Judicial Board of Advisors.²⁸⁶

Thus the status of GB was even more relegated than AJ&K and it was placed under the political resident based in Peshawar. Subsequently under 1949 Karachi Pact, Government of AJ&K accorded legitimacy and ratification of already established *de facto* control GB by Government of Pakistan through appointment of a Political Agent.²⁸⁷ After the cease fire in 1949, the UN demarcated a cease-fire Line, later renamed as Line of Control (LoC) in 1972 under Simla Agreement²⁸⁸, alongwith GB boarder with Ladakh of Indian Held Kashmir beside appointment of UN Observers alongwith the line of control in GB as well AJ&K.

²⁸² Ibid.

²⁸³ Cyan M. R. & Latif A, "Background Papers on Governance, Northern Areas Strategy for Sustainable Development", (Gilgit: IUCN, 2003; R. T. Enderson, "History, Folklore and Culture of Gilgit-Baltistan", (London and Gbtibune: Oxford University Press, <http://gbtribune.blogspot.com/p/history-dispute.html>, (accessed on 01.09.2016).

²⁸⁴ Frontier Crimes Regulations were made by the Government of British India for tribal areas under which a civil servant exercises all judicial and administrative powers in an area.

²⁸⁵ Jammu and Kashmir Constitution Act, 1996 (BiK)-corresponding to 1939 AD., Article 56,

²⁸⁶ Ibid., Article 71.

²⁸⁷ Karachi Agreement, 1949, Appendix III.

²⁸⁸ Simla Agreement, 1972 executed between India and Pakistan to settle the issues arising out of 1971 Indo-Pak War, <http://mea.gov.in/in-focus-article.htm?19005/Simla+Agreement+July+2+1972>, (Accessed on 20-06-2017).

3.5.3 Government of Pakistan Direct Rule: Appointment of Resident under KANA

The administrative and political reforms were introduced by the Government of Pakistan from time to time in response to increasing demand from the local people. The Government of Pakistan established the Ministry of KANA and in 1950 transferred the affairs of the Northern Areas to it. Thereafter, in 1952 a Joint Secretary of KANA was appointed as Resident in the Northern Areas with all administrative and judicial authorities.²⁸⁹

In 1967, KANA introduced certain reforms by transferring powers of High Court and Revenue Commissioner to the Resident and appointed two Political Agent one each for Gilgit and Baltistan. Moreover, district level powers were delegated to the Political Agent to act as District and Sessions Judge, Revenue Collector, Commissioner for FCR, Chief of Police and Controlling Officer of Cooperative Society.²⁹⁰

3.5.4 Dawn of Democratic Era: Northern Areas Advisory Council

In 1970, elections for members of Northern Areas Advisory Council were held for the first time. While the Council had the power to sanction development schemes only and all other matters including legislative powers were beyond its jurisdiction.²⁹¹ In 1972, through a Presidential Order 1972, the post of Resident was re-designated as

²⁸⁹ Hussain, *supra* N. 281.

²⁹⁰ Ibid.

²⁹¹ M. Amir Rana and Mujtaba Rathore, *Northern Areas: Crises and Prospects*, (Pakistan Institute for Peace Studies (PIPS). Nigarishat Publishers. 2007),442.

Resident Commissioner and Gilgit and Baltistan Agencies were transformed into districts by appointing Deputy Commissioners alongwith creating an additional district of Diamer.²⁹² In 1974, Z. A. Bhutto announced a package of administrative and judicial reforms by abolishing the State of Hunza and FCR. The Rajas of abolished States were accommodated by government jobs and maintenance allowances as compensation.²⁹³

In 1977, when General Zia-ul-Haq imposed Martial Law in Pakistan, the GB was declared as one of the zone i.e. Zone-E of Martial Law contrary to Karachi Pact and stance of Government of Pakistan on Kashmir Conflict and the representatives from GB were included in the Majlis-e-Shura (parliament) at federal level.²⁹⁴ This was the first major step towards the deviation of Pakistan's earlier stance about on GB in relation to Kashmir Conflict. In 1985, a committee was constituted by Government of Pakistan including federal secretaries of Finance, Planning, Law, Interior, Education, and KA&NA for introducing the reforms in GB and on its recommendations a representative from Northern Areas, Aga Ahmad Ali Shah, was appointed as Advisor to Minister of Kashmir Affairs. In 1988, Ms. Benazir Bhutto had appointed an elected representative of Northern Areas Council (Mr. Qurban Ali) as Advisor to Prime Minister with equal status of a State Minister.²⁹⁵

²⁹² Ibid.

²⁹³ Paul Beersmans, "Political and Democratic Process in Gilgit-Baltistan"; Ajai Sahni & Saji Cherian, "Gilgit-Baltistan: The Laws of Occupation" (Faultlines: Volume 18, January 2007), <http://www.satp.org/satporgtp/publication/faultlines/volume18/Article5.htm>. (accessed on 01.09.2016); International Crisis Group Asia Report, "Discord in Pakistan's Northern Areas", <http://www.cicas.org.uk/papers/pdffpapers/crisisoflegitimacy.pdf>, (accessed on 27.04.2017).

²⁹⁴ Sahar Arshad, "Military intervention in Pakistan, A case study of Zia and Bhutto regime", https://www.academia.edu/4188687/Military_intervention. (accessed on 01.09.2016).

²⁹⁵ Ibid.

3.5.5 Formal Governance Structure: Legal Framework Order, 1994

Federal Cabinet of Government of Pakistan approved reforms package for GB as Legal Framework Order, 1994 (LFO) through which Northern Areas Rules of Business were framed, Office of the Chief Secretary and Civil Secretariat were established alongwith introduction of judicial reforms. The post of Judicial Commissioner was abolished, and a three member Chief Court was constituted under the chairmanship of a retired Judge. Any senior judicial officer belonging to federation or the provincial High Court was eligible to be deputed as member of the Chief Court, whereas a District Session Judge from the Northern Areas was also eligible to become its member.²⁹⁶

In 1999, the LFO was amended by empowering the Northern Areas Legislative Council (NALC) to legislate on 49 subjects as envisaged in schedule-II of the LFO.²⁹⁷ In 2005, Northern Areas Court of appeals was established in addition to increasing number of six reserved seats for technocrats and one additional seat for women in NALC. In 2006, six advisors were appointed from the NALC members and they were brought at par with members of AJ&K Assembly in relation to their pay and privileges.²⁹⁸ In 2007, the LFO was renamed as Northern Areas Governance Order 1994 and NALC was renamed as Northern Areas Legislative Assembly alongwith certain other formal amendments.²⁹⁹

²⁹⁶ Ibid., 162-168.

²⁹⁷ Dr. Ahmad Hasan Dani. *History of Northern Areas of Pakistan*, (Lahore: Sange-e-Meel Publications 2001), 348.

²⁹⁸ Ibid.

²⁹⁹ Ibid.

3.5.6 Province like status: Gilgit-Baltistan (Empowerment and Self Government) Order, 2009

3.5.6.1 Introduction

The Gilgit-Baltistan Empowerment and Self Governance Order 2009 (the Order, 2009) was introduced in August 2009 which is heavily influenced by the AJ&K setup and provincial setups of Pakistan. It says that on continues demand of the local people; the Government of Pakistan has decided to take the GB further towards full internal autonomy and to bring it at par with the provinces of Pakistan but not exactly as province keeping in view disputed nature of the territory being part of Kashmir Conflict. It clearly explains that GB is not part of Pakistan in terms of Article 1 of the Constitution of Islamic Republic of Pakistan which spells out the territorial limits of the country.³⁰⁰ Since neither Constitution of Islamic Republic of Pakistan nor Interim Constitution of AJ&K is applicable to territories of GB hence Order, 2009 being supreme law of land hold position as constitution of the area.

The Prime Minister of Pakistan constituted a committee under the chairmanship of Minister for KANA. The Director General Inter Services Intelligence and Intelligence Bureau were the members of this committee along with Minister for Foreign Affairs, Minister for Law and Justice, Secretary Law and Justice, Secretary Cabinet, Secretary KANA and Advisor for Interior.³⁰¹ In its various sittings the Committee discussed the present status and the reforms introduced so far in the Northern Areas and consulted informally the members of Northern Areas Legislative Assembly and the like minded public opinion leaders from different walks of life for

³⁰⁰ Gilgit-Baltistan (Empowerment and Self Government) Order, 2009.

³⁰¹ "Government of Pakistan", www.northernareas.gov.pk, (accessed on 27.04.2017).

drafting the Order 2009. The draft reforms package was vetted by the Law and Justice Division Government of Pakistan and approved by the federal cabinet.³⁰²

Under the Order, 2009, the name of the area has been changed from Northern Areas to GB, Offices of Governor, Chief Minister and Ministers were created. On pattern of AJ&K Council, the GB Council headed by the Prime Minister of Pakistan was introduced, the GB Assembly is delegated with the powers of approving budget and the concept of Consolidated Fund was introduced. The detailed functions and procedures of running various organs of GB's government in light of Order 2009 was laid down in GB Rule of Business 2009 alongwith system of financial management and budgeting.³⁰³

3.5.6.2 Legislatuure: GB Council, Assembly and Government of Pakistan

Legislation on various subjects pertinent to governance has been assigned to Council and Assembly and Government of Pakistan in their respective jurisdiction.³⁰⁴ The Assembly shall consist of thirty three members of whom twenty four members shall be elected directly on the basis of adult franchise, six women members shall be elected on the pattern as in case of reserved seat in Pakistan. One additional women seat (total 07) was created for newly created district of Hunza Nagar. Three technocrats and professional members shall be elected on the pattern as is in case of reserved seat in Pakistan.³⁰⁵ The Assembly will have its Chief Minister, Speaker and

³⁰² Constitution of Pakistan, *supra* N.374.

³⁰³ *Ibid.*

³⁰⁴ GB Order, 2009, *supra* N. 300, Article 47.

³⁰⁵ *Ibid.*, Article 42.

Deputy Speaker elected by the house.³⁰⁶ The order has also increased legislative powers of the Assembly from 49 to 61 subjects.³⁰⁷

GB Council is consisting of Prime Minister of Pakistan, Governor, six members nominated by the Prime Minister of Pakistan from time to time from amongst Federal Ministers and members of parliament alongwith the Federal Minister for Kashmir Affairs and GB shall be an ex-officio member and Minister Incharge of the Council.³⁰⁸ Besides that, the Chief Minister of GB as its ex-officio member and six members shall be elected by the Assembly in accordance with the system of proportional representation by means of a single transferable vote. The Prime Minister of Pakistan shall be the Chairman of the Council whereas the Governor shall be the Vice-Chairman of the Council and the Minister of State for Kashmir Affairs and GB shall be an ex-officio nonvoting member of the Council.³⁰⁹ The Governor shall be appointed by the President of Pakistan on advice of the Prime Minister.³¹⁰

3.5.6.3 Executive: Government of Pakistan, GB Council and Government

The GB Council has been given dual powers i.e., executive and legislative authority over these 55 subjects³¹¹ and Government of GB has been given executive authority over 61 subjects.³¹² Whereas, Government of Pakistan has been given executive and legislative authority over the residue subjects.³¹³ Instead of direct election of the Council on the basis of adult franchise, the indirect election by members of GB

³⁰⁶ Ibid., Article 35.

³⁰⁷ Ibid., Fourth Schedule.

³⁰⁸ Ibid., Article 33.

³⁰⁹ Ibid., Article 20.

³¹⁰ Ibid., Article, 33.

³¹¹ Ibid., Third Schedule.

³¹² Ibid., Fourth Schedule.

³¹³ Ibid., Article 47(3).

Assembly is provided. There is no role of elected members of the Council in relation to exercise of the executive authority as it is to be exercised by the Chairman directly or through Council Secretariat of which Federal Minister for Kashmir Affairs and GB shall be incharge.³¹⁴ The chairman may appoint three advisors from elected members of the Council or the Assembly.³¹⁵ The provisions of Karachi Pact were not adhered to while framing the governance framework of GB. Though the Order, 2009 is said to be made on the pattern of the Interim Constitution but its status is not even equivalent to AJ&K. Thus GB has become a dependent entity quite opposite to the short title of the Order, 2009.

3.5.6.4 Judiciary: Supreme Appellate Court and Chief Court

The highest court of appeal is the Supreme Appellate Court consisting of a Chief Judge to be known as Chief Judge of GB and two other judges however, Government of Pakistan may from time to time increase the number of judges. The Chief Judge and other judges of Supreme Appellate Court are appointed by Governor on advice of the Prime Minister of Pakistan as Chairman of the Council. An appeal lies to the Supreme Appellate Court of the GB from any judgment, decree, final order or sentence of the Chief Court of GB.³¹⁶ This court also has the original jurisdiction on an application of any aggrieved party, if it considers that a question of general public importance with reference to the enforcement of any of the fundamental right is involved.³¹⁷

³¹⁴ Ibid., Article 33(12).

³¹⁵ Ibid., Article 33(13) & (15).

³¹⁶ Ibid., Article 60.

³¹⁷ Ibid., Article 61.

GB Chief Court is equivalent to High Court consisting of a Chief Judge and four other judges of whom 60% are appointed from lawyers' community and 40% from subordinate judiciary. Government of Pakistan may from time to time increase the number of judges.³¹⁸

3.6 Structural Flaws of Both Frameworks

A careful and comparative study of both of the frameworks i.e. AJ&K Interim Constitution and GB Order, 2009, which is the constitutional law of the area, vis a vis principles enshrined in the modern constitutions³¹⁹ of the world lead us to find certain structural flaws which are not only incompatible but negates the core principles of constitutional jurisprudence and principle of democratic governance as under:-

3.6.1 Non adherence to principle of trichotomy of powers

At present, principle of trichotomy of powers or separation of powers is a universally accepted principle. Indeed, in today's constitutionalism, the principle formulated to restrain abuse of authority and to maintain a mutual check and balance system.

The doctrine of separation of powers, as implemented in drafting the Constitution, was based on several principles generally held that the government is to be separated into three branches i.e. legislative, executive, and judicial. The conception that each branch performs unique and identifiable functions that are appropriate to each and the limitation of the personnel of each branch to that branch

³¹⁸ Ibid., Article 69.

³¹⁹ Like fundamental rights, separation of powers, independence of judiciary, rule of law etc. for detail please see Hatchard, John, Muna Ndulo, Peter Slinn. "Constitutionalism and Good Governance in the Commonwealth an Eastern and Southern African Perspective", Cambridge University Press, The Edinburgh Building, Cambridge cb2 2ru, UK, 2004. www.cambridge.org/9780521584647, (accessed on 09-06-2018).

only, so that no person or group should be able to serve in more than one branch simultaneously.³²⁰

In this case the executive and legislative authority of AJ&K and GB Councils³²¹ has been conjoined in one body against the principle of trichotomy of powers. Government of Pakistan is supposed to exercise executive and legislative powers for the subjects which are within its exclusive mandate under Section 31(3) read with Section 56 of the Interim Constitution and Article 47(3) of the GB Order, 2009. At present these powers are exercised by Government of Pakistan without any enactment or legislative instrument especially in case of AJ&K which make judicial review almost impossible coupled with constraint of territorial jurisdiction. Moreover, in respect of this executive authority Government of Pakistan is not accountable before any forum of Pakistan as well.

3.6.2 Empowerment without accountability

A state that adheres to constitutionalism, the power of executive authorities should not only be sourced in the constitution but should also be subject to judicial and democratic accountability. Judicial accountability under the constitution means the protection and promotion of fundamental rights of citizens against executive authorities through extra-ordinary jurisdiction of superior judiciary. Democratic accountability means that people of a state must be empowered through the constitution to throne or dethrone the governments through their voting powers. A

³²⁰ Cornell University, “Separation of Powers”, (Legal Information Institute), https://www.law.cornell.edu/anncon/html/art1/frag1_user.html, (accessed on 05.05.2017).

³²¹ Executive and legislative authority of AJ&K Council is now abolished and only advisory role has been given, please see Section 16 of AJ&K Interim Constitution (Thirteenth Amendment) Act, 2018, Appendix IV.

constitution thus becomes an instrument for making government accountable in both ways.³²²

Constitutions are implemented by and through the actions of the institutions yet these very institutions are accountable to the constitution as well and their powers are limited and defined though their power may not always be crystal-clear or precise. Thus while judicial power is normally considered the bedrock of constitutional protection and to that extent its status is quite distinctive and superior to all the other institutions of accountability but even the courts are not above the constitution or the law.³²³ Other notable instruments of accountability are non-constitutional i.e., some may have been created separately by executive action or by legislation and certain others may be set up directly by initiatives of society. Political parties, for example are, central to making effective accountability arrangements but not mentioned in all constitutions. But of course such freedoms as speech, assembly, association and access to information, which tend to be written into the constitution, are indispensable to helping non-constitutional actors, called people in power to account.³²⁴

We have already discussed that the AJ&K and GB Councils consist of elected members by respective assemblies and nominated members by Government of Pakistan. The elected members of AJ&K and GB Councils indirectly elected by AJ&K and GB Assemblies respectively are not directly accountable to people of their

³²² Peter Burnell, "The Relationship of Accountable Governance and Constitutional Implementation, with Reference to Africa", (England: Department of Politics and International Studies, University of Warwick, Coventry, CV4 7AL, Journal of Politics and Law, Vol. I, No. 3, September 2008) www.ccsenet.org/journal.html, (accessed on 02.05.2017).

³²³ Ibid; David S. Law, "A Theory of Judicial Power and Judicial Review", (The Georgetown Law Journal, Vol. 97:723), <http://georgetown.lawreviewnetwork.com/files/pdf/97-3/Law.PDF>, (accessed on 02.05.2017).

³²⁴ George W. Carey, "The Separation of Powers in United States of America: Past and Present", (2009), 263-295, <http://www.historiaconstitucional.com>, (accessed on: 02.05.2017).

respective territories. Moreover, these bodies comprise nominated members from Government of Pakistan thus compromising its representative and democratic character, the executive authority is either exercised by the Chairman³²⁵ directly or through respective Council Secretariat, located in Islamabad, of which one of the Federal Minister is incharge in spite of the fact that he is not elected from these areas and thereby either of the incharge secretariat or the Chairman is accountable democratically to people of these areas as they have no power to vote for or against them and they are not within territorial jurisdiction of superior courts of these areas to hold them accountable. Likewise, Government of Pakistan is not accountable in relation to exercise of its executive and legislative authority in respect of subjects assigned to it.

Moreover, in GB Order, 2009, almost all the subjects of potential economic value including the taxation are dealt by GB Council or Government of Pakistan directly.³²⁶ Likewise in AJ&K substantial subjects of potential economic value and taxations are dealt by the council which invariably deprives these territories from control on their resources and both of these territories are increasingly dependent on Government of Pakistan instead of being self-sufficient. It is ironical to note that this massive empowerment is without any democratic or judicial accountability even under Constitution of Pakistan.

3.6.3 Inherent culture of impunity

The culture of impunity means culture of certain countries where the looting of economic resources and other crimes by the powerful regularly goes unpunished

³²⁵ Please see Interim Constitution, supra N.253, Section 21 as well.

³²⁶ GB Order,2009, supra N.300, Article 47.

routinely. This culture is fatal to rule of law³²⁷ but when the impunity is inherent in the structure than such situation is inevitable.³²⁸ In this situation the high government officials and their cronies in the private sector shall abuse their power knowing that they will never be held responsible and their victims know that, too. In such situations, establishing the rule of law involves far more than instituting formal legal procedures because it requires transforming everyday expectations about equality and demonstrating in practice that the powerful can and will be brought to justice.³²⁹

We have already discussed that a large number of important and vital subjects given to Council or Government of Pakistan are not subject to judicial review for executive action especially for exercise of contempt powers and implementation of decisions in view of location of Councils Secretariats alongwith secretariats of Government of Pakistan beyond territorial jurisdiction as discussed above. It is ironical that even superior courts in Islamabad have no jurisdiction as both Councils are not creations of Constitution of Pakistan rather they are product of other constitutions having no nexus with Constitution of Pakistan and as such jurisdiction of Pakistani courts become doubtful in relation to their official functions. Likewise role of Government of Pakistan in AJ&K and GB is beyond territorial jurisdiction of Pakistan hence Pakistani courts are not having their jurisdiction for these territories. Resultantly, the executive authorities and officials of these councils are enjoying

³²⁷ Rule of law means that the sovereignty or supremacy of law over human beings. It necessitates that every person irrespective of his status and rank in society is subject to law; see Hilaire Barnett, *Constitutional and Administrative Law*, (USA, New York: Routledge, Cavendish Taylor & Francis Group, Sixth Edition, 2006), 67-92; Hamid Khan and M. Waqar Rana, *Comparative Constitutional Law*, (Islamabad, Karachi, Lahore: Pakistan Law House, First Edition, 2008), 48-61.

³²⁸ Paul Starr, "Cultures of Impunity", (July 24, 2015). <http://prospect.org/article/cultures-impunity>, (accessed on 04.05.2017).

³²⁹ Martin Krygier, "The Rule of Law: An Abuser's Guide", http://fsi-media.stanford.edu/evnts/4387/Abusing_the_rule_of_law2.pdf, (accessed on 04.05.2017).

absolute structural impunity resulting in frequent abuse of authority by the executive machinery.

3.6.4 Financial dependence of Government of AJ&K on Council

In spite of empowerment of AJ&K Assembly and Government of AJ&K regarding certain taxes like sales tax, excise duty, property tax etc., the collection of taxes was made by Excise and Taxation Department under control of the AJ&K Council.³³⁰

Besides that Audit and Accounts Department is also under control of the Council.³³¹

These two departments were initially raised by Government of AJ&K and then transferred to the Council during regime of an unelected Chief Executive on 23rd of March, 1979 through a notification issued under Section 19(5) of the Interim Constitution, 1974.³³² According to a previous notification the Income Tax Commissioner and his staff had been transferred to the Council from 30th June of 1979 alongwith all assets and liabilities subject to the condition that it will continue to perform functions for GOVERNMENT OF AJ&K for realization of its taxes without any service charge. Similarly the Accountant General along with its staff had been transferred to Council from the said date as well. The 80% share of the Government of AJ&K out of net receipts from concerned taxes was to be paid to it on monthly basis. However, there always remained disputes regarding late payment of Government of AJ&K share therefore; the above notification was amended on 07-09-

³³⁰ After AJ&K Interim Constitution (Thirteenth Amendment) Act, 2018, after abolition of executive authority of AJ&K Council both departments i.e. Audit and Accounts and Taxation have been transferred back to Government of AJ&K.

³³¹ Ibid.

³³² Services and General Administration Department, Azad Government of the State of Jammu and Kashmir Notification No. 17842-60/S&GAD/79 dated 23-08-1979, Appendix V.

2012³³³ to the effect that the 80% share of Government of AJ&K out of the net receipts from the concerned taxes shall be paid on monthly basis through cheque issued in this behalf on 11th day of every month to GOVERNMENT OF AJ&K and no other payments except payment for salaries, pension, POL, utility charges, medical charges, refund of GPF shall be made by the Council from 1st to 11th day of each month so as to ensure drawl of its due share by Government of AJ&K.

In spite of the new commitment by Council, the full share of Government of AJ&K had not been released in time and an amount of Rs.3.628 billion is outstanding with the Council; existing 20% charged by the Council as collection charges is very high as compared to 1% charged by Federal Board of Revenue, hence, the Council should charge not more than 10%.³³⁴ Moreover, concerns had been shown by non-transfer of GSM (Global System for Mobile Communication) license fee Rs. US\$ 20 million and Universal Services Fund contributed by mobile companies operating in territories of AJ&K.³³⁵

3.6.5 No Common Forum

Although both of these territories have common historical background and problem and issues faced by them are more or less common and identical in nature but they have no common forum for all stake holders to share their problems with each other and Government of Pakistan. The above discussion also lead us to the conclusion that constitutional and governance frameworks of AJ&K and GB is almost same with difference that AJ&K Interim Constitution is more leaned towards a state whereas GB

³³³ Services and General Administration Department, Azad Government of the State of Jammu and Kashmir Notification No. S&GAD/G-12(42)/2012, dated 07-09-2012, Appendix VI.

³³⁴ Minutes of AJ&K Cabinet meeting dated 17-10-2016 issued vide No. Admin /CS-2(11)/2016 dated 14.11.2016, Appendix VII.

³³⁵ Ibid.

Order, 2009 is more tilted towards a province like set up. Moreover, their financial structure, dependence and degree of control over their natural resources are not much different. Nonetheless, they have no joint constitutional and administrative mechanism with Government of Pakistan to address their alike and similar issues as discussed in spite of the fact that both territories are part of a disputed state and have interim set ups. The governments of AJ&K and GB are not able to jointly raise their voice regarding issues and their concern to Government of Pakistan.

3.7 Conclusion

The Government of AJ&K was established as a revolutionary interim government without any written constitution and it initially functioned as war council. The Karachi Pact 1949 transformed the status of AJ&K into a protectorate state. In 1970 new enactment for Government of AJ&K was passed which provided self-government and presidential rule in the state. The Interim Constitution, 1974 provided parliamentary form of government in the state. It has given complete judicial hierarchy including High Court and Supreme Court. The AJ&K Council have been vested with dual executive and legislative powers³³⁶ regarding vital subjects of potential economic value. Government of Pakistan also exercises dual authority in respect of defense, currency, foreign affairs including foreign aid and trade. On the other hand, GB after its liberation also established an interim revolutionary government which could only work for sixteen days till appointment of political agent by Government of Pakistan. The Order, 2009 provided nearly AJ&K like set up in GB but more resembling to a province than to a state. It has Chief Court and

³³⁶ Please see Interim Constitution, supra N.253, Section 21 as well.

Supreme Appellate Court. It also provided two legislative lists one for GB Assembly and another for GB Council. The residue subjects are with Government of Pakistan which has executive and legislative mandate on these subjects.

Both Councils Secretariats alongwith secretariats of Government of Pakistan are located in Islamabad beyond jurisdiction of AJ&K or GB courts. Moreover empowerment of the councils is without any accountability mechanism and their functionaries enjoy impunity in relation to exercise of function for AJ&K and GB, as the case may be. The duality of executive and legislative authority on the Councils and Government of Pakistan is against the principle of trichotomy of powers. Moreover, there is no common forum for AJ&K and GB to voice their issues.

Chapter IV:

RELATIONSHIP OF AJ&K AND GB WITH PAKISTAN

4.1 Introduction

In this chapter the relationship of AJ&K and GB with Government of Pakistan depicted in various constitutional, administrative documents shall be discussed.

In second section of this chapter, the relationship of AJ&K and Government of Pakistan under Karachi Agreement shall be deliberated. The dynamics of the relationship before dawn of democratic era shall be dilated upon in third section including AJ&K and Government of Pakistan relationship as well as GB and Government of Pakistan relationship in its first and second subsections respectively. In fourth section, dynamic of the relationship after dawn of democratic era shall be discussed alongwith AJ&K and Government of Pakistan relationship and GB and Government of Pakistan relationship in its first and second subsections. Then *de jure* and *de facto* status of AJ&K and GB viz a viz Government of Pakistan shall be deliberated in fifth section. Thereafter, in sixth chapter the structural flaws in the relationship shall be identified as no financial empowerment for AJ&K and GB, no equitable revenue sharing formula, no equitable dispensation for natural resources, no representation in Federal Bodies in its first, second, third and fourth subsection. The conclusion shall follow the discussion.

4.2 Relationship of AJ&K and Government of Pakistan under Karachi Agreement

As we have discussed that the Karachi Agreement executed in 1949 is the only agreement between AJ&K including GB and Government of Pakistan governing their mutual relationship.³³⁷ The agreement has not only provided mode of posting of lent officers in AJ&K from Pakistan but also dealt with financial arrangements between Government of Pakistan and Government of AJ&K in second part of the Agreement.³³⁸ Part II of the Karachi Pact, 1949 provided that monies advanced to Government of AJ&K shall only be spent for that purpose only and not otherwise for this purpose the Government of Pakistan shall have right to satisfy itself that these monies have been properly spent. It was also elaborated that the monies given to Government of AJ&K as general grant in aid shall be provided on production of budgetary statement by Government of AJ&K and the Government of Pakistan shall again have the right to satisfy that the money has been spent according to the budgetary proposals. For this purpose Government of Pakistan shall provide services of an Accounts Officers to Government of AJ&K for employment as Accountant General of AJ&K Government.³³⁹

In the third part of the Agreement, subjects of defense, negotiations with UNCIP, foreign policy of AJK Government, publicity in Pakistan and Foreign Countries, coordination of arrangement for relief and rehabilitation of refugees, all activities within Pakistan itself with regard to Kashmir such as procurement of food

³³⁷ See Section 3.3 of Chapter III.

³³⁸ Please see Karachi Pact, Appendix III.

³³⁹ Ibid., Part II.

and all affairs of Gilgit and Ladakh area under the control of political Agent at Gilgit were given to Government of Pakistan.³⁴⁰ There is no other clause in the Agreement about the GB except this provision. Hence, it can be deduced that Government of Pakistan was authorized to administer these areas as per its own convenience.

4.3 Relationship before Dawn of Democratic Era

The dynamics of the relationship of Government of Pakistan with AJ&K and GB have been distinct as both areas were accorded altogether different treatment by Government of Pakistan from time to time. Nonetheless, such treatment could not be at par with provinces irrespective of *de facto* status as such. The period prior to democratic era in AJ&K is from 1950 to 1960 and for GB stretches from 1947 to 1970.

4.3.1 AJ&K and Government of Pakistan Relationship

The relationship between Government of Pakistan and AJ&K have been discussed while introduction of various constitutional and administrative frameworks for AJ&K from time to time. Since its conclusion on 28-04-1949, Karachi Agreement had been the only document under which the affairs of AJ&K were managed till 28th of December, 1950, when the first Rules of Business was promulgated by Ch. Ghulam Abbas as Supreme Head of Azad Kashmir Movement.³⁴¹ This document maintained the original spirit of the relationship spelled out in Karachi Agreement. Through this framework complete internal autonomy was given to AJ&K except right to vote and subjects given to Government of Pakistan under Karachi Pact were continuously dealt

³⁴⁰Ibid.

³⁴¹Gillani, supra N.25, pp.45-74(Appendices).

by Government of Pakistan. In other words the working of the Government and relationship with Government of Pakistan were dealt by different documents.

The Rules of Business were revised in 1952 and the Supreme Head was divested of his power to appoint President. The President was declared to hold office during pleasure of the General Council of All Jammu and Kashmir Muslim Conference duly recognized by the Government of Pakistan through KANA. A joint secretary at Ministry of Kashmir Affairs was made incharge of all affairs of AJ&K who was also declared final appellate authority against orders of secretaries to government and head of departments of the Government.³⁴² No protocol to Karachi Agreement was made and this was the first ever violation of the Karachi Pact and Government of Pakistan has directly taken control of almost all affairs including appointment of the President. This made the Karachi Agreement irrelevant and redundant.

On 29th of November, 1958, the Rules of Business were again revised. The office of the Chief Advisor (an officer) was introduced instead of Joint Secretary. He was again to be appointed by Ministry of Kashmir Affairs. Legislative powers of the council of ministers were subject to advice of Chief Advisor. The advice of Chief Advisor could not be disregarded except with prior consultation of Ministry of Kashmir Affairs. Chief Advisor was also given powers of supervision of policy and general administration of Government of AJ&K. Chief Advisor was also declared as appellate authority in service matters.³⁴³

³⁴²Ibid, P. 77 (Appendices).

³⁴³Ibid, P.107 (Appendices).

4.3.2 GB and Government of Pakistan relationship

In 1947, after termination of lease of Gilgit Agency by British Government, successful revolt against the Governor of State of Kashmir and liberation of the considerable part of the area, on November 1, 1947³⁴⁴ An interim self-government was established under Raja Shah Rais Khan of Gilgit as head of the State which was replaced by Government of Pakistan.³⁴⁵ Sardar Muhammad Alam, Naib Tehsildar, was sent to Gilgit on November 16, 1947 as political agent by Government of Pakistan who had succeeded the interim self-government.³⁴⁶ The political agent was answerable to the Resident Commissioner based in Peshawar responsible for administration of tribal areas bordering Afghanistan.³⁴⁷ Frontier Crimes Regulations³⁴⁸ (FCR) already enforced for the tribal areas, made applicable for GB as well.

Thus the status of GB was even more relegated than AJ&K and it was placed under the political resident based in Peshawar. Subsequently under 1949 Karachi Pact executed on 28-04-1949, Government of AJ&K accorded legitimacy and ratification of already established *de facto* control of GB by Government of Pakistan through appointment of a Political Agent on 16th of November, 1947.³⁴⁹ Subsequently, the Government of Pakistan established the Ministry of KANA and transferred the affairs

³⁴⁴ Sikandar Khan Baloch, *In the Wonderland of Asia Gilgit & Baltistan*, (Lahore: Sang-e-Meel Publication, 2004), 135-160; Pak Army General Headquarters, *The Kashmir Campaign 1947-48*, (Pakistan, Rawalpindi: Services Book Club, 2006-07), 8; Dr. Ahmad Hasan Dani, *History of Northern Areas of Pakistan*, (Lahore: Sange-e-Meel Publications, 2001), 348.

³⁴⁵ Baloch, *supra* N. 280.

³⁴⁶ *Ibid.*

³⁴⁷ Cyan M. R. & Latif A, "Background Papers on Governance, Northern Areas Strategy for Sustainable Development", (Gilgit: IUCN, 2003); R. T. Enderson, "History, Folklore and Culture of Gilgit-Baltistan", (London and Gbtribune: Oxford University Press) <http://gbtribune.blogspot.com/p/history-dispute.html>, (accessed on 01.09.2016).

³⁴⁸ Frontier Crimes Regulations were made by the Government of British India for tribal areas bordering Afghanistan where through a civil servant exercised all judicial and administrative powers in an area.

³⁴⁹ Please see Karachi Agreement, Appendix III.

of the Northern Areas to the Ministry in 1950 and in 1952 a Joint Secretary of KANA was appointed as Resident in the Northern Areas with all administrative and judicial powers.³⁵⁰

In 1967, KANA introduced certain reforms by transferring powers of High Court and Revenue Commissioner to the Resident and appointed two Political Agent one each for Gilgit and Baltistan. District level powers were delegated to the Political Agent to act as District and Session Judge, Revenue Collector, Commissioner for FCR, Chief of Police and Controlling Officer of Cooperative Society.³⁵¹

4.4 Relationship after Dawn of Democratic Era

The dynamics of the relationship of Government of Pakistan with AJ&K and GB are different as well even after the dawn of democratic era for AJ&K i.e. 1960 to date and for GB it is since 1970 to date.

4.4.1 AJ&K and Government of Pakistan relationship

Right to vote was given to people of AJ&K for the first time in 1960 when AJ&K Basic Democracies Act was enforced³⁵² under which elections were held for basic democrats i.e. municipal representatives. Under the AJ&K Government Act, 1964, the basic democrats elected as such were empowered to elect members of state council comprising eight members. In spite of election the office of chief advisor was retained and the council was not made competent to elect its chairman out of its members

³⁵⁰ Hussain, *supra* N. 281.

³⁵¹ *Ibid.*

³⁵² Department of Law, Justice, Parliamentary Affairs and Human Rights, *Azad Jammu & Kashmir Basic Democracies Act, 1960 (Act X of 1960)*, *The Azad Jammu and Kashmir Laws Code*, (Muzaffarabad: Azad Government of the State of Jammu and Kashmir, Vol. I. 1948-1962, Second Edition, 2008), 474-538.

rather it was to be appointed by the chief advisor. So much so the term of the council was not fixed rather it was left to the sweet will of the chief advisor. The chairman was also declared as ex-officio President. Moreover, the legislative powers of the council were made subject to approval of the chief advisor. Besides that, legislative powers were not extended for the subjects of defense, evacuee property and amendment in AJ&K Government Act, 1964³⁵³ which invariably meant that Government of Pakistan would continue to deal with these subjects. This enactment also negated the arrangements earlier agreed in the Karachi Agreement.

The Act 1964 was replaced by AJ&K Government Act, 1968 which was almost replica of Act, 1964 subject to amendment that membership of state council was increased from eight to twelve and four seats were given to refugees of Jammu and Kashmir settled in Pakistan who were to be nominated by the chief advisor. The chief advisor was authorized to dissolve the council. The chief advisor had authority to issue proclamation of emergency. Legislative powers could only be exercised subject to prior consent of the chief advisor.³⁵⁴

Both of these Acts introduced the democratic culture in AJ&K but did not restore the concept of self-rule and indigenous character of the government. The Government of Pakistan took almost complete control over all process of legislation. Elected government was lacking requisite powers to run the affairs of the state. This was again altogether contrary to the explicit terms of the Karachi Pact.

Under the AJ&K Government Act, 1970 the presidential form of government was introduced where through the President was to be directly elected by vote of adult

³⁵³ Ibid., Vol. II, 19-22.

³⁵⁴ Ibid., 68-75.

franchise. The role of the chief advisor was altogether abolished and Legislative Assembly was declared competent to make laws for all state subjects and for territories of AJ&K. The Judicial board was highest court of appeal and all judges of superior courts were to be appointed by President. The Government of Pakistan was given overriding powers only to the extent of discharging its responsibilities under UNCIP Resolutions, defense and currency. All residue subjects were given within executive and legislative domain of GOVERNMENT OF AJ&K and AJ&K Assembly respectively.³⁵⁵

This Act was comparatively more nearer to the Karachi Pact and is one the best constitutional framework of AJ&K so far and gave full autonomy and self-government to people of AJ&K and the role of Government of Pakistan was restricted to the extent of the UNCIP Resolutions, currency, defense and security. The Act, 1970 was approved by Government of Pakistan during military regime and when civilian government, after restoration in Pakistan, did not accept the situation and endeavored to reverse the position. Ultimately, it succeeded to introduce the AJ&K Interim Constitution Act, 1974 through which the Government of Pakistan has been given exclusive authority on defense, currency, external affairs and UNCIP resolutions. The Government of Pakistan is having non-derogatory power in regard to these responsibilities and it may take any action in discharge of those responsibilities. The Government of Pakistan alongwith Council have been given dual executive and legislative authority over vital subjects.³⁵⁶ Like Government of Pakistan, the Council is also headed by the Prime Minister Pakistan who is its ex-officio Chairman. Council

³⁵⁵ Ibid., 113-122.

³⁵⁶ After AJ&K Interim Constitution (Thirteenth Amendment) Act, 2018, executive authority of AJ&K Council has now been abolished; please see section 16, Appendix XV.

is having its secretariat in Islamabad and it has both legislative and executive authority over fifty-two subjects.³⁵⁷ President is though appointing authority for judges of superior judiciary, Chief Election Commissioner, Auditor General, but he can do so only on an advice of the Council.³⁵⁸ The president is to issue proclamation of emergency again on advice of Chairman of the Council if the security of AJ&K is threatened by war or external aggression or by internal disturbances.³⁵⁹

4.4.2 GB and Government of Pakistan relationship

Right to vote was granted to people of GB in 1970, through elections for members of Northern Areas Advisory Council (NAAC), held for the first time. While the NAAC had the power to sanction development schemes only and all other matters were beyond its powers.³⁶⁰ All executive and legislative powers remained with Government of Pakistan and in 1977, when General Zia-ul-Haq imposed Martial Law in Pakistan, GB was declared as Zone-E of Martial Law altogether contrary to Karachi Pact and international stance of Government of Pakistan about the Kashmir Conflict. The representatives from GB were included in the Majlis-e-Shura.³⁶¹ This was the first major deviation of Pakistan's earlier legitimate stance on AJ&K and GB in relation to Kashmir Conflict.

In 1985, on recommendation of a committee constituted in this behalf, Aga Ahmad Ali Shah, a representative from Northern Areas, was appointed as Advisor to Minister of Kashmir Affairs. In 1988, Government of Pakistan during regime of Ms.

³⁵⁷ Interim Constitution, supra N. 253, Section 21.

³⁵⁸ Ibid., Sections 42, 43, 50 and 50-A.

³⁵⁹ Ibid., Section 53.

³⁶⁰ M. Amir Rana and Mujtaba Rathore, *Northern Areas: Crises and Prospects*. (Pakistan: Pakistan Institute for Peace Studies (PIPS), Nigarishat Publishers, 2007), 442.

³⁶¹ Sahar Arshad, "Military intervention in Pakistan, A case Study of Zia and Bhutto Regime", https://www.academia.edu/4188687/Military_intervention, (accessed on 01.09.2016).

Benazir Bhutto had appointed an elected representative of Northern Areas Council (Mr. Qurban Ali) as Advisor to Prime Minister with equal status of a State Minister.

³⁶²

Subsequently, Legal Framework Order 1994 was approved for GB through which Federal Minister KANA was declared as Chief Executive. The GB Council was empowered as the legislature with power to legislate on 49 subjects and residue powers were directly given to Government of Pakistan. In 1999, the LFO was amended by empowering the Northern Areas Legislative Council (NALC) to legislate on 49 subjects as envisaged in schedule-II of the LFO.³⁶³ In 2006, six advisors were appointed from the NALC members and they were brought at par with members of AJ&K Assembly in relation to their pay and privileges.³⁶⁴

The Gilgit-Baltistan Empowerment and Self Governance Order, 2009, was introduced in August 2009 which is heavily influenced by the AJ&K setup and provincial setups of Pakistan. It clearly explains that GB is not part of Pakistan in terms of Article 1 of the Constitution of Islamic Republic of Pakistan which spells out the territorial limits of the country.³⁶⁵ On pattern of AJ&K Council, the GB Council was established which is headed by the Prime Minister of Pakistan³⁶⁶ consisting of, Governor, six members nominated by the Prime Minister of Pakistan from time to time from amongst Federal Ministers and members of Parliament and the Federal Minister for Kashmir Affairs and GB as an ex-officio member and Minister Incharge

³⁶² Ibid.

³⁶³ Dr. Ahmad Hasan Dani, *History of Northern Areas of Pakistan*. (Lahore: Sange-e-Meel Publications, 2001), 348.

³⁶⁴ Ibid.

³⁶⁵ GB Order, 2009, supra N.300.

³⁶⁶ Ibid, Article 47

of the Council.³⁶⁷ Besides that, the Chief Minister of GB would be an ex-officio member and six members shall be elected by the Assembly in accordance with the system of proportional representation by means of a single transferable vote. Minister of State for Kashmir Affairs and GB is made as an ex-officio nonvoting member of the Council.³⁶⁸ The Governor shall be appointed by the President of Pakistan on advice of the Prime Minister.³⁶⁹

The GB Council has been given dual executive and legislative authority over these 55 subjects³⁷⁰ and Government of GB has been given executive authority over 61 subjects.³⁷¹ Whereas, Government of Pakistan has been given executive and legislative authority over residue subjects.³⁷² The chairman may appoint three advisors from elected members of the Council or the Assembly.³⁷³ The Chief Judge and other judges of Supreme Appellate Court are appointed by the governor on advice of the Prime Minister of Pakistan as Chairman of the Council.

4.5 Existing Status of AJ&K And GB vis-a-vis Federal Structure of Pakistan

As discussed above, after Karachi Pact the status of a sovereign revolutionary state was transformed into a protectorate state whose defense and foreign affairs etc were managed by a sovereign country i.e. Pakistan. Therefore, all subsequent constitutional and administrative frameworks would be deemed to be based on the Karachi Pact,

³⁶⁷ Ibid., Article 33.

³⁶⁸ Ibid., Article 20.

³⁶⁹ Ibid., Article, 33.

³⁷⁰ Ibid., Third Schedule.

³⁷¹ Ibid., Fourth Schedule.

³⁷² Ibid., Article 47(3).

³⁷³ Ibid., Article 33(13) & (15).

which acts as a convention for constitutional framework of AJ&K and GB including their relationship with Pakistan.

Status of AJ&K and GB and their relationship with Government of Pakistan have not been determined by the Constitution of Pakistan 1973. Pakistan is a federal republic comprising four provinces and two special territories i.e. Islamabad Capital Territory and Federally Administered Tribal Areas. For having correct appreciation, Article 1(2) (d) of Constitution of Islamic Republic of Pakistan, 1973, is reproduced as under:-

- “(2) *The territories of Pakistan shall comprise;*
- (a)
- (b)
- (c)
- (d) *Such States and Territories as are, or may be included in Pakistan, whether by accession or otherwise.”*

Since AJ&K and GB are part of disputed State of Jammu and Kashmir and about that Constitution of Pakistan provides³⁷⁴ as under:-

“257. When the people of the State of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and the State shall be determined in accordance with the wishes of the people of that State.”

The above provision of the Constitution clearly manifests the future relationship of State of Jammu and Kashmir with Pakistan after its accession to Pakistan.

³⁷⁴ Constitution of Islamic Republic of Pakistan, 1973, Article 257.

4.5.1 *De jure* and *de facto* status

As discussed in the third chapter that after execution of Karachi Pact, the status of a sovereign revolutionary state of AJ&K has been transformed into a protectorate state whose defense and foreign affairs etc are managed by a sovereign country i.e. Pakistan. Therefore, as all subsequent constitutional and administrative frameworks especially the provisions governing the relationship with Government of Pakistan would be deemed to be based on the Karachi Pact, which would be treated as convention for constitutional framework of AJ&K and GB particularly their relationship with Pakistan.

High Court of AJ&K while repelling an argument that policy issued by the State Bank of Pakistan applies to AJ&K without any adoption by AJ&K Council as the State Bank is not a Foreign Bank, it was held that:-

*“Azad Kashmir is a territory included in Pakistan in view of Article 1(2)(d) of the Constitution of Pakistan, 1973. It cannot be said that the State Bank is a Foreign Bank or that the AJ&K is a Foreign Territory for Pakistan & vice versa.”*³⁷⁵

The above judgment cannot be given extended interpretation that AJ&K or GB has formally integrated to Pakistan especially in presence of another explicit provision about the State of Jammu and Kashmir i.e. Article 257 of Constitution of Islamic Republic of Pakistan, 1973. As far as above referred judgment is concerned, the High Court has tried to regulate the role of State Bank of Pakistan in AJ&K in respect of one of the subjects of Government of Pakistan under the Interim Constitution i.e. currency and the same precedent can also be used for other subjects of Government of

³⁷⁵ *Genuine Rights Commission v. Federal Government through its Chief Secretary and others*, PLD 2006 AJ&K 1.

Pakistan i.e. defense and external affairs of AJ&K including foreign aid and trade on the basis of analogy but not otherwise. This position has been reaffirmed by Supreme Court of AJ&K in clear phraseology that AJ&K territory did not constitute a part of Pakistan.³⁷⁶ Hence, it can be concluded that *de jure* status of AJ&K and GB has not been determined so far especially with regard to their relationship with Pakistan.

In the backdrop of the separation of East Pakistan, it was seriously felt that the territory of AJ&K may part its way from Government of Pakistan if it is not given its due status *viz a viz* provinces of Pakistan. Therefore, on 24th of June 1970, an Office Memorandum was issued³⁷⁷ by Federal Government where through provincial status for AJ&K was admitted as policy *viz a viz* its relationship with Government of Pakistan. The extract of the Office Memorandum is as under:-

- “(i) *Although Azad Kashmir is not a part of Pakistan within the meaning of Article 1(2) of the Constitution, it should for all practical be treated like any other province.....”*
- “(ii) *“Azad Kashmir should be brought into the main stream of the general administration (of the country). For this purpose the leaders and officials of that Government should be invited at appropriate level to attend inter-ministerial meetings in which the problems of that area are coming up for discussion.”*

This Office Memorandum was reiterated on May 11, 1971 through a DO letter³⁷⁸ and on 6th of June 1988, another D.O Letter was issued wherein the provincial status of AJ&K was again reiterated and reaffirmed as under:-

“would like to reiterate to advice conveyed in the above mentioned DO letter that AJ&K should be brought into the mainstream of the general

³⁷⁶ *Commissioner of Income Tax v. Ali Khan*, PLD 1985 SC (AJ&K) 62.

³⁷⁷ Office Memorandum No. 8/9/70 (Cord. I), dated 24-06-1970. Appendix VIII.

³⁷⁸ Cabinet Division D.O. No. 8/9/70- Coord. I.Government of Pakistan Rawalpindi, May 11, 1971. Appendix IX.

*administration and the various Ministries/ Divisions should directly entertain communication and proposal emanating from the Government of AJ&K. The Kashmir Affairs and Northern Affairs Division would continue to play its co-coordinating role as well. Although Azad Kashmir is not a part of Pakistan under the Article 1(2) (d) of the Constitution, it should, for all practical purposes, be treated like any other provinces of Federation.*³⁷⁹

However, any such arrangement between AJ&K and Pakistan without enabling constitutional provision would be deemed to be an administrative arrangement without having any constitutional coverage, hence, it is interpreted to be restricting to developmental activities only. It is true that a policy letter cannot prevail over the constitutional and legal provisions but such like document needs to be given constitutional structure and protection otherwise they would be meaningless.

For GB, the Government of Pakistan introduced GB Empowerment and Self-Governance Order, 2009 on August 28, 2009. Under the Order, 2009, the GB now have its own Governor and Chief Minister and the status similar like a province but not a province because of following provision which is reproduced hereunder, the stance of Pakistan towards Kashmir Conflict has been safeguarded:

“92. Order not to prejudice stance.- The provision of this Order shall not derogate from, or in any manner prejudice, the declared stand of the Government of Pakistan regarding the right of self-determination for the people of Jammu and Kashmir in accordance with the United Nations Resolutions.”³⁸⁰

In the above provision the official position of Pakistan towards Kashmir Conflict has been reiterated. A setup has been created like AJ&K, the GB Council headed by the Prime Minister of Pakistan except the difference that the head of GB

³⁷⁹ Cabinet Division, Government of Pakistan, No. 6/7/88-GC, dated 06.06.1988, Appendix X.

³⁸⁰ GB order, 2009, supra N.300, Article 92.

Government is named as Chief Minister and Governor represents the Government of Pakistan.

4.5.2 Direct and indirect role of Government of Pakistan

The Government of Pakistan has kept its direct and indirect role in affairs of AJ&K and GB since independence of both of these territories. Nonetheless, of introduction of various different constitutional and governance frameworks the defense, security, currency and foreign relations have always been within purview of the Government of Pakistan directly besides exercising influence indirectly through key lent officers i.e. Chief Secretary, Inspector General of Police, Finance Secretary, Health Secretary, Accountant General and usually Additional Chief Secretary Development. These officers are not under control of Government of AJ&K especially in the matters of their posting and discipline. They directly follow the Government of Pakistan and often defy the executive authority of Government of AJ&K.³⁸¹ In GB the role of lent officers is more obvious, contrary to AJ&K, as their ratio is fixed i.e., in BS-17, 15%; BS-18, 40%; BS-19, 50%; BS-20, 60% and BS-21, 65%.³⁸² Another mode of indirect rule over the areas is the role of both AJ&K and GB Councils Secretariats located in Islamabad and headed by Federal Minister Kashmir Affairs and Gilgit-Baltistan³⁸³ (KGB) by exercising exclusive control over vital subjects of economic value and financial control beside their power to collect taxes from the both areas.³⁸⁴

³⁸¹ Centre for Peace, *supra* N.29, P. 2; Snedden, *supra* N.11, P. 157.

³⁸² GB Order, 2009, *supra* N. 300, Fifth Schedule.

³⁸³ Please see Chapter III for role of both Councils in detail but after passage of AJ&K Interim Constitution (Thirteenth Amendment) Act, 2018, and abolition of executive authority of AJ&K Council, indirect role of Government of Pakistan has been reduced significantly.

³⁸⁴ GB Order, 2009, *supra* N. 300; Snedden, *supra* N. 11, P. 108.

4.6 Structural Flaws in the Relationship

The above analysis reveals certain flaws in the relationship as follows:-

4.6.1 No Financial Empowerment

The financial arrangement between a federation and its units is regulated by the constitution. Since AJ&K and GB are not constitutionally formal federating units of Federation of Pakistan yet they are linked with the Federation as its units and are given status like a province without any enabling provision in the constitution which debars them to get their due share from the Federation like the provinces.

The first financial arrangement ever made between AJ&K and Government of Pakistan was Part II of the Karachi Pact, 1949. It says that monies advanced to Government of AJ&K shall only be spent for that purpose only and not otherwise and Government of Pakistan shall have right to satisfy itself that these monies have been properly spent. Whereas, the monies given to Government of AJ&K as general grant in aid shall be provided on production of budgetary statement by Government of AJ&K and the Government of Pakistan shall again have the right to satisfy that the money has been spent according to the budgetary proposals. For this purpose Government of Pakistan shall provide services of an Accounts Officers to Government of AJ&K for employment as Accountant General of AJ&K Government.³⁸⁵

³⁸⁵ Karachi Pact, part II, Appendix III.

The above arrangements continued till new policy of Government of Pakistan issued in 1973.³⁸⁶ Under this policy the fixed annual grant of Rs. 13.3 crore from Government of Pakistan to Government of AJ&K was introduced from Financial Year 1973-74. This policy was replaced in 1992 by introduction of a new policy³⁸⁷ according to which the fixed annual grant of Rs. 13.3 crore from Government of Pakistan to Government of AJ&K was replaced by a variable grant to be worked out each year on hypothetical basis in the light of the share awarded to Baluchistan whose population was comparable to AJ&K from Financial Year 1992-93. For that financial year this grant was worked out as Rs. 754.6 million. The income tax and sales tax collected from territory of AJ&K by Government of AJ&K and difference of rate of these taxes (than those applicable in Pakistan) shall also be deducted from pool of taxes and excise duties calculated on hypothetical basis as above. However, any resource generated by Government of AJ&K through any special tax, in addition to above mentioned taxes, will not be adjusted by Government of Pakistan.³⁸⁸

Moreover, Government of AJ&K had to continue to receive cash development loans and grants including ways and means advances as it had earlier been receiving at that time. The revenue deficit grant was said to be worked out on the basis of average increase of 14 percent annually for non development expenditures. AJ&K was said to receive increase in rupee allocation each year in their Annual Development program. Moreover, AJ&K was also obliged to finance major power generation projects in a way that foreign aid component does not affect the rupee

³⁸⁶ Government of Pakistan, Finance Division, Office Memorandum No. F-1(1)WC (AK)/ dated 20.06.1973.

³⁸⁷ Government of Pakistan, Finance Division, Office Memorandum, No. F-5(11) PF, II/89-718, dated August 11, 1992, Appendix XI.

³⁸⁸ Ibid.

component of normal Annual Development Program and sufficient funds are allocated for such projects.³⁸⁹

According to above formula the share of AJ&K out of federal income tax and sales tax was worked out as 2.27% i.e. a half of 5.11% which was the share of Baluchistan before 18th Amendment as the population of AJ&K was most comparable with Baluchistan. After 18th Amendment the share of Baluchistan has gone up to 9.09 % but the share of AJ&K is still at 2.27%. Now AJ&K cabinet is of the view that this share should be enhanced up to 4.5% as AJ&K is facing acute shortfall of Rs. 18.2 billion due to gap between receipts and expenditure since last seven years.³⁹⁰ The Cabinet further stated that budget deficit of AJ&K is due to unrealistic targets of Finance Division of Government of Pakistan about income from AJ&K own receipts and 80% share of income tax, therefore, it was demanded that targets should be fixed on the basis of actual collection of the previous year.³⁹¹ On 16-04-2018, new financial arrangements have been made with effect from 1st of July, 2018, whereby share of AJ&K from FBR taxes has been enhanced from 2.27% to 3.64% and revenue deficit grant has been discontinued.³⁹²

GB has no formal policy or financial arrangement with Government of Pakistan unlike AJ&K. Its affairs are directly managed by KGB on discretionary basis by Government of Pakistan. The non development budget is allocated by Ministry of Finance Government of Pakistan as a grant in aid and GB Government makes its own

³⁸⁹ Ibid.

³⁹⁰ Minutes of AJ&K Cabinet meeting dated 17-10-2016 issued vide No. Admin /CS-2(11)/2016 dated 14.11.2016, Appendix VII.

³⁹¹ Ibid.

³⁹² Government of Pakistan, Finance Division (PF Wing), Office Memorandum, No. F.5(11)PF.II/2017-18/105 dated 16-04-2018, please see Appendix XII.

budget according to its needs and gets it approved from GB Assembly as annual budget. As far as development budget is concerned Government of Pakistan makes two types of development allocation to GB i.e. block allocation as grant in aid and Public Sector Development Program. The Government of GB prepares Annual Development Programs against the block allocation as per its requirements and gets it passed from GB Assembly as part of the annual budget, whereas, Public Sector Development Program is directly controlled by KGB and releases are sanctioned in consultation with the Ministry of Finance.

4.6.2 No equitable revenue sharing formula

A continuing source of tension between AJ&K and Government of Pakistan is over sharing water use charges/net hydel profit. At present AJ&K is being paid Rs. 0.15/KWh plus indexation as water use charges for Mangla Dam project which affects the waters of the Jhelum and Poonch rivers before they flow into Punjab in Pakistan. Moreover, AJ&K is not being paid income tax and general sales tax by Water and Power Development Authority (WAPDA) on power generated from Mangla Dam.³⁹³ Particularly affected is the Mirpur district, which has increasingly felt a sense of discrimination and economic exploitation because of the project.³⁹⁴

People of GB frequently articulate their discontent as well because under their governance framework they are not able to have their due share of revenues earned by Government of Pakistan from their territory. They insist that their lack of constitutional status impedes their communities' ability to obtain a fair share of the financial benefits derived from their natural resources since they are unable to

³⁹³ Ibid.

³⁹⁴ Roger Ballard, *The Kashmir Crisis: A view from Mirpur*, (India. Mumbai: Economic and Political Weekly, 1991), 513-517.

effectively lobby the Government of Pakistan. Furthermore, even where the government of GB would have control over the revenue, it is still practically managed and controlled by departments of the Government of Pakistan in Islamabad, as it is in the case of tourism, for example.³⁹⁵

4.6.3 No equitable dispensation for natural resources

The position is not different as far as equitable dispensation for natural resources is concerned. Both AJ&K and GB are blessed with abundant water resources but they are not given equal treatment comparing to provinces of Pakistan. For example Mangla Dam located in AJ&K territory is a key to the success of the Pakistani economy as a whole. Pakistan argues that the construction of the Mangla Dam is a consequence of the 1961 Indus Basin treaty between India and Pakistan with the World Bank acting as guarantor. The people of AJ&K, particularly the Mirpuris, argue that water is an indigenous natural resource controlled by the Pakistani state to the disadvantage of Kashmiris.³⁹⁶ Moreover, 969 MW Neelum-Jehlum Hydel Power Project located in AJ&K is likely to complete in 2018 but still no agreement has been made with Government of AJ&K for sharing of net hydel profit.

Likewise Government of Pakistan has made decision to construct the Bhasha Dam but without any assurance to pay royalty or net hydel profit to GB being due to it

³⁹⁵ “Issuance of Mining Lease Creates Rift in GBLA”, (Pamir Times online (25 June 2011), <http://pamirtimes.net/2011/06/25/issuance-of-mining-lease-creates-rift-in-gbla/>, (accessed on 21.09.2016).

³⁹⁶ Human Rights Watch, “With Friends like these... Human Rights Violations in Azad Kashmir” (Volume 18. No. 12 (C). September 2006), https://www.hrw.org/sites/default/files/reports/pakistan0906webwcover_0.pdf. (accessed on 29.10.2016).

on the basis of parity and equality with provinces of Pakistan.³⁹⁷ Hence, unsettled revenue-sharing formula becomes very critical for GB and AJ&K especially when distribution of natural resources is already a common source of dispute among provinces and the Government of Pakistan. It includes controversial claims of distribution of royalties to Khyber Pakhtunkhwa for hydro-electric power and to Baluchistan for its natural gas and the disputes over the construction of the Kalabagh Dam.³⁹⁸

4.6.4 No representation in Federal Bodies

After 18th Amendment to Constitution of Pakistan 1973, the Pakistan has become a consociational federation with greater say of provinces through federal bodies but AJ&K and GB have no representation in these bodies. It is appropriate to discuss functioning and role of these bodies in federal structure of Pakistan.

The first body, Council of Common Interest (CCI) was established under Constitution of Pakistan, 1973 for inter provincial dispute resolution body. After 18th Amendment the role of CCI is enlarged to 22 subjects mentioned in part II of Federal Legislative List including railway, mineral oil and natural gas, electricity, major ports, regulatory bodies established under federal law, national planning and economic coordination etc. The changes in the composition of CCI are oriented towards greater provincial autonomy and their greater say in supervision of their resources and dispute management. The Prime Minister of Pakistan chairs the meeting of CCI who also nominates three other members from Government of Pakistan besides Chief Ministers

³⁹⁷ Institute for Gilgit Baltistan Studies, “Gilgit-Baltistan Legislative Assembly Session: Gemstone and Metal Mining Banned”, <http://www.gilgitbaltistan.us/Bulletin/gilgit-baltistan-legislative-assembly-session-gemstone-and-metalmining-banned.html/>, (accessed on 21.09.2016).

³⁹⁸ Khurshid Iqbal, *The Right to Development in International Law: The Case of Pakistan*, (London, New York: Routledge, 2010), 151.

of provinces who are ex-officio members. AJ&K and GB are invariably dependent on CCI for resolution of issues of their concern but they do not have any representation being non-federating units. A classic example is the provision of drinking and irrigation water to AJ&K from Mangla Dam Reservoir. Under Mangla Dam Raising Agreement Government of Pakistan and Water and Power Development Authority are bound to provide the share of water. The case is pending for resolution in CCI where AJ&K has no representation at all.

Second federal body is the National Economic Council (NEC). This body is meant to strengthen economic relations between federation and provinces. PM Pakistan is chairman of NEC and all four Chief Ministers and one member nominated by each Chief Minister is member of this body. It is responsible for economic planning and equitable development of all provinces. Now provinces can raise their domestic or international loan on basis of the security of provincial consolidated fund within such limit as may be specified by NEC. Previously this role was performed by Economic Affairs Division. Both AJ&K and GB are affected by decisions but they have no representation.

Third body, National Finance Commission (NFC), was established by Constitution of Pakistan 1973. It is responsible to distribute federal revenue amongst federation and provinces on the basis of agreed formula through NFC Award. After 18th Amendment, NFC has been strengthened. A constitutional guarantee has also been given that the share of provinces in each award of NFC shall not be less than the previous award. Federal and provincial finance ministers are responsible to monitor the implementation of the award biannually. Reports of NFC Award implementation is

to be submitted before both houses of the parliament and provincial assemblies. Again AJ&K and GB are not having any representation in this body in spite of the fact that they are directly affected by its decisions.

Similarly sub-constitutional bodies i.e., Indus River System Authority (IRSA) and National Electric Power Regulatory Authority (NEPRA) have been established comprising representatives from all provinces of Pakistan. IRSA is responsible to allocate the water resources amongst provinces of Pakistan according to Water Accord approved by CCI. This body has been established by special enactment of Pakistan and being a regulatory body, it is controlled by CCI. AJ&K is also eligible for allocation of water resources according to agreement between Government of Pakistan and AJ&K for Mangla Dam Raising Project. Therefore, AJ&K should also give representation in IRSA for resolution of its outstanding issues. On the other hand NEPRA is responsible to regulate power sector issue including determination of tariff and net hydel profit to be paid to provinces under Article 161 of Constitution of Pakistan, 1973. AJ&K and GB have enormous hydel potential but they have no representation in NEPRA which is one of the impediments in development of hydel sector.

4.6.5 No constitutional cover for existing relationship

The relationship with AJ&K and GB has been maintained by Government of Pakistan administratively without any constitutional cover. Moreover, the provincial status accorded to them by Government of Pakistan has no constitutional protection. It is also evident whatever relationship has been maintained that is with Government of Pakistan only and not with federal structure of Pakistan in spite of the fact that

Pakistan is a consociational federation as discussed above. Resultantly, when these arrangements come across the constitutional provisions that are thwarted altogether and AJ&K and GB are the ultimate losers. Hence, it is needed that the agreed relationship must be given due protection under Constitution of Pakistan.

4.7 Conclusion

The relationship of AJ&K including GB and Government of Pakistan were formalized through Karachi Agreement, 1949. Through this agreement the control of GB was given to Government of Pakistan. The Karachi Agreement was not adhered most of the time while enforcing different constitutional and governance framework of AJ&K and GB. Neither the provincial status nor the existing relationships of AJ&K and GB with Government of Pakistan has any enabling provision in the Constitution of Pakistan. Consequently, there could be no financial empowerment, no equitable revenue sharing formula, no representation in federal bodies besides which made denial the due share and equivalent treatment of these areas with provinces of Pakistan almost impossible. Moreover, existing arrangement of AJ&K and GB with Pakistan at administrative level is limited to formal relationship with executive organ of Pakistan only i.e. Government of Pakistan, without any linkage with other organs of the Country, which too is heavily tilted in favor of Government of Pakistan much more than the provinces under Constitution of Pakistan.

Chapter V:

HUMAN RIGHTS OBLIGATION OF PAKISTAN VIZ-A-VIZ AJ&K AND GB

5.1 Introduction

Having discussed the Human Rights Obligation of States and constitutional set up of AJ&K as well as governance framework of GB, this chapter shall discuss the specific Human Rights Obligation of Government of Pakistan in relation to territories of AJ&K and GB under the principle of extra territorial application.

Human Rights Obligations of Government of Pakistan under international law would be discussed in Second Section. This section would be divided into three subsections wherein obligations under ICCPR and ICESCR shall be explained respectively. In the third subsection the notion of indivisibility and interdependence of Human Rights shall be dilated upon. Thereafter, the obligations of Government of Pakistan on the basis of equality and non discrimination vis a vis provinces of Pakistan shall be deliberated in the third section that would be further divided into three subsections, specific obligation for explanation of provision of devolution and consociational federation dispensations for AJ&K and GB like provinces, empowerment of parliament and executive and financial empowerment in first, second and third subsections respectively.

5.2 Obligation under International Human Rights Law

AJ&K and GB are not constitutional part of Pakistan but their constitutional and governance frameworks do have substantial role and control of Government of

Pakistan, hence obligations of Government of Pakistan up to extent of these territories would be extraterritorial.³⁹⁹ In case of AJ&K, preamble of Interim Constitution acknowledges UNCIP Resolutions regarding admissibility of right to self-determinations of people of Jammu and Kashmir. It is also aimed that the constitution shall bring better governance and administration of AJ&K. Besides passage of the Interim Constitution from Legislative Assembly, the Government of Pakistan approved it in discharge of its responsibilities under UNCIP Resolutions.⁴⁰⁰ On the other hand, Government of Pakistan has issued the GB Order, 2009 as fundamental law of the area without its approval from any representative or elected forum of GB.⁴⁰¹

5.2.1 Civil and Political Rights

ICCPR provides right to self-determination of people including the right to freely dispose of their natural wealth and resources and not to be deprived of their means of subsistence.⁴⁰² Each State Party has undertaken to respect and ensure that all of the rights are given to all of the individuals within its own territory as well as territory of its jurisdiction and control on the basis of equality and non-discrimination. HRC has commented that it is mandatory for states to ensure the rights by taking positive steps to protect against both State and non-state abuses. Moreover, states parties undertake to adopt the legislative or other measures as may be necessary to give effect to the provisions of ICCPR.⁴⁰³ The obligation of state parties is clearly extended to

³⁹⁹ See Section 2.4, Chapter II.

⁴⁰⁰ Interim Constitution, *supra* N.253, preamble.

⁴⁰¹ GB Order, 2009, *supra* N.300, preamble.

⁴⁰² Civil and Political Rights Covenants, *supra* 64, Article 1.

⁴⁰³ UN Human Rights Committee, "International Justice Resource Center", <http://www.ijrcenter.org/un-treaty-bodies/human-rights-committee/>, (accessed on 20.11.2016).

territories controlled by them as Non-self-Governing and Trust territories.⁴⁰⁴ The state parties to ICCPR have invariably undertaken that, –

- (a) *any persons whose rights are violated must have an effective remedy, even if the violation was committed by a person in an official capacity;*
- (b) *any person claiming a remedy must have his/her right to a remedy against alleged violations of these rights to be determined by competent judicial, administrative or legislative authorities, or by any other competent authority provided by the legal system of the State; and*
- (c) *the competent authorities are capable to enforce their remedies which are granted to individuals. The Human Rights Committee made interpretation of these provisions that the States Parties are bound to take steps to prevent and address abuses by both State and non-State actors.*⁴⁰⁵

The HRC refers to the interrelationship between the positive obligations and the duty to provide effective remedies in Article 2(3), implying that remedies should be provided for all breaches, including the situation where the State has failed to abide by its obligations and to ensure that private persons or entities do not abuse rights.⁴⁰⁶

Other rights provided by ICCPR include the right to life be protected by law,⁴⁰⁷ prohibition of torture or cruel, inhuman or degrading treatment,⁴⁰⁸ prohibition of slavery and slave-trade in all their forms are prohibited,⁴⁰⁹ prohibition of arbitrary arrest and detention,⁴¹⁰ freedom from deprivation of liberty and to treat persons with respect and dignity,⁴¹¹ right of alien not to be expelled from a country arbitrarily,⁴¹²

⁴⁰⁴ Civil and Political Rights Covenants, *supra* 64.

⁴⁰⁵ *Ibid.*

⁴⁰⁶ *Ibid.*

⁴⁰⁷ Civil and Political Rights Covenants .*supra* 64, Article 6.

⁴⁰⁸ *Ibid.*, Article 7.

⁴⁰⁹ *Ibid.*, Article 8.

⁴¹⁰ *Ibid.*, Article 9.

⁴¹¹ *Ibid.*, Article 10.

⁴¹² *Ibid.*, Article 13.

right to fair trial,⁴¹³ the right to protection of the law against arbitrary or unlawful interferences with privacy of family, home or correspondence or unlawful attacks on honor or reputation.⁴¹⁴

Certain other rights include freedom of religion,⁴¹⁵ prohibition by law of war propaganda and advocacy of national, racial or religious hatred,⁴¹⁶ right of family to the State's protection;⁴¹⁷ right of child to legal protection,⁴¹⁸ democratic rights⁴¹⁹ and entitles all persons to have equal protection of the law,⁴²⁰ in particular, it says that the law shall prohibit any discrimination and guarantee to all persons equal and effective protection against discrimination on any ground such as race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status and minority rights.⁴²¹ The only exception is where security and life of state is threatened and the emergency has been officially proclaimed than these rights may be suspended, except articles 6, 7, 8(1) & (2), 11, 15, 16 and 18,⁴²² but such suspension must only be made strictly to the exigencies of the situation and on the basis of equality and without any discrimination on the basis of race, color, sex, language, religion or social origin. It is worth to mention here the vital safeguard given in Article 47 of the ICCPR that present covenant shall not be interpreted in a way to

⁴¹³ Ibid., Article 14.

⁴¹⁴ Ibid., Article 17.

⁴¹⁵ Ibid., Article, 18.

⁴¹⁶ Ibid., Article 20.

⁴¹⁷ Ibid., Article 23.

⁴¹⁸ Ibid., Article 24.

⁴¹⁹ Ibid., Article, 25.

⁴²⁰ Ibid., Article 26.

⁴²¹ Ibid., Article, 27.

⁴²² These are non-derogable rights and cannot be suspended at any time viz. right to life, prohibition of torture, slavery, deprivation of liberty and humane treatment etc. imprisonment for contractual liability, retroactive punishment, recognition as person before law and freedom of religion etc.

impair the inherent right of all people to enjoy and utilize fully and freely their natural wealth and resources.

The HRC often interprets these provisions to require the state to criminalize acts by State and non-state actors which could interfere with the relevant rights. It considers that a state party's failure to investigate claims of abuse because of failure to establish appropriate administrative processes could amount to a breach of the ICCPR. The HRC is of the view that states must investigate the alleged violations by both state and private actors in good faith and take necessary appropriate action, while ensuring that persons whose rights are violated have an effective remedy. It also obliges the states to take steps to put an end to ongoing violations of these rights. The HRC further says that the administrative mechanisms must ensure that investigations are carried out promptly, thoroughly and effectively through independent and impartial bodies. It was recognized that national human rights institutions, having appropriate powers, can contribute to this end.⁴²³

Pakistan has ratified ICCPR on 5th of June, 2010 alongwith certain reservations⁴²⁴ and as such she is bound to provide all of these rights to AJ&K and GB in discharge of extra-territorial obligations. The Pakistan had made reservations to nine articles 3, 6, 7, 12, 13, 18, 19, 25 and 40 of the ICCPRs which were not compatible with the object and purpose of the ICCPR because its scope, generality and the restrictions they impose on key rights, including non-derogable rights such as the right to life; freedom from torture and other cruel, inhuman or degrading treatment or punishment; and freedom from gender discrimination. Especially, the reservation to

⁴²³Civil and Political Rights Covenants, Art. 1.3, supra 64.

⁴²⁴ Please see Instrument of Ratification of ICCPR and reservations. Appendix XIII.

Article 40 of the ICCPR wherethrough Pakistan seeks to avoid reporting under the ICCPR thereby negating role of the HRC, for determining the state's discharge of ICCPR obligations.⁴²⁵ HRC has commented that the normal consequence of an unacceptable reservation is not that the ICCPR will not be effective at all for a reserving party but such a reservation will generally be severable, and the ICCPR will be operative for the reserving party without any benefit of the reservation.⁴²⁶ Subsequently, on 14-09-2011 Pakistan had withdrawn these reservations except to the extent of Articles 3 and 25 which were partially modified.⁴²⁷

A careful study shows that Interim Constitution⁴²⁸ and GB Order, 2009 almost contain identical provisions regarding all fundamental rights.⁴²⁹ Civil and political rights include security of liberty save in accordance with law,⁴³⁰ safeguard as to arrest and detention, prohibition of slavery and forced labour, protection against retrospective punishment, freedom of movement, freedom of assembly, freedom of association, freedom of speech, freedom of religion,⁴³¹ safeguard against taxation purposes of any particular religion and safeguard as to educational institution in

⁴²⁵ Amnesty International and International Commission of Jurists, Pakistan's Reservations: A Challenge to the Integrity of the United Nations Human Rights Treaty System, <https://www.amnesty.org/download/documents/28000/asa330062011en.pdf>, (accessed on 01-06-2018).

⁴²⁶ Human Rights Committee, General Comment 24, para. 18, www.ohchr.org › OHCHR › English › Human Rights Bodies, (accessed on 01-06-2018).

⁴²⁷ See instrument for partial withdrawal of reservations dated 11-09-2-11 Appendix XIV.

⁴²⁸ New rights in line with Constitution of Pakistan 1973 like, Right to fair trial, Protection against double punishment and self-incrimination, Inviolability of dignity of man, Right to information, Right to education and Preservation of language, script and culture are added in list of fundamental rights beside rephrasing language of few existing rights vide AJ&K Interim Constitution (Thirteenth Amendment) Act, 2018, please see Section 7, Appendix IV.

⁴²⁹ See Section 4 of Interim Constitution and Articles 3 to 19 of GB Order, 2009.

⁴³⁰ This right has been interpreted to include that the liberty provided not only protects liberty of a person but also rights attached to the persons, please see PLD 1983 SC (AJ&K).

⁴³¹ The people of AJ&K are given religious freedom with an exception that law can be made to prohibit or punish the conversion of Muslim into any other religion but no law has been made in AJ&K so far. It is argued that this provision is made to keep intact the demography of the area before the plebiscite for exercising Right to Self-determination under ICCPR; see Mahfooz Ahmad, "Enforcement of Islamic Law of Apostasy in Azad Jammu and Kashmir", (LL.M. diss., Department of Law, University of Azad Jammu and Kashmir, 2013), 72.

respect of religion, protection of property, equality of state subjects.⁴³² The High Court⁴³³ and Chief Court⁴³⁴ are responsible to provide remedy to the aggrieved persons in AJ&K and GB respectively.

In case of comparison of these rights with those of ICCPR, it is found that certain significant rights of ICCPR are missing in the Interim Constitution and GB Order, 2009 i.e. Right to life,⁴³⁵ prohibition of torture,⁴³⁶ protection against imprisonment for contractual obligations,⁴³⁷ right to fair trial,⁴³⁸ right to privacy of person, family, home or correspondence,⁴³⁹ respect for human dignity, protection from unlawful attacks on honour and reputation,⁴⁴⁰ protection from freedom of propaganda of war and advocacy of ethnic, racial or religious hatred⁴⁴¹ and protection of family and marriage etc.,⁴⁴² and protection of children.⁴⁴³ Being a party to ICCPR, Government of Pakistan is obligated to provide these rights in fundamental laws of AJ&K and GB and enable governments of these territories to implement these rights in true letter and spirit.

Under Section 53 of the Interim Constitution, the president is authorised to issue proclamation of emergency on advice of the Chairman Council where grave emergency exists whereby security of AJ&K is threatened by external aggression or

⁴³² Interim Constitution, supra N. 253, Section 4.

⁴³³ Ibid., Section 44.

⁴³⁴ GB Order 2009, supra N. 300, Article 71.

⁴³⁵ Civil and Political Rights Covenant, supra N. 64, Article 6; though the Supreme Court of AJ&K has held that in every society, right to life is most prime fundamental right and all the institutions and systems are set-up only for the purpose of securing this very basic fundamental right to life. (2015 SCR 865).

⁴³⁶ Ibid., Article 7.

⁴³⁷ Ibid., Article 11.

⁴³⁸ Ibid., Article 14.

⁴³⁹ Ibid., Article 17.

⁴⁴⁰ Ibid., Article 10.

⁴⁴¹ Ibid., Article 20.

⁴⁴² Ibid., Article 23.

⁴⁴³ Ibid., Article 24.

by internal disturbances but under Section 54, the President is authorised to suspend any of the fundamental right given under Section 4 and can suspend even non-derogable rights under ICCPR. Similarly under Article 87 of the GB Order, 2009, the chairman GB Council is competent to proclaim emergency on report of Governor GB and under Article 88, the Governor can suspend any right without any exception in sheer violation of ICCPR.

5.2.2 Economic, Social and Cultural Rights

The obligation of state parties under the ICESCR is also clearly extended to territories controlled by them as Non-self-Governing and Trust Territories⁴⁴⁴ like ICCPR. Article 2 of the International ICESCR on Economic, Social and Cultural Rights outlines the basic obligations of states parties in relation to each of the rights found in the ICESCR.⁴⁴⁵ Article 2.1 requires states parties to begin immediately the measures towards the full enjoyment of all the rights in the ICESCR by everyone.

In many cases, the adoption of legislation will be necessary if economic, social and cultural rights are to be enforceable alongwith administrative, judicial, policy, economic, social and educational measures etc. Under this article states parties can also be obliged to undertake legislative measure in some cases, especially when existing laws are clearly incompatible with the obligations undertaken by states under the ICESCR.

States Parties to the ICESCR under Article 2.2 have undertaken and guaranteed that the rights enunciated in the ICESCR will be exercised on the basis of

⁴⁴⁴ Economic, Social and Cultural Rights Covenant, supra N. 64, Article 1.3.

⁴⁴⁵ Philip Alston, and Gerard Quinn, "The Nature and Scope of States Parties' obligations under the International ICESCR on Economic, Social and Cultural Rights", in "Human Rights Quarterly", (Vol. 9, No. 2, May, 1987), 156-229.

equality and without discrimination on any base viz. race, color, sex, language, religion, political or other opinion, national or social origin, property, birth or other status. As these rights need financial resources, therefore, Article 2.3 requires that developing countries, with due regard to human rights and their national economy, may determine to what extent they would guarantee the economic rights recognized in the ICESCR to non-nationals.

It is pertinent to clarify that the progressive realization component of the ICESCR does not mean that economic, social and cultural rights can be realized only when a country reaches a certain level of economic development. This duty obliges all states parties, notwithstanding the level of national wealth, to move as early as possible towards the realization of economic, social and cultural rights.⁴⁴⁶ In other words, these are relative rights and differ from state to state and are not uniform and equal like ICCPR. The ICESCR requires the effective and equitable use of resources forthwith. The obligation to protect economic, social and cultural rights also requires states to develop focused, consistent and progressive policies to secure the rights mentioned in the ICESCR. The use of indicators as a means of monitoring and evaluating specific aspects of economic, social and cultural rights are increasingly accepted as a step for the implementation of the ICESCR.⁴⁴⁷

⁴⁴⁶ Office of High Commissioner for Rights Human Rights, "The Nature of States Parties' Obligations", (CESCR General Comment No. 3: adopted at the Fifth Session of the Committee on Economic, Social and Cultural Rights, on 14 December 1990. Document E/1991/23), <http://www.refworld.org/docid/4538838e10.html>, (accessed pm 24 November 2016).

⁴⁴⁷ Danilo Türk, "Social and economic indicators and their role in the realization of economic, social and cultural rights" in "Special Rapporteurs of the Sub-Commission on the Promotion and Protection of Human Rights on the realization of Economic, Social and Cultural Rights", (E/CN.4/Sub.2/1990/19); Please see preliminary work on the possible use of indicators with respect to these rights in the said progress report.

Rights provided by ICESCR are right to self-determination including the right to freely dispose of their natural wealth and resources⁴⁴⁸ and not to be deprived of their means of subsistence⁴⁴⁹, equality for men and women,⁴⁵⁰ right to work,⁴⁵¹ just and favorable conditions of work,⁴⁵² right to make or join trade union,⁴⁵³ right to social security⁴⁵⁴ and social protection,⁴⁵⁵ adequate standard of living,⁴⁵⁶ highest standard of physical and mental health,⁴⁵⁷ right to education,⁴⁵⁸ free compulsory primary education,⁴⁵⁹ right to cultural life and benefiting from scientific inventions.⁴⁶⁰ Safeguard is also given that the present covenant shall not be interpreted as impairing the inherent right of all people to enjoy and utilize fully and freely their natural wealth and resources.⁴⁶¹

Since Pakistan has ratified ICESCR on 5th of April, 2008,⁴⁶² hence, she is also bound to provide all of these rights to AJ&K and GB in discharge of its extra-territorial obligations. A minute study reveals that fundamental laws of these areas provide only three rights viz. freedom of trade, business or profession, non-discrimination in respect of access of public places and safeguard against discrimination in service.⁴⁶³ There is no specific right providing for equality of men

⁴⁴⁸ Economic, Social and Cultural Rights Covenant, supra N. 64, Article 1.3.

⁴⁴⁹ Ibid.

⁴⁵⁰ Ibid., Article 3.

⁴⁵¹ Ibid., Article 6.

⁴⁵² Ibid., Article 7.

⁴⁵³ Ibid., Article 8.

⁴⁵⁴ Ibid., Article 9.

⁴⁵⁵ Ibid., Article 10.

⁴⁵⁶ Ibid., Article 11.

⁴⁵⁷ Ibid., Article 12.

⁴⁵⁸ Ibid., Article 13.

⁴⁵⁹ Ibid., Article 14.

⁴⁶⁰ Ibid., Article 15.

⁴⁶¹ Ibid., Article 25.

⁴⁶² Please see Instrument of Ratification of ICESCR, Appendix XV.

⁴⁶³ Interim Constitution, supra N. 253, Section 4(4)17. It has been explained that right of service and right of entry into any lawful profession is available only to state subjects and cannot be claimed by

and women but it can be said that it is covered in the general right of equality of all state subjects before law. In this respect the position of AJ&K and GB as well as of Pakistan is same. Abolition of untouchability⁴⁶⁴ is an additional and unique right of AJ&K which is not recognized in International Law. Nonetheless, ICCPR⁴⁶⁵ acknowledges any other right not recognized under the ICESCR. The High Court⁴⁶⁶ and Chief Court⁴⁶⁷ are responsible as well to provide remedy to the aggrieved persons in AJ&K and GB respectively.

5.2.3 Indivisibility and interdependence of all human rights

The indivisibility and interdependence of all human rights i.e. civil, cultural, economic, political and social are fundamental canons of international Human Rights Law, repeatedly reaffirmed, especially at the 1993 World Conference on Human Rights.⁴⁶⁸ Human Rights advocates made immense works and efforts to achieve the normative and the practical recognition of the interdependence of the rights. Indivisibility and interdependence are core principles of human rights like inherent dignity of the human being alongwith equal participation and gender equality. It means that economic, social and cultural rights apply to all individuals on the basis of equality and without discrimination on any base and they create specific governmental obligations that they are justifiable. All rights need to be treated as

any other persons. Only state subjects are eligible to enter into state service, but Government in case of non-availability of qualified state subjects can relax this condition; PLD 2013 HC AJ&K 34.

⁴⁶⁴ Untouchability is an ancient social practice of Hindu community where a person of a lower cast could not touch another person of an upper cast. This practice was prevalent in State of Jammu and Kashmir prior to 1947 and it is still in practice in rural society of India.

⁴⁶⁵ Economic, Social and Cultural Rights Covenant, *supra* N. 64, Art., 5(2).

⁴⁶⁶ Interim Constitution, *supra*, N.253, Section 44.

⁴⁶⁷ GB Order, 2009, *supra* N. 300, Article 71.

⁴⁶⁸ World Conference on Human Rights, 1993, *supra* N. 71.

equal by national human rights institutions in their efforts to promote and protect human rights.⁴⁶⁹

United Nations General Assembly made following observation⁴⁷⁰ in this regard:-

- (a) *All human rights and fundamental freedoms are indivisible and interdependent; therefore, equal attention and prompt consideration should be given to the implementation, promotion and protection of civil, political, economic, social and cultural rights;*
- (b) *Full realization of civil and political rights without having economic, social and cultural rights is impossible; and*
- (c) *Progress in the implementation of human rights is dependent upon sound and effective national and international policies of economic and social development.*

All human rights treaties and instrument contain provisions of direct relevance to economic, social and cultural rights. Even the ICCPR and other treaties apparently dealing exclusively with civil and political rights, in recognizing the rights to life, equal protection of the law and freedom of association, indirectly recognize and necessitate components of economic, social and cultural rights. Hence, in term of application of human rights, the formal classification of rights into two groups' i.e. civil and political rights as well as economic, social and cultural rights is now

⁴⁶⁹ Office of the United Nations High Commissioner for Human Rights, "Economic, Social and Cultural Rights, Handbook for National Human Rights Institutions" (New York and Geneva: 2005). <http://www.ohchr.org/Documents/Publications/training12en.pdf>, (accessed on 09.10.2016).

⁴⁷⁰ United Nations General Assembly Resolution 32/130 of 16 December, 1977, <http://www.un.org/documents/ga/res/32/ares32.htm>, (accessed on 20-06-2017).

becoming increasingly meaningless. Supreme Court of Pakistan held that the right to life includes other rights being essential to a quality of life.⁴⁷¹

5.3 Obligation on the Basis of Equality and Non Discrimination

All human rights standards including equality and non-discrimination can be used to strengthen claim to both set of rights. These principles include equal treatment, equal protection of the law, equal opportunity and substantive equality. These principles apply equally to economic, social and cultural rights and civil and political rights.⁴⁷² The importance of equality and non-discrimination will continue to expand, particularly as forms of substantive equality gain greater recognition and as equality rights are recognized as necessitating positive obligations to act, and not merely obligations of governmental control.⁴⁷³ Hence, there could hardly be any dissenting view about necessity of equality and non-discrimination principle for enforcement of Human Rights between national territory and other non-self-governing and trust territories under control.

Constitution of Pakistan 1973 has gone through numerous amendments over the history since its enforcement. Even back in 1973, the parliament which passed it made six amendments within a short period of four years. Seventh amendment was purely a temporary one providing for a referendum and was passed during Z. A. Bhutto regime but by newly elected National Assembly that had come into existence as an outcome of the controversial elections of 1977. Eighth Amendment has negatively changed the parliamentary character of the constitution and paved the way for presidential superiority over the Prime Minister. The remaining amendments up to

⁴⁷¹ *Shehla Zia v. WAPDA*, PLD 1994 SC 693.

⁴⁷² Please see both ICCPR and ICESCR.

⁴⁷³ *Ibid.*

the 17th one were introduced from time to time by the democratic governments. Whereas, Seventeenth Amendment was made after effectuating a compromise between the military regime of General Pervaiz Musharraf and politicians which came into power after 2002's general election.

Through 18th Amendment a serious effort has been made to settle many chronic and outstanding issues. It was made after months of deliberations and consensus of a committee represented by all political parties in the parliament. The purposes and impacts of the amendment is not less than all substantial changes in the Constitution to restore its parliamentary character in the areas of democracy, empowerment of parliament, provincial autonomy, decrease in the powers of President and appointment of election commission and judiciary.

In other words AJ&K and GB are entitled to similar fundamental rights, devolution, administrative and financial empowerment as under:-

5.3.1 Fundamental Rights

Three new fundamental rights have been added in constitution of Pakistan after 18th Amendment i.e. right to fair trial;⁴⁷⁴ right to information⁴⁷⁵ and right to education.⁴⁷⁶ Unlike AJ&K and GB, right to life has expressly been given in Constitution of Pakistan.⁴⁷⁷ Similarly, other rights given by Constitution of Pakistan include right of privacy and dignity as well as prohibition of torture⁴⁷⁸ and right of citizens having a

⁴⁷⁴ Constitution of Pakistan, supra N. 374, Article 10-A.

⁴⁷⁵ Ibid., Article 19-A.

⁴⁷⁶ Ibid., Article 25-A.

⁴⁷⁷ Ibid., Article 9.

⁴⁷⁸ Ibid., Article 14.

distinct language, script, culture have the right to preserve and promote them.⁴⁷⁹ These rights are non-existent in case of GB but recently provided for AJ&K.⁴⁸⁰

5.3.2 Devolution and consociational federation

Pakistan had always maintained the concurrent list, by allowing federation and provinces to legislate with overriding power to federation in case of conflict, despite making of three different constitutions. For the first time in the Pakistan's history, a consensus has emerged on reshaping the precincts of provincial autonomy by abolishing all items from the Concurrent List. The abolishment of the concurrent list entailed the devolution of seventeen departments and thereby transfers of large parts of the executive and legislative authority to provinces in many areas which had earlier been solely regulated by federation.

The subjects mentioned in Part II of Federal Legislative List⁴⁸¹ have been specified for exercise of consociational authority by provinces through Council of Common Interest (CCI). The CCI was initially established under Constitution 1973 to function as inter provincial coordination and dispute resolution body alongwith power to exercise executive authority over few subjects viz. railways, mineral oil and natural gas etc., development of industries and federal corporations. It could not become effective body due to lack of political will and could not hold meetings as was required under the Constitution.

⁴⁷⁹ Ibid., Article 28.

⁴⁸⁰ HRC General Comment 28, *supra* N. 426.

⁴⁸¹ Constitution of Pakistan, *supra* 374. Fourth Schedule, Part II, Federal Legislative List.

After 18th Amendment, the mandate of CCI has been enlarged⁴⁸² and besides the above mentioned subject the other important subjects like electricity, major ports, regulatory authorities established under federal law, national planning and national economic coordination, supervision and management of public debt, extension of the powers and jurisdiction of member of the police force belonging to any province, legal, medical and other professions and standards in institutions for higher education and research have additionally been given to it. It remained intact as main dispute-resolution body of the federation. Apart from the extension of the scope, certain structural changes⁴⁸³ have also been made to make it an effective body for inter provincial relationship and dispute resolution. The Prime Minister has been made its Chairman and empowered to nominate three other members of the CCI from the Federal Government. Chief Minister of Provinces are members of the CCI. The decisions of CCI shall be expressed in terms of majority. If Federal Government or any provincial governments is not satisfied with decision of CCI, it may refer the case to Parliament whose decision shall be final.⁴⁸⁴

The reconstitution of CCI is considered to be a milestone towards the long desired provincial autonomy especially by smaller provinces. Previously, it had been controversial because of its ineffective past and political uncertainty which ultimately resulted in inordinate delay in resolution of important national issues. It is also obliged to submit an annual report to both the houses of the Parliament. The change in CCI is oriented towards greater provincial autonomy and greater say of the provinces in supervision of their resources and dispute management.

⁴⁸² Ibid.

⁴⁸³ Ibid., Article 153.

⁴⁸⁴ Ibid.

The CCI Rules of Procedure have been devised on 19th of July 2010.⁴⁸⁵ The quorum of meeting was fixed as four members with at least two chief ministers. No issue of a province can be discussed unless its Chief Minister is present in meeting. The decision of CCI shall be implemented promptly. In case of a reference, CCI secretariat is to be intimated before 15 days of its communication. The CCI is to be constituted within thirty days by Prime Minister from taking oath of the office. Inter-provincial Coordination Division has been designated to work as Secretariat of CCI.

Another body at federal level is National Economic Council (NEC)⁴⁸⁶ established for major economic planning and equitable development of all provinces. The Prime Minister is the Chairman of NEC, four other members are be nominated by Prime Minister and all four Chief Ministers are member and one member each from every province nominated by respective Chief Minister are members. Its composition is tilted towards provinces as representation of the federation including Prime Minister is restricted to five and that of provinces it is eight members. It is guided by principles of policy set out in the Constitution and supposed to meet at least once in ninety days. Now it is mandatory for NEC, under the Constitution, to meet at least twice in a year.⁴⁸⁷

The provinces have been made more autonomous politically as well than past. The governor of any province would be the voter and resident of the same province and shall not be taken from any other province.⁴⁸⁸ For the imposition of emergency in a province, the requirement of a resolution of the concerned provincial assembly has

⁴⁸⁵ "Council of Common Interest Rules of Procedure, 2010", <http://cci.gov.pk/rules-of-procedure-of-cci>, (accessed on 20.11.2016).

⁴⁸⁶ Constitution of Pakistan, *supra* N.374, Article, 156.

⁴⁸⁷ *Ibid.*

⁴⁸⁸ *Ibid.*, Article, 101.

also limited the dominance of the federation and increased the muscles of the provinces.⁴⁸⁹ The spellings of the names of two provinces written in the Article 1 of the Constitution of Pakistan have been corrected.⁴⁹⁰ Moreover North West Frontier Province has been renamed as Khyber Pukhtunkhwa.⁴⁹¹ The corrected spellings of Baluchistan and Sindh and renaming of Khyber Pukhtunkhwa mark the effort to consol the regional political forces of the provinces through recognition of their ethnic identities and to increase their faith on federation. Moreover, the perpetual claim of different ethnic groups for the recognition of their identity has been accepted. Like empowerment of provinces and regional groups, the minorities also gained support from the Amendment and got the representation in the Senate by addition of four seats.⁴⁹²

5.3.3 Empowerment of Parliament and Executive

The notable success of the 18th Amendment can also be judged in respect of empowerment to the democratic institution of parliament that has been made more powerful in different ways. In this respect the governmental control on the passage of the legislation through a mediation committee has been curtailed.⁴⁹³ The process now simply gives power to each house of Parliament or joint session of the Parliament to pass or reject any legislation.⁴⁹⁴ Moreover the time limit given to the President for

⁴⁸⁹ *Ibid.*, Article, 232.

⁴⁹⁰ *Ibid.*, Article, 1(2).

⁴⁹¹ *Ibid.*

⁴⁹² *Ibid.*, Article, 59.

⁴⁹³ Constitution of Pakistan (Eighteenth Amendment) Act, 2010. Omission of Article 71.

⁴⁹⁴ Constitution of Pakistan, *supra* N. 374, Article 70.

consideration on the bill passed by the Parliament has been decreased from thirty days to ten days.⁴⁹⁵

Besides increase in legislative powers, the Parliament has been made stronger regarding imposition of emergency, if the President decides to impose emergency, the proclamation of emergency will be placed before both houses of the parliament for approval within ten days.⁴⁹⁶ Moreover the Parliamentary committees will have vital role in appointments of judges and Election Commissioner.⁴⁹⁷ Especially the role of Senate in various matters has been enhanced. The increase in Senate's role means that the voice and desires of all units of the federation will find more chances to be heard because it represents all of the units of the federation. Besides that, the working days of the Senate have been increased from 90 to 110⁴⁹⁸ and the president is bound to submit a report on the observance and implementation of the Principles of Policy not only before the National Assembly, as was the case previously, but now before the Senate as well.⁴⁹⁹ Thus now both houses of the parliament would be able to discuss the report of the President on the Principles of Policy.

One of the extraordinary achievements of the 18th Amendment is that the powers of the President have been curtailed and the Prime Minister has been empowered more like he was in the original Constitution of 1973. The powers delegated to President, through later amendments in the constitution made under General Zia-ul-Huq and General Musharraf era, have been reversed. Instead of vesting the executive authority of the federation in the President, it was said to be

⁴⁹⁵ Constitution of Pakistan, *supra* N. 374, Article. 75.

⁴⁹⁶ *Ibid.* Article, 232.

⁴⁹⁷ *Ibid.* Articles, 175-A and 213.

⁴⁹⁸ *Ibid.* Article. 61..

⁴⁹⁹ *Ibid.* Article. 29(3).

exercised by the Federal Government in the name of President.⁵⁰⁰ The Federal Government consists of the Federal Minister and Prime Minister is the Chief Executive of the Government.⁵⁰¹ The President is not supposed to appoint or invite the Prime Minister to hold office and he is elected by simple majority of the National Assembly.⁵⁰²

Prime Minister is no longer bound in relation to President for communication of the cabinet decisions, information of the administration and his decisions as well as of his ministers. He is only to keep the President informed on internal and foreign policy matters and about legislative proposals.⁵⁰³ The President is supposed to function in accordance with the advice of the Cabinet or the Prime Minister.⁵⁰⁴ He can require reconsideration of the advice but he can do so within fifteen days. Moreover, President has to act on the reconsidered advice within ten days.⁵⁰⁵ This restriction of the time limit has decreased the discretion of the President and the advice of the Prime Minister and Cabinet has now been given more weight.

Presidential powers of dissolution of the National Assembly have also been curtailed.⁵⁰⁶ The dissolution is discretionary power of the President only when vote of confidence has been passed against the Prime Minister and no other member of the National Assembly commands the confidence of National Assembly.⁵⁰⁷ In other words the discretionary power of the President to dissolve the National Assembly has been

⁵⁰⁰ *Ibid.* Article. 90.

⁵⁰¹ *Ibid.*

⁵⁰² *Ibid.* Article. 91.

⁵⁰³ *Ibid.* Article. 46.

⁵⁰⁴ *Ibid.* Article 48.

⁵⁰⁵ *Ibid.* Article. 48.

⁵⁰⁶ *Ibid.* Article. 58.

⁵⁰⁷ *Ibid.*

withdrawn and for dissolution of the Assembly the President has to follow the advice of the Prime Minister or Cabinet.

The President after the dissolution has to fix a date of election within ninety days and appoint a care-taker Prime Minister and Cabinet but these appointments are not its sole discretion. He will have to select the caretaker Prime Minister and cabinet after consultation with the Prime Minister and the Leader of Opposition in outgoing Assembly. Even further members of the cabinet will be appointed by the President on the advice of the caretaker Prime Minister.⁵⁰⁸

The authority of appointment for the Election Commission in the discretion of the President has also been seized and he is just to declare the names finalized by the parliamentary committee formed to recommend final appointment.⁵⁰⁹ Moreover the appointments of the Chairman, Joint Chief of Staff Committee, the Chiefs of Army, Naval and Air Staffs,⁵¹⁰ the Chairman of the Federal Public Service Commission would be made by the President but not in his discretion but on advice of the Prime Minister.⁵¹¹ The President also appoints the governor of any province on advice of the Prime Minister.⁵¹²

The powers of the President to influence on the provincial governments through his appointed governors have been limited.⁵¹³ A step that has attracted praise from all circles is the putting a limit on the number of the Cabinet members by eleven percent of the total number of parliamentarians and by limiting the number of

⁵⁰⁸ *Ibid.* Article. 224.

⁵⁰⁹ *Ibid.* Article. 213.

⁵¹⁰ *Ibid.* Article. 243.

⁵¹¹ *Ibid.* Article. 242.

⁵¹² *Ibid.* Article. 101.

⁵¹³ *Ibid.* Article. 105.

advisors for the Chief Ministers to five although the amendment has made it difficult for the ruling parties to keep the independent members in their fold through offering them with ministries yet it will lessen the burden of the exchequer through saving of the expenses on a large number of ministers who had previously been included in the cabinet just to ensure their support for ruling party.⁵¹⁴

To strengthen the impartiality in the system, especially election process, the caretaker Prime Minister and members of caretaker cabinet and their immediate family members, spouse and children shall not be eligible to contest the elections during the period when they would be in power.⁵¹⁵ Similarly in order to make the election of the Prime Minister and Chief Ministers more transparent, their elections would not be held by secret ballot.⁵¹⁶ There are chances and has been also a practice that, in case of the secret elections of the Prime Minister, the sympathies of the members can easily be purchased or influenced.

Another outstanding innovation introduced in the Eighteenth Amendment is the procedure⁵¹⁷ for appointment of the Chief Election Commissioner and other four members of Election Commission of Pakistan. For appointments of Election Commission, the Prime Minister after consultation with the leader of opposition in the National Assembly shall forward three names to the parliamentary committee who will confirm any one name. The maximum twelve members-Committee would be constituted by the Speaker of National Assembly and comprise at least one third members from Senate and having fifty percent representation from opposition and

⁵¹⁴ *Ibid.* Article. 92.

⁵¹⁵ *Ibid.* Article. 224(1-B).

⁵¹⁶ *Ibid.* Article. 226.

⁵¹⁷ *Ibid.* Article. 213.

treasury benches each. The members from opposition parties would be nominated by the respective parliamentary leaders based on their strength in the parliament. If the National Assembly would be dissolved committee would comprise members from Senate only.

Another prominent work of the 18th Amendment is that Islamabad High Court, earlier established but now has been given constitutional cover.⁵¹⁸ The bar on prime ministers standing for only two terms in office was removed.⁵¹⁹ The application of condition for a Member of Parliament of being sagacious, righteous, non-profligate, and honest and *ameen* has been made obvious and a contrary declaration of any court in this respect would decide for his disqualification.⁵²⁰

The appointment of Chief Justice of Pakistan continued to be made by President from amongst the senior most judge of Supreme Court; an altogether new procedure has been introduced for the appointment of the judges of Supreme Court, High Court and Shariat Courts.⁵²¹ A Judicial Commission, consisting of the Chief Justice of Pakistan, two senior judges of Supreme Court, a former judge or Chief Justice nominated by the Chief Justice, Attorney General and Minister for law and a nominated lawyer from Pakistan Bar Council, would nominate one qualified person for one vacancy to be appointed as judge.⁵²²

The recommendation of judicial commission is reviewed by a parliamentary committee⁵²³ comprising eight parliamentarians equal from both houses and from

⁵¹⁸ *Ibid.*, Article, 198.

⁵¹⁹ *Ibid.*, Article, 91(5).

⁵²⁰ *Ibid.*, Article, 63-A.

⁵²¹ *Ibid.*, Article, 175-A.

⁵²² *Ibid.*

⁵²³ *Ibid.*

government as well as opposition nominated by the leader of houses and leaders of opposition respectively. The members of the commission and the committee are taken from the provincial judiciary and provincial governments as well as assemblies respectively in the case of appointment of the judges of High Court. The parliamentary committee can reject the nomination of judicial commission by three-fourth majority. The president will appoint the person nominated by judicial commission and confirmed by the parliamentary committee.⁵²⁴

5.3.4 Financial Empowerment

The federation's grip over the resources of the provinces has been loosened through the 18th Amendment. The Federal government now, through insertion of a new provision in Article 157 will have to consult the concerned provincial government before taking a decision to construct hydro-electric power station in any province. Equally the right of the provinces on the net proceeds of the duty on oil has been recognized under inclusion of Article 160. Sub-article (1) (b). Now the provinces will receive this duty collected by the Federal Government and it will not become the part of Federal Consolidated Fund.

National Finance Commission (NFC) has been further strengthened;⁵²⁵ share of Provinces in each award of NFC shall not be less than previous award, Federal and Provincial Finance Ministers have to monitor implementation of award biannually, reports of NFC award on implementation is to be submitted before both houses of Parliament and Provincial Assemblies. Provinces may raise domestic or international loan, or give guarantees on security of Provincial Consolidated Fund within such

⁵²⁴ Ibid.

⁵²⁵ Ibid. Article, 160.

limits as may be specified by NEC, previously this role was solely performed by the Economic Affair Division. Moreover the decisions of previous NFC Award (8th NFC Award), which allocated more resources to the provinces especially to Baluchistan. was made the part of the constitution.

The Cabinet has been made collectively responsible to the Senate as well to the National Assembly.⁵²⁶ The time of Senate's consideration on the bill or budget has been increased from 7 days to 14 days.⁵²⁷ This has increased the quantity and quality of the debate in the Senate. Power of President to promulgate ordinance has also been limited by including a restriction that he can promulgate the ordinance only when Senate as well as National Assembly is not in session. In the previous arrangement he could had promulgated ordinances when National Assembly alone is not in session.⁵²⁸ The Senate, like National Assembly will also be sent the report of Auditor General for reconsideration.⁵²⁹

5.4 Obligation for Right to Self-Determination Internal of AJ&K and GB

There is no specific provision in the Constitution of Pakistan which could either provide status of AJ&K and GB or any mechanism for their relationship with Pakistan. Since AJ&K and GB are part of disputed State of Jammu and Kashmir and about which Constitution of Pakistan has only one provision⁵³⁰ that too manifests the future relationship of State of Jammu and Kashmir with Pakistan after its accession to her which invariably accepts Right to Self-determination Internal of Kashmiri people

⁵²⁶ *Ibid.* Article, 91(6).

⁵²⁷ *Ibid.* Article, 37(1).

⁵²⁸ *Ibid.* Article, 89.

⁵²⁹ *Ibid.* Article, 171.

⁵³⁰ *Ibid.* Article 257.

in case of their integration with Pakistan. In this situation Right to Self-determination Internal cannot be denied to AJ&K and GB even under Constitution of Pakistan.

Besides fulfilling the obligation under International Human Rights Law for provisions of all Human Rights including treatment at par with its federating units on the basis of principle of equality and non-discrimination, Pakistan is also required to address the structural flaws of both frameworks which is inevitable for grant of Right to Self-determination Internal. For this purpose it is mandatory to have not only the novation of the existing relationships of AJ&K and GB with Government of Pakistan but also revamping their prevailing constitutional and governance framework.

Apart from structural flaws in the relationship of both AJ&K and GB with Government of Pakistan on the basis of equality and non-discrimination with provinces of Pakistan,⁵³¹ there are certain other inherent shortcomings of both constitutional and governance frameworks of AJ&K and GB⁵³² which require to be removed for grant of Right to Self-determination Internal as under:-

- (i) Both of these territories should not only be given all rights under International Human Rights Law but also the fundamental rights enshrined in Constitution of Pakistan.
- (ii) The members of AJ&K and GB Councils are indirectly elected AJ&K and GB Assemblies respectively and thereby they do not become accountable to the people like members of National Assembly of Pakistan.

⁵³¹ Please see Chapter IV.

⁵³² Please see Chapters III.

- (iii) The executive and legislative authority of AJ&K and GB Councils are conjoined in one body against the principle of trichotomy of powers.
- (iv) It is not clear that which forum will exercise legislative powers for the subjects which are within exclusive mandate of Government of Pakistan under Section 31(3) of the Interim Constitution. At present these powers are exercised by Government of Pakistan without any enactment which make judicial review impossible coupled with constraint of territorial jurisdiction. Moreover, in respect of this executive authority, Government of Pakistan is not accountable before any forum including parliament of Pakistan.
- (v) Similarly, in case of GB under Order, 2009, the residue subjects are dealt by Government of Pakistan under Article 47(3) by an order notified in official gazette. Hence, executive and legislative authority is conjoined in one authority against the principle of trichotomy of powers. Moreover, Government of Pakistan is not accountable before any forum for exercise of this authority.
- (vi) Both AJ&K and GB were part of the former State of Jammu and Kashmir and now part of Kashmir Conflict. Their issues and legal position is same but there is no common forum for them alongwith Pakistan so as to sort out their mutual issues which are common in nature.

5.5 Conclusion

Government of Pakistan is bound to provide all human rights to AJ&K and GB in discharge of its extra-territorial obligations. The rights admissible under ICCPR and not provided to these territories are right to life, prohibition of torture, and protection against imprisonment for contractual obligations, right to fair trial, right to privacy of person, family, home and correspondence, respect for human dignity, protection from unlawful attacks on honor and reputation, protection from freedom of propaganda of war and advocacy of ethnic, racial or religious hatred and protection of family and marriages etc and protection of children. Moreover, there is no restriction on suspension of fundamental rights on President and governor of AJ&K and GB unlike the provisions of ICCPR.

On the other hand under ICESCR only three rights i.e. freedoms of trade, business or profession, non-discrimination in respect of access to public places and safeguard against discrimination in services have been provided to Pakistan, AJ&K and GB. All human rights are inter-dependent and indivisible. On the basis of equality and non discrimination, AJ&K and GB are entitled to all fundamental rights, devolution and consociational federation as well as empowerment of parliament and executive alongwith financial empowerment as enjoyed by provinces of Pakistan. Moreover, Government of Pakistan is also obliged to grant Right to Self-determination Internal to AJ&K and GB through removing the existing structural flaws in the relationships and inherent defects in the frameworks of AJ&K and GB.

Chapter VI:

NOVATION OF THE RELATIONSHIP

6.1 Introduction

This chapter will discuss the required comprehensive restructuring and novation⁵³³ of the existing relationship between AJ&K, GB and Government of Pakistan as evolved from analysis made in the preceding chapters.

In second and third sections rationale of the novation and discharging obligations through novation of Karachi Pact shall be deliberated. In fourth section foundational aspects of the novation shall be discussed including the novation to be tripartite, all arrangements to be provisional, ensuring relationship with federation of Pakistan, assurance of no less treatment than provinces, ensuring accountability and end to impunity, trichotomy of powers, provision of common forum and consociational bondage, Kashmir cause not to be compromised and constitutional cover of all provisions shall be discussed in one to nine sub-sections respectively. In fifth section, substantive aspects of the novation including, provision of all Fundamental Rights, provision of equivalent provincial status, control over natural resources, equitable sharing of revenue, Central Joint Council, Central Government, representation in federal bodies, regulation of role of lent officers and mechanism for judicial review and waiver of impunity shall be discussed in its one to nine subsections respectively. In sixth section, impact of the novation on Kashmir Conflict shall be analyzed followed by the conclusion of the discussion.

⁵³³ Novation generally means the substitution of an old legal obligation with a new one.

6.2 Rationale of Novation of Relationship

Self-determination has both internal and external dimensions and grant of self-determination internal cannot be delayed till attainment of self-determination external as it amounts to violation of mandatory rules of international law. Right to self-determination is one of the basic Human Rights and under principle of extra-territorial application territorial boundaries are irrelevant for state parties to discharge their Human Rights obligations in territories of their occupation and control.

AJ&K had once enjoyed complete internal autonomy and self-rule and exercised right to self-determination internal through AJ&K Government Act, 1970⁵³⁴ wherethrough except defense, currency, foreign affairs and UNCIP resolutions, all subjects were dealt by AJ&K. On the other hand GB has never been given such autonomy in history. The existing constitutional and governance frameworks of AJ&K and GB provide direct and indirect rule of Government of Pakistan⁵³⁵ and thus nullifies the right to self-determination internal especially when these territories neither have control on their natural resources nor have any equitable revenue sharing formula from federal divisible pool unlike provinces.⁵³⁶ The *de facto* provincial status given to them by Government of Pakistan beyond Constitution of Pakistan is of no use in this regard except development initiatives by Government of Pakistan.

6.3 Discharging Obligations through Novation of Karachi Pact

As we have identified the obligation of Pakistan under International Human Rights Law, obligation on the basis of equality and non-discrimination with its federating

⁵³⁴ For detail please see Chapter III.

⁵³⁵ Please see Chapter IV.

⁵³⁶ Please see Chapter IV.

units and obligation for grant of Right to Self-determination to AJ&K and GB, therefore, these obligations have to be discharged through a composite document by bringing together all stakeholders in this regard and forging their consensus. The existing document i.e. Karachi Pact is not fulfilling the obligations of Government of Pakistan, hence, novation is required in this behalf. The novation shall have two parts i.e. foundational part to be devised keeping in view the existing federal character of Pakistan and the operational part being variable and dependent on amendments made in Constitution of Pakistan from time to time.

6.4 Foundational Part of the Novation

As discussed earlier that Karachi Agreement 1949⁵³⁷, was the first formal document providing relationship between AJ&K, GB and Government of Pakistan but ever since, the relationship kept on changing without any protocol to it which has made the situation not only complicated but confusing as well. Besides that, such changes in relationship have been established by providing enabling provision in constitutional and legal frameworks of AJ&K and GB only or at executive level by Government of Pakistan without any corresponding provisions in Constitution of Pakistan. Therefore, it is necessitated that for the proposed relationship, a foundational part, permanent in nature must be formulated in light of analysis made in preceding chapters before discussing operational part of the novation as under:-

⁵³⁷ Please see Section 3.3, Chapter III.

6.4.1 The novation to be tripartite

The Karachi Pact 1949 was executed among Government of Pakistan, Government of AJ&K and All Jammu and Kashmir Muslim Conference.⁵³⁸ The novation of Karachi Pact must also be among same parties except All Jammu and Kashmir Muslim Conference which would now be replaced by Government of GB being elected government of the area. The Karachi Pact and the novation shall function as a “constitutional convention” for superior courts in relation to interpretation of relevant constitutional and governance frameworks incorporating the novation of the relationship.

6.4.2 All arrangements to be provisional

All such arrangements through the novation should be on temporary basis for right to self-determination internal till resolution of Kashmir Conflict and exercise of their right to self-determination external. The UN and UNCIP Resolutions as well as stance of Pakistan on Kashmir Conflict and disputed nature of territory must be explicitly reiterated so as to repel any impression of integration of AJ&K and GB to mainland of Pakistan.

6.4.3 Ensuring relationship with federation of Pakistan

So far all arrangements including Karachi Pact were made between Government of Pakistan on one part and AJ&K or GB on the other part without any enabling provision in Constitution of Pakistan which has invariably made these territories alien to federal structure of Pakistan where power is shared by various entities. In certain case where even Government of Pakistan is willing to fulfill its obligations it could

⁵³⁸ The only political party of people of Azad Jammu and Kashmir in 1949.

not do so because of its inability to convince and compel other federal entities empowered in this behalf under relevant legal and constitutional framework. Therefore, the novation must be focused on relationship with State of Pakistan through constitutional enabling provision for all federal entities to discharge their respective obligations with regard to AJ&K and GB.

6.4.4 Assurance of no less treatment than provinces

The AJ&K and GB would be assured to be given equal treatment as well for other subjects, not covered hereinbefore, like the provinces and where different treatment is required due to peculiar status of these territories that it would be made after prior agreement between all of the three parties on the principle of equality and non-discrimination.

In other words, it necessitates that *de facto* provincial status available to AJ&K and GB must be documented as implying all rights and empowerments on the basis of equality and non-discrimination with provinces of Pakistan. In no case these territories shall be degraded and given lesser position comparing the provinces and assurance in this respect must be enshrined explicitly in the novation to reduce the trust deficit created in past. Under right to equality and non-discrimination with federating units of Pakistan, the notions empowerment of parliament and executive, devolution of administrative and financial powers to provinces including control over their natural resources and equitable revenue sharing at par provinces of Pakistan, should be introduced for AJ&K and GB.

6.4.5 Ensuring accountability and end to impunity

To provide good governance and to ensure provisions of Human Rights for people of AJ&K and GB it is necessary to introduce enabling provisions in all constitutional frameworks for accountability and end to impunity now enjoyed by the functionaries especially those located beyond territorial jurisdictions of AJ&K and GB.

6.4.6 Ensuring trichotomy of powers

To introduce check and balance at top most level, it is direly needed to adhere to principle of trichotomy of powers. Therefore, existing duality of executive and legislative authority must be done away with by splitting the executive and legislative function on separate and distinct authorities.

6.4.7 Provision of common forum and consociational bondage

As discussed earlier that at present there is no common forum for AJ&K and GB in spite of their common history and background wherein common issues could be discussed. Federation of Pakistan must also be given equal representation so as mutual issues could be discussed and resolved. To remove trust deficit created in the past, it is appropriate that representative of each stakeholder must be given veto power as block so as to create consociational relationship between the three stakeholders.

6.4.8 Kashmir Cause not to be compromised

The proposed novation of relationship should acknowledge the disputed status of State of Jammu and Kashmir and should provide an interim and temporary relationship of AJ&K and GB with Pakistan in order to provide them right to self-determination internal to people of these territories under mandatory dictates of

International Human Rights Law till exercise of their right to self-determination external.

6.4.9 All provision must be given constitutional cover

The novation of the relationship could not achieve the desired objectives in absence of any constitutional cover. Therefore, the necessary amendments for enabling provision for the novation of relationship in Constitution of Pakistan, Interim Constitution and Order, 2009 should be made.

6.5 Operational Part of the Novation

Besides the above mentioned foundational part, operational part of the novation also needs to be dilated upon which is also formulated on the basis of analysis and discussion made in the preceding chapters as under:-

6.5.1 Provision of all Fundamental Rights

It should be laid down that all rights admissible under International Human Rights Law as well as on the basis of equality and non-discrimination with provinces of Pakistan shall be given to people of AJ&K and GB. For this purpose the territorial governments should be strengthened so as they could provide these rights to their citizens and discharge Human Rights obligations on behalf of Pakistan.

6.5.2 Provision of equivalent provincial status

The *de facto* provincial status admitted for AJ&K and GB with Government of Pakistan must be transformed into *de jure* constitutional status by amendment in the Constitution of Pakistan along with right for representation in all constitutional and

sub-constitutional bodies of federal character except parliament of Pakistan as that may amount to formal integration of these areas in mainland of Pakistan.

6.5.3 Control over natural resources

The right to self-determination provided to people under both ICCPR and ICESCR includes the right to freely dispose of their natural wealth and resources alongwith a safeguard that these instruments shall not be interpreted in a way to impair inherent right of all people to enjoy and utilize fully and freely their natural wealth and resources. In case of Pakistan such control has already been given to the provinces under Eighteenth Amendment in Constitution of Pakistan; hence, like control on indigenous natural resources, including hydel generation, oil and natural gas; must also be passed to both Government of AJ&K and Government of GB by eliminating direct and indirect control of Government of Pakistan.

6.5.4 Equitable Sharing of Revenue

AJ&K and GB shall be entitled their due share on the basis of NFC Award and formula applicable for the provinces instead of existing hypothetically calculated variable grant and fixed grant admissible to AJ&K and GB respectively.

6.5.5 Central Joint Council

Existing AJ&K and GB councils should be replaced by one body i.e. Central Joint Council (the joint council) with equal number of members from AJ&K, GB and Government of Pakistan. In order to remove trust deficit created in past, it is proposed

that each AJ&K, GB and Pakistan should be given veto powers⁵³⁹ as a group i.e. all members from each AJ&K or GB or Pakistan could veto any legislation as a block. The veto power can be used by each group to stop any legislation against their interest in order to create a sense of consociational relationship with federal structure of Pakistan and to provide an effective safeguard for protection of rights of each stakeholder. The veto power for each stakeholder shall create the trust and faith in the future relationship.

The joint council should elect its own chairman and vice-chairman out of its members so as to instead of declaring the Prime Minister of Pakistan and the President or the Governor as ex-officio chairman and vice-chairman respectively so as to ensure principle of trichotomy of powers. To enhance the representative character of the Council and on the basis of parity with National Assembly it would be necessary that the members of the joint council from AJ&K and GB should be directly elected by people of these areas. Whereas, members from Pakistan must be nominated by Government of Pakistan, Senate and National Assembly in equal numbers.

The joint council legislative list should be derived from Federal Legislative List of Constitution of Pakistan as being akin to federal parliament except, defense, foreign affairs and currency which should continue to be handled by Government of Pakistan under laws made by Parliament of Pakistan. The first part of the list shall be exclusively handled by the joint council whereas second part of the list shall be handled by it only on recommendations of CCI after being given due representation to AJ&K and GB.

⁵³⁹ This idea has been derived from Belfast Agreement between Republic of Ireland, UK and Northern Ireland executed on 10th April, 1998 at Belfast; see "The Belfast Agreement" <https://www.gov.uk/government/publications/the-belfast-agreement>, (accessed on 04.06.2017).

6.5.6 Central Government

The executive authority for the subjects of the joint council shall be exercised by the Central Government headed by the Chairman Council/Prime Minister of Pakistan and equal number of the ministers to be appointed from the elected members of AJ&K and GB in the joint council. The federal divisions would be competent to work in AJ&K and GB provided their jurisdiction is duly extended by an enactment of the joint council. To the extent of exercise of jurisdiction in AJ&K and GB territories, the federal division shall be subordinate to the Central Government who shall onward be responsible to the joint council for exercise of executive authority.

The Federal Divisions of Government of Pakistan should function for the Central Government as they work for Pakistan through dedicated staff or otherwise but subject to control of its head and ministers. The ministers should be selected by the head of the Central Government, in equal numbers from AJ&K and GB, who should be accountable before the joint council for discharge of their responsibilities.

6.5.7 Representation in Federal Bodies

AJ&K and GB shall be entitled to due representation in all constitutional and sub-constitutional federal bodies where provinces are being represented as members. The issues of AJ&K and GB shall also be discussed in these bodies like the provinces. This will also create in AJ&K and GB concept of an equal stakeholder by replacing any preferential position for one or the other.

6.5.8 Regulation of Role of Lent Officers

Role of lent officers needs to be regulated under deputation policy. It should be ensured that such officers should not undermine the authority of respective elected governments of these areas and any impression of indirect rule of Government of Pakistan through these officers must be repelled.

6.5.9 Mechanism for judicial review and waiver of impunity

In order to end impunity and to ensure judicial review for all executive and legislative functions in relation to AJ&K and GB, the principle of territorial jurisdiction of courts must be enshrined in relevant constitutional and governance frameworks. Federal Divisions exercising executive authority for AJ&K and GB but located beyond jurisdiction of courts of these areas must be subject to jurisdiction of Supreme Court of Pakistan, Islamabad High Court and other courts of Islamabad Capital Territory for judicial review of their executive actions within their respective jurisdiction.

6.6 Impact of the Novation on the Kashmir Conflict

The proposed novation of relationship is not only affirming the disputed status of State of Jammu and Kashmir but also it is providing an interim and temporary relationship of AJ&K and GB with Pakistan in order to provide right to self-determination internal to people of these territories under mandatory dictates of International Human Rights Law till exercise of their right to self-determination external. The novation is neither an integration of AJ&K and GB nor it tantamount to signing of an accession document in favor of Pakistan. This is quite opposite to

situation of Indian Held Kashmir where not only Instrument of Accession⁵⁴⁰ has been signed in favor of India followed by resolution of Legislative Assembly of Indian Held Kashmir ratifying the accession in violation of UN resolutions. The resolution of the Legislative Assembly altering the political status of the State unilaterally was categorically denounced by UN Security Council through its resolution passed in 1957.⁵⁴¹

The novation affirms the disputed and unresolved status of the State and it can never be treated to be in contravention of UN and UNCIP Resolutions on Kashmir Conflict especially when they are altogether silent on governance mechanism of these areas. Hence, people of these areas are at liberty to adopt any mode of governance as suited to them and agree on any relationship with Pakistan which is consistent with International Law.

6.7 Conclusion

This chapter reveals that the state are territories resided by bunch of people associated with rights duly affirmed in international law as well as in the domestic laws of the nations. The novation prescribed hereinabove will require changes in the public law prevailing in all three zones i.e. Pakistan, AJ&K and GB for application of all of the rights under international law especially right to self-determination internal on the basis of equality and non-discrimination. This academic effort is made to resolve the issues in an admissible and amicable way for better public governance and equal resource sharing among all stakeholders in the context of widely accepted devolution

⁵⁴⁰ Please see Karachi Pact Appendix III.

⁵⁴¹ United Nations Security Council Resolution No. 122 passed in its 765th meeting dated 24.01.1957, <http://www.un.org/en/sc/documents/resolutions/1957.shtml>, (accessed on 20-06-2017), Appendix XVI.

of power mechanism under Eighteenth Amendment to Constitution of Pakistan 1973. Moreover, this novation shall not be prejudicial to stance of Pakistan already enunciated before international arena in relations to Kashmir Conflict.

CONCLUSION

Self-determination as a practice was originated from Declaration of Independence of United States of America, 1776 which initially developed as a norm of political dispensation. Subsequently the leaders of French Revolution adopted it as a principle of annexation of territories replacing old practice of forceful occupation. This principle was also used to promote peace and avoid war and was incorporated in UN charter. It was further developed as a fundamental right providing a baseline for all other human rights and duly incorporated in various international human rights declarations and instruments. The obligation for right to self-determination is an *erga omnes* obligation under international law. This right has been explained and reaffirmed by ICJ in different cases.

The Commission of the Conference on Yugoslavia formally classified right to self-determination into internal and external dimensions as applicable principle of political dispensation in post colonial era. Supreme Court of Canada, in Reference for secession of Quebec, has reaffirmed this principle in its landmark judgment while holding that right to self-determination external applies to people of a sovereign state only if agreed by other stakeholders recognized by international law. Right to self-determination also means the right of people to govern themselves and it has ultimately acquired a new 'constitutional' dimension to encompass the right to democratic governance in a nation State.

In contemporary era the application of right to self-determination is subject to human rights approach and bilateral approach otherwise the very objective for grant and realization of right to self-determination cannot be achieved.

Human rights are primarily viewed as being exercisable against the states which has primary obligation to respect, protect and fulfill human rights obligations. Obligation to respect signifies the obligation of states not to interfere with the enjoyment of the rights. The obligation to protect means that the states are responsible to prevent third parties from interfering in any way with these rights. The obligation to fulfill denotes that the states are required to adopt appropriate legislative, administrative, budgetary, judicial and other measures for full realizations of these rights.

The source of obligation is international treaty law, international customary law and general principles of law. The human rights are also divided into obligation of conduct and obligation of result. The obligation of conduct is obligation of action of states as visualized by relevant treaty or customary law, whereas the obligation of result is an obligation of states to achieve and realize targets desired by these instruments especially in relation to progressive realization the certain specified human rights. In relation to the human rights obligation, the jurisdiction or territorial limit of states is irrelevant as they are not only responsible and owes obligation for human rights in their own territory but in the territory under their occupation or control as well as all over the world.

Moreover, in relation to discharge the human rights obligations, states are also bound to guarantee non-discrimination and promote equality. All human rights

obligations are *erga omnes* obligations including right to self-determination which is basic and mother right of all other rights and in case of breach of any of these obligations every state has a *locus standi* to enforce remedial measures.

The Government of AJ&K was established on 24th of October, 1947 as a sovereign revolutionary government with Sardar Muhammad Ibrahim Khan as its first President. No constitution was adopted and the government functioned as a war council. After the cease fire on 5th of January, 1949, the relationship with Pakistan direly needed to be formalized. Accordingly, a formal agreement was made among Government of Pakistan, Government of AJ&K and All Jammu and Kashmir Muslim Conference on 28-04-1949. The agreement not only regulated inter se relationship but also distributed powers and subjects among themselves. Moreover, it worked as constitutional conventions for future constitutional relationships with Pakistan. Karachi Pact transformed the status of AJ&K from a sovereign state to a protectorate state as defense and foreign affairs, including all affairs of GB, were given to Government of Pakistan. The pact also provided mode of appointment of lent officers and procedure for conduct of business of Government of AJ&K.

On the basis of Karachi Pact, the first Rules of Business were framed in 1950. Subsequently, the Rules of Business were revised in 1952 and 1958 contrary to the provisions of Karachi Pact and status of Government of AJ&K was relegated to a subservient authority to KANA. Thereafter, in 1964 and 1968 AJ&K Government Acts were passed wherethrough democratically elected government, subservient to KANA, was introduced.

In 1970, new enactment for Government of AJ&K was passed which provided self-government and presidential rule in the state. This Act was almost in line with Karachi Pact and Government of Pakistan retained few subjects only viz. defense, currency, foreign affairs and UNCIP resolutions. Under this Act, the status of AJ&K was restored and the area had seen tremendous development.

The Interim Constitution replaced the Act 1970 and provided parliamentary form of government in the state. It has given complete judicial hierarchy including Supreme Court. It provided three executive and four legislative bodies. The council having executive and legislative powers over 52 subjects and headed by Prime Minister Pakistan as its ex-officio chairman provided indirect rule of Government of Pakistan along with its direct rule up to the extent of defense, currency, foreign affairs including foreign aid and trade.

On the other hand GB after its liberation also established and interim revolutionary government which could not work for sixteen days till appointment of political agent by Government of Pakistan under political resident of North-West Frontier Province. The FCR were enforced in GB like Federally Administered Tribal Areas. In 1952, a Joint Secretary of KANA was made Resident in the Northern Areas with all administrative and judicial authorities. In 1967, KANA introduced reforms by transferring powers of High Court and Revenue Commissioner to the Resident and appointed two political agents one each for Gilgit and Baltistan who were entrusted with district level powers.

In 1970 democratic system was introduced with election of 16 members Northern Areas Advisory Council but with only power to approve development

schemes. In 1994, LFO was introduced. It provided office of chief secretary, civil secretariat and judicial reforms. In 1999 it was amended and NALC was authorized to legislate on 49 subjects. Chief Court and Court of Appeal were established. In 2007, the LFO was renamed as Northern Areas Governance Order, 1994 and NALC was renamed as Northern Areas Legislative Assembly.

The Order, 2009 provided AJ&K like set up in GB. It established GB Assembly, GB Council headed by Prime Minister of Pakistan and provided office of chief minister and governor. It provided two legislative lists one for GB Assembly and another for GB Council including important subjects of revenue generation and economic dividends alongwith other residue subjects unlike AJ&K. Among AJ&K and GB, the AJ&K appears to be much better in term of its identity, self-government and control over economic resources.

The direct role of Government of Pakistan in AJ&K is its executive and legislative authority in matters of defense, foreign affairs including foreign trade and foreign aid, currency and the implementation of UNCIP Resolutions under the Interim Constitution alongwith power to approve amendment in Section 31, 33 and 56 of Interim Constitution. In case of GB, the direct role of Government of Pakistan is the exclusive power to amend the Order, 2009, and executive and legislative authority over all residue subjects, comprising vital subjects. For GB, role of Government of Pakistan much greater than AJ&K.

The indirect role is through the AJ&K Council which has exclusive control over important and revenue generation subjects including electricity, tourism, population planning, banking, insurance, stock exchange and future markets, trading corporations, telecommunication, planning for economic coordination, highways,

miners, oil and gas, development of industries, newspapers etc., along with power to approve important constitutional offices.

Government of Pakistan is bound to provide all human rights to AJ&K and GB in discharge of its extra-territorial obligations. The rights under ICCPR not provided to these territories are right to life, prohibition of torture, and protection against imprisonment for contractual obligations, right to fair trial, right to privacy of person, family, home and correspondence, respect for human dignity, protection from unlawful attacks on honor and reputation, protection from freedom of propaganda of war and advocacy of ethnic, racial or religious hatred and protection of family and marriages etc., and protection of children. Moreover, there is no restriction on suspension of fundamental rights on President and governor of AJ&K and GB unlike the provisions of ICCPR.

On the other hand under ICESCR only three rights i.e. freedoms of trade, business or profession, non-discrimination in respect of access to public places and safeguard against discrimination in services have been provided to Pakistan, AJ&K and GB. All human rights are inter-dependent and indivisible. On the basis of equality and non discrimination AJ&K and GB are entitled to all fundamental rights, devolution and consociational federation as well as empowerment of parliament and executive alongwith financial empowerment as enjoyed by provinces of Pakistan.

The above state of affairs required protocol to Karachi Pact and novation of relationship between Pakistan, AJ&K and GB. Accordingly, the novation is proposed containing foundational or permanent provisions and operational to enable Government of AJ&K and Government of GB to provide their people all rights available under international law and other rights admissible on the basis of equality

and non-discrimination with people living in provinces of Pakistan. The proposed novation also addresses the inherent structural flaws in existing frameworks and relationships of AJ&K and GB with Government of Pakistan. It is also proposed that the relationship should be given constitutional protection by amendment in their relevant frameworks besides incorporating therein the provisional status of these arrangements for people of AJ&K and GB till exercise of right to self-determination external by people of State of Jammu and Kashmir as promised under UN Resolutions.

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APPENDICES

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12. Government of Pakistan, Finance Division (PF Wing), Office Memorandum, No. F.5(11)PF.II/2017-18/105 dated 16-04-2018. (Appendix XII)
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APPENDIX-I**Instrument of Accession of Jammu and Kashmir, 1947**

WHEREAS the Indian Independence Act 1947, provides that as from the fifteen 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 omission, 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 Inder Mahander Rajrajeswar Maharajadhiraj Shri Hari Singhji, Jammu and 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

1. 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 Jammu and Kashmir (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 is hereafter referred to as "the Act").
2. 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.
3. 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.
4. 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.

5. 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 is accepted by me by an Instrument supplementary to this Instrument.
6. 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.
7. 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.
8. Nothing in this Instrument affects the continuance of my sovereignty in and over this State, or, saves 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.
9. 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 to my heirs and successors.

Given under my hand this 26th day of OCTOBER Nineteen hundred and forty seven.

Sd/-
Hari Singh
Maharajadhiraj of Jammu and Kashmir State.

I do hereby accept this Instrument of Accession.

Dated this twenty seventh day of October, nineteen hundred and forty seven.

Sd/- (Governor General of India)

APPENDIX-II**Declaration of Azad Government, 1947**

The Provisional Azad Government, which the people of Jammu and Kashmir have set up a few weeks ago with the object of ending intolerable Dogra tyrannies and securing to the people of the State, including Muslims, Hindus and Sikhs, the right of free self-Government has now established its rule over a major portion of the State territory and hopes to liberate the remaining pockets of Dogra rule very soon. In view of these circumstances it has been reconstituted with Mr. Ibrahim, Bar-at-Law of Poonch as its provisional head, and its headquarters have been moved to Plandari in Poonch.

The new Government represents the united will of the Jammu and Kashmir State to be free from the rule of the Dogra dynasty which has long suppressed and oppressed the people.

The movement of liberty which has culminated in the formation of the present provisional Government has a long history dating from 1929. Thousands of Jammu and Kashmir people, including members of all communities, have suffered death and imprisonment in the cause of this movement. One of its forms was the Quit Kashmir Movement launched in the Kashmir valley last year.

It will be recalled that Pandit Jawaharlal Nehru as a friend of the suffering people of Indian States went to help this movement at the time but was not allowed to enter the State territory under the orders of the ex-Ruler Hari Singh. The tyrannies perpetrated by the Raja and his officials and his troops on the people increased with the increase in the desire of the people for freedom and self-Government.

Recently a prominent Hindu patriot, who wanted to proceed to Karachi and New Delhi to represent the intolerable conditions in the State to our neighboring Dominion of Pakistan and India was arrested by the ex-Ruler's officials.

"The united will of the people has, however, overcome the organized violence of the Ruler's armies. He and his so called Prime Minister have fled from Kashmir and will perhaps soon flee from Jammu as well.

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.

The Provisional Government entertain sentiments of the utmost friendliness and goodwill towards its neighboring Dominions of India and Pakistan and hopes that both the Dominions will sympathies with the people of Jammu and Kashmir in their

efforts to exercise their birthright of political freedom. The provisional government is further anxious to safeguard the identity of Jammu and Kashmir as political entity.

The question of accession of Jammu and Kashmir to either Dominion can only be decided by the free vote of the people in the form of a referendum. The Provisional Government will make prompt arrangements for this and hopes to invite independent observers to see that the question is decided by the free will of the people.

(Quoted Form Civil and Military Gazette)
October, 1947

APPENDIX-III**The Karachi Pact, 1949**

Heads of agreement between Hon'ble Minister without Portfolio, the President of AJ&K Muslim Conference and the President of the Azad Kashmir Government

I- CIVIL ADMINISTRATION OF THE AZAD KASHMIR AREA

- i. The Azad Kashmir Cabinet shall formulate policy and generally supervise administration in Azad Kashmir area. Day to day administration shall however, be entrusted to executive officers viz the Heads of Departments who shall also be secretaries to Government for their respective Departments.
- ii. Besides the Heads of Departments the Azad Kashmir Government will have only the following two Secretaries:
 - (1) Secretary, finance Department; and
 - (2) Cabinet Secretary.

The Cabinet Secretary besides maintaining record of Cabinet proceedings will be directly responsible to keep the Cabinet well- posted with all matters connected with the plebiscite and for all correspondence with the Plebiscite Administrator.

- iii. The details of the set up will be as follows:

	Subject	Head of Department- cum Secretary	Minister-in-charge
1.	Law and Order including jails and Police	Commissioner-cum-Chief Secretary	Hon'ble President
2.	Food and Civil	Director of Food and Civil Supplies and Secretary to Government Civil Supplies Departments	Minister for Civil Supplies
3.	Revenue (including Forests, Customs) and Public Works.	Commissioner –Cum-Chief Secretary	Revenue and Fiancé Minister

4.	Finance	Finance Secretary	Revenue and Finance Minister
5.	Rehabilitation	Director of Rehabilitation Secretary Rehabilitation Department	Minister of Rehabilitation
6.	Medical and health	Director of Health Services and Secretary Health Department	Minister of Health and Education
7.	Education	Director of Education and Secretary Education Department	Minister of Health and Education
8.	Cabinet and Plebiscite work	Cabinet Secretary	Hon'ble President

- iv. No one below the rank of Head of Department/ Secretary shall have access to the Ministers and orders to lower staff shall always be communicated through the Head of Department/ Secretary.
- v. Heads of Departments / Secretaries shall submit all important cases to their Ministers and shall generally keep them fully informed of developments in their respective Departments.
- vi. Heads of Departments/ Secretaries who are at present located outside Azad Kashmir area may continue to be so located. But they would / meet their Ministers once or twice a week and put up cases on which orders of Ministers have to be obtained.
- vii. Whenever Heads of Department feels that an order passed by an Hon'ble Minister needs revision, he would bring the case to the notice of the Commissioner who in his capacity as Chief Secretary to the Azad Kashmir Government, will endeavor to have the matter satisfactorily settled, if necessary, in consultation with the Chief Plebiscite Advisor to the Pakistan Government, who will also be notified by the Azad Kashmir government as the Chief Advisor.
- viii. Officers loaned to Azad Kashmir Government will be formally appointed as Officers-on-Special Duty with the Chief Plebiscite Advisor and their Services will informally be placed at the disposal of Azad Kashmir Government who would formally appoint them to office by notification in their own Gazette. All correspondence of the Azad Kashmir government with the Secretariat of the Minister without Portfolio, Government of Pakistan, will be through the Chief Plebiscite Advisor.

ix. Pending the appointment of a Public Service Commission for Azad Kashmir an ad-hoc Committee consisting of the following may be appointed to recommend future recruitment and promotions in services in the Azad Kashmir Government.

- (1) Commissioner (Chairman).
- (2) Judge of Azad Kashmir High Court.
- (3) The Head of the Department Concerned.
- (4) Cabinet Secretary as member- Secretary.

II- FINANCIAL ARRANGEMENTS

- (i) Monies advanced to the A.K Government for specific purposes shall be spent for those projects and no other. The Pakistan Government shall satisfy them that they have been properly spent.
- (ii) Moneys advanced to the A.K Government as general Grants-in-aid shall be given only after the A.K Government has produced a budget statement for the government as whole. In the case of these funds, the Government of Pakistan shall satisfy themselves that the A.K Government spend according to the budget proposals. For the purpose, they may ask for periodical statement of accounts from that Government.
- (iii) The Pakistan Government shall loan the services of an Accounts Officer for employment as Accountant General of the AJ&K Government.

III- DIVISION OF FUNCTIONS BETWEEN THE GOVERNMENTS OF PAKISTAN, THE AZAD KASHMIR GOVERNMENT AND THE MUSLIM CONFERENCE

A. MATTERS WITHIN THE PURVIEW OF PAKISTAN GOVERNMENT

- (i) Defense. (Complete control over A.K. forces).
- (i) Negotiation with U.N.C.I.P.
- (ii) Foreign Policy of A.K. Government.
- (iii) Publicity in Pakistan and foreign countries.
- (iv) Coordination of arrangements for relief and Rehabilitation of refugees.
- (v) Coordination of publicity and all arrangements in connection with the plebiscite.

- (vi) All activities within Pakistan itself with regard to Kashmir such as procurement of food and civil supplies transport, running of refugee camps, medical arrangements etc.
- (vii) All affairs of the Gilgit and Ladakh areas under the control of the Political Agent at Gilgit.

B. MATTERS WITHIN THE PURVIEW OF A.K. GOVERNMENT

- a. Policy with regard to administration in Azad Kashmir.
- b. General Supervision of administration in the Azad Kashmir area.
- c. Publicity with regard to activities of the A.K. Government and its administration.
- d. Advise to H. M without portfolio with regard to negotiations with U.N.C.I.P.
- e. Development or economic resources of A.K. area.

C. MATTER WITHIN THE PURVIEW OF MUSLIM CONFERENCE

- a. Publicity with regard to plebiscite in A.K. area.
- b. Field work and publicity in the Indian occupied area of the State. Organization of political activities in the A.K and the Indian occupied area of the State.
- c. Preliminary arrangements in connection with plebiscite.
- d. Organization for contesting the plebiscite.
- e. Political work and publicity among Kashmir refugees in Pakistan.
- f. General guidance of the A.K. Government.
- g. Advice to H. M without portfolio with regard to Negotiations with U.N.C.I.P

Note:- I agree to this so far as this concerns with the part regarding the Muslim Conference.

-Sd-(Muhammad Ibrahim)
President Azad Kashmir Govt.

-Sd- (Ghulam Abbas)
President All Jammu and Kashmir Muslim Conference

-Sd- (M.A. Gurmani)
Minister without Portfolio,
Government of Pakistan

APPENDIX-IV**AZAD GOVERNMENT OF THE STATE OF JAMMU AND KASHMIR**

Law, Justice, Parliamentary Affairs and Human Rights Department

"Muzaffarabad"

Dated: The 2nd day of June, 2018

No.LD/Legis-Act/37-52/2018. The following Act of the Azad Jammu and Kashmir, passed by the Joint Sitting and assented by the President on the 1st day of June, 2018, is hereby published for general information:-

[Act III of 2018]**AN****ACT**

further to amend the Azad Jammu and Kashmir Interim Constitution Act, 1974

WHEREAS it is expedient further to amend the Azad Jammu and Kashmir Interim Constitution Act, 1974 (VIII of 1974), for the purposes hereinafter appearing:

It is hereby enacted as follows:-

1. Short title and commencement.- (1) This Act may be called the Azad Jammu and Kashmir Interim Constitution (Thirteenth Amendment) Act, 2018.

(2) It shall come into force at once.

3. General amendment in the Constitution.- In the Constitution,-

(i) for the words "this Act" wherever occurring, the words "the Constitution" shall be substituted and referred as such;

(ii) for the words "Section" and "sub-section", wherever occurring, the words "Article" and "sub-Article" shall be substituted and referred as such respectively.

4. Amendment of Article 1 of the Constitution.- In the Constitution, sub-Article (1) of Article 1 shall be substituted as under,-

"(1) **This Constitution shall henceforth be known as the Azad Jammu and Kashmir Interim Constitution, 1974.**"

7. Amendment of Article 4 of the Constitution.- In the Constitution, in sub-Article (4) of Article 4, in paragraphs relating to fundamental rights,-

(i) in paragraph 1, between the words "of" and "liberty" the words "life or" shall be inserted;

(ii) in paragraph 2, for the sub-paragraph (4) and (5), the following shall be substituted, namely:-

"(4) No law providing for preventive detention shall be made except to deal with persons acting in a manner prejudicial to the integrity, security or defense of Azad Jammu and Kashmir or Pakistan or any part thereof, or public order, or the maintenance of supplies or services, and no such law shall authorize the detention of a person for a period exceeding three months unless the Review Board has, after affording him an opportunity of being heard in person, reviewed his case and reported, before the expiration of the said period, that there is, in its opinion, sufficient cause for such detention, and, if the detention is continued after the said period of three months, unless the Review Board has reviewed his case and

"17. **Safeguard against discrimination in services.**- No State Subject otherwise qualified for appointment in the service of Azad Jammu and Kashmir shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, residence, sex or place of birth:

reported, before the expiration of each period of three months, that there is, in its opinion, sufficient cause for such detention.

Explanation-I: In this clause, "the Review Board" means a Board appointed by the Chief Justice of Azad Jammu and Kashmir consisting of a Chairman and two other persons, each of whom is or has been a Judge of the Supreme Court or a High Court.

Explanation-II: The opinion of the Review Board shall be expressed in terms of the views of the majority of its members.

(5) When any person is detained in pursuance of an order made under any law providing for preventive detention, the authority making the order shall, within fifteen days from such detention, communicate to such person the grounds on which the order has been made, and shall afford him the earliest opportunity of making a representation against the order:

Provided that the authority making any such order may refuse to disclose facts which such authority considers it to be against the public interest to disclose.

(6) The authority making the order shall furnish to the Review Board all documents relevant to the case unless a certificate, signed by a Secretary to the Government concerned, to the effect that it is not in the public interest to furnish any documents, is produced.

(7) Within a period of twenty four months commencing on the day of his first detention in pursuance of an order made under a law providing for preventive detention, no person shall be detained in pursuance of any such order for more than a total period of eight months in the case of a person detained for acting in a manner prejudicial to public order and twelve months in any other case:

Provided that this clause shall not apply to any person who is employed by, or works for, or acts on instructions received from, the enemy, or who is acting or attempting to act in a manner prejudicial to the integrity, security or defense of Azad Jammu and Kashmir or Pakistan or any part thereof or who commits or attempts to commit any act which amounts to an anti-national activity as defined in a law or is a member of any association which has for its objects, or which indulges in, any such anti-national activity.

(8) The Review Board shall determine the place of detention of the person detained and for a reasonable subsistence allowance for his family.

(9) Nothing in this clause shall apply to any person who for the time being is an enemy alien.

(iii) In paragraph 3:-

(a) in sub-paragraph (2), between the words "labour" and "are" the words "and traffic in human beings" shall be inserted and thereafter the following new sub-paragraph (2-a) shall be added;

"(2-a) No child below the age of fourteen years shall be engaged in any factory or mine or any other hazardous employment."

(b) the full stop at the end of clause (b) of sub-paragraph (3) shall be substituted by a colon and thereafter the following proviso shall be added:

"Provided that no compulsory service shall be of a cruel nature or incompatible with human dignity."

(iv) for paragraph 7, the following shall be substituted, namely:-

“7. Freedom of association.-(1) Every State Subject shall have the right to form association or unions, subject to any reasonable restrictions imposed by law in the interest of sovereignty or integrity of Pakistan and Azad Jammu and Kashmir, morality or public order.

(2) Every State Subject, not being in the Service of Azad Jammu and Kashmir, shall have the right to form or be a member of a political party, subject to any reasonable restrictions imposed by law in the interest of the sovereignty or integrity of the State and such law shall provide that where the Government declares that any political party has been formed or is operating in a manner prejudicial to the sovereignty or integrity of the State, the Government shall, within fifteen days of such declaration, refer the matter to the Supreme Court whose decision on such reference shall be final.

(3) No person or political party in Azad Jammu and 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.

(4) Every political party shall account for the source of its funds in accordance with law.”

(v) in paragraph 8, in clause (c).-

- (a) the words “**or Council**” appearing between the words “**Government**” and “**or**” shall be omitted; and
- (b) the words and comma “**or the Council**,” appearing between the words “**Government**” and “**of**” shall be omitted.

(vi) In the paragraph 14.-

- (a) in sub-paragraph (3), in clause (b), after the words “**under any law**”, at the end, the words and brackets, “**(not being property which has ceased to be evacuee property under any law)**” shall be added; and
- (b) after sub-paragraph (3), the following new sub-paragraph (4) shall be added,-
“(4) The adequacy or otherwise of any compensation provided for by any such law as is referred to in this Article, or determined in pursuance thereof, shall not be called in question in any court.”

(vii) For paragraph 15, the following shall be substituted, namely:-

“15. Equality of State Subjects.-(1) All State Subjects are equal before law and are entitled to equal protection of law.

(2) There shall be no discrimination against any State Subject on the basis of sex.

(3) Nothing in this Article shall prevent the state from making any special provision for the protection of women and children.

(viii) The paragraph 16 shall be renumbered into sub-paragraph (1) and thereafter the following new sub-paragraph (2) shall be added, namely,-
“(2) Nothing in sub-Article (1) shall prevent the state from making any special provision for women and children.”

(ix) For paragraph 17, the following shall be substituted namely:-

“17. Safeguard against discrimination in services. No State Subject otherwise qualified for appointment in the service of Azad Jammu and Kashmir shall be discriminated against in respect of any such appointment on the ground only of race, religion, caste, residence, sex or place of birth:

Provided that in the interest of the said service, specified posts or services may be reserved for members of either sex if such posts or services entail the performance of duties and functions which cannot be adequately performed by members of the other sex:

Provided further that under-representation of any class or area in the service of State may be redressed in such manner as may be determined by an Act of Assembly.

(x) After paragraph 18, the following new paragraphs 19, 20, 21, 22, 23 and 24 shall be added, namely:-

- “19. **Right to fair trial.**-For the determination of his civil rights and obligations or in any criminal charge against him, a person shall be entitled to a fair trial and due process.
- 20. **Protection against double punishment and self- incrimination.**-No person shall,-
 - (i) be prosecuted or punished for the same offence more than once; or
 - (ii) when accused of an offence, be compelled to be a witness against himself.
- 21. **Inviolability of dignity of man, etc.**-
- (i) The dignity of man and, subject to law, the privacy of home, shall be inviolable.
- (ii) No person shall be subjected to torture for the purpose of extracting evidence.
- 22. **Right to information.**- Every State Subject shall have the right to have access to information in all matters of public importance subject to regulation and reasonable restrictions imposed by law.
- 23. **Right to education.**- The State shall provide free and compulsory education to all children of the age of five to sixteen years in such manner as may be determined by law.
- 24. **Preservation of language, script and culture.**- Without prejudice to the national language of Azad Jammu and Kashmir as may be declared by the Government, any section of society having a distinct language, script or culture shall have the right to preserve and promote the same and subject to law, establish institutions for that purpose.”

“19. **Extent of executive authority of Government.**- (1) The executive authority of the Government shall extend to the matters with respect to which the Assembly has power to make laws including Part-B of Third Schedule and shall be so exercised as,-

- (a) not to impede or prejudice the responsibilities of Government of Pakistan in relation to the matters specified in sub-Article (3) of Article 31; and
- (b) to secure compliance with the laws made in relation to matters specified in Third Schedule as set out under sub-Article (3) of Article 31.

(2) The Government, if deems necessary or expedient in the public interest and to secure paramount purpose of social and economic wellbeing of the people of the State, may with the consent of the Government of Pakistan, entrust, either conditionally or unconditionally, to the Government of Pakistan or to any of its subordinate authority including a ministry, division, organization or statutory body or entity of Pakistan, to perform any of such functions within territory of the State as may be prescribed by law.

(3) The Government of Pakistan may also entrust, either conditionally or unconditionally, any of its functions to the Government in relation to any matter specified in Part-B of the 'Third Schedule' as set out under sub-Article (3).

(4) The relationship between Government of Pakistan with the Government shall be such as manifested in sub-Article (3) of Article 31 and the Cabinet Division D.O. No. 8/9/70-Cord-1 dated the 11th May, 1971 of the Government of Pakistan with respect to peculiar political status of Azad Jammu and Kashmir and shall be the guiding principles to maintain direct working relationship of Government with the Government of Pakistan.”.

16. Amendment of Article 21 of the Constitution.- In the Constitution, in Article 21,-

- (i) sub-Articles (7), (8), (9), (10), (11), (12) and (13) shall be omitted; and
- (ii) sub-Article (14) shall be renumbered as sub-Article (7) thereof and thereafter the following new sub-Article (8) shall be added, namely:-

“(8) The Council shall have an advisory role in respect of matters and subjects, referred to in sub-Article (3) of Article 31 and in respect of the responsibilities of Government of Pakistan under the UNCIP Resolutions.”.

20. Substitution of Article 31 of the Constitution.- In the Constitution, for Article 31, the following shall be substituted, namely:-

“31. Legislative Power.- (1) Subject to sub-Article (3) the Assembly shall have the power to make laws,-

- (a) for the territories of Azad Jammu and Kashmir;
- (b) for all state subjects, wherever they may be; and
- (c) for all persons in the Service of Azad Jammu and Kashmir, wherever they may be.

(2) The Assembly shall have exclusive power to make laws on any matter not enumerated in Part-A of the Third Schedule.

(3) The Government of Pakistan shall have exclusive power to make laws with respect to any matter enumerated in 'Part-A' of the Third Schedule.

(4) The Assembly shall, with the consent of Government of Pakistan, make laws with respect to any matters enumerated in 'Part-B' of the Third Schedule.

(5) All taxes including the income tax shall be levied for the purposes of the territories of Azad Jammu and Kashmir by or under the authority of an Act of the Assembly.

(6) No law shall be repugnant to the teachings and requirements of Islam as set out in the Holy Quran and Sunnah and all existing laws shall be brought in conformity with the Holy Quran and Sunnah.

Explanation.- In the application of this sub-Article to the personal law of any Muslim sect, the expression "Quran and Sunnah" shall mean the Quran and Sunnah as interpreted by that sect.”.

22. Substitution of Article 33 of the Constitution.- In the Constitution, for Article 33 the following shall be substituted, namely:-

“33. Amendment of the Act.- (1) The provisions of the Constitution may be amended in accordance with the following provisions.

(2) No amendment shall be made in Articles 31, 33 and 56, without the prior approval of the Government of Pakistan.

(3) A bill to amend the Constitution, shall be originated in the Assembly and when the bill has been passed with or without amendment by the votes of not less than two-third of total membership of the Assembly, the bill shall be presented to the President for assent.”.

23. Omission of Article 33-A of the Constitution.- In the Constitution, Article 33-A shall be omitted.

29. Amendment of Article 41 of the Constitution.- In the Constitution, in Article 41,-

(i) in sub-Article (2), in the clause (a), the semi-colon at the end shall be substituted by a colon and the word “and” at the end shall be omitted and thereafter following proviso shall be added:

“Provided that the Assembly may by a resolution extend the Ordinance for a further period of four months and it shall stand repealed at the expiration of the extended period.” and

(ii) sub-Article (4) shall be omitted.

40. Addition of Articles 52-B and 52-C in the Constitution.- In the Constitution, after Article 52-A, following Articles 52-B and 52-C shall be added:-

“52-B. Ownerless property.- Any property which has no rightful owner, if located within Azad Jammu and Kashmir, shall vest in the Government.

52-C. Natural Resource endowment.- (1) The natural resource of Azad Jammu and Kashmir which having a potential of economic value and providing for the sustenance of life for future generations shall be preserved and regulated by an Act of the Assembly.

(2) Without prejudice to sub-Article (1), the natural resource of Azad Jammu and Kashmir may be utilized under the law, in the economic and efficient manner, by the Government and also may be authorized under an Act of Assembly to utilize any resource of the State by any person, entity or authority of Pakistan in consideration of valuable economic benefits for the public interest such as net-hydel profit or royalty or any other acceptable form or benefit but without affecting the pristine environmental value of the inherent endowment of the State.”

45. Substitution of Third Schedule of the Constitution.- In the Constitution, for the Third Schedule the following shall be substituted, namely,-

“THIRD SCHEDULE

[See Article 31 (3) and (4)]

‘Part-A’

1. The responsibilities of the Government of Pakistan under the UNCIP Resolutions.
2. Defense and security of Azad Jammu and Kashmir.
3. The current coin or the issue of bills, notes or other paper currency.
4. The External affairs of Azad Jammu and Kashmir including foreign trade and foreign aid.
5. Post and Telegraphs, including Telephones, Wireless, Broad- Casting and other like forms of communications; post office saving Bank.
6. Nuclear energy, including:-
 - (a) mineral resources necessary for the generation of nuclear energy;
 - (b) the production of nuclear fuels and the generation and use of nuclear energy; and

(c) ionizing radiations.

7. Aircraft and air navigation; the provision of aerodromes; regulation and organization of air traffic and of aerodromes.
8. Beacons and other provisions for safety of aircraft.
9. Carriage of passengers and goods by air.
10. Copyright, inventions, designs, trademarks and merchandise marks.
11. Opium so far as regards sale for export.
12. State Bank of Pakistan; banking, that is to say, the conduct of banking business by corporations other than corporations owned or controlled by Azad Jammu and Kashmir and carrying on business only within the Azad Jammu and Kashmir.
13. The law of insurance, except as respects insurance undertaken by Azad Jammu and Kashmir and the regulation of the conduct of insurance business, except as respects business undertaken by Azad Jammu and Kashmir.
14. Stock exchanges and future markets with objects and business not confined to Azad Jammu and Kashmir.
15. Corporations, that is to say, the incorporation, regulation and winding-up of trading corporations, including banking, insurance and financial corporations, but not including corporations owned or controlled by Azad Jammu and Kashmir or cooperative societies, and of corporations, whether trading or not, with objects not confined to Azad Jammu and Kashmir, but not including universities.
16. Planning for economic coordination including planning and coordination of scientific and technological research.
17. Highways, continuing beyond the territory of Azad Jammu and Kashmir and also roads declared by the Government of Pakistan to be of strategic importance.
18. External affairs; the implementing of treaties and agreements, including educational and cultural pacts and agreements, with other countries; extradition, including the surrender of criminals and accused persons to Governments outside Pakistan.
19. Foreign exchange; cheques, bills of exchange, promissory notes and other like instruments.
20. Administrative Courts and Tribunals for subjects under this Part.
21. Libraries, museums, and similar institutions controlled or financed by the Government of Pakistan.
22. Government of Pakistan agencies and institutes for the following purposes, that is to say, for research, for professional or technical training, or for the promotion of special studies.
23. Education as respects Azad Jammu and Kashmir students in foreign countries and foreign students in Azad Jammu and Kashmir.
24. Import and export across customs frontiers as defined by the Government of Pakistan.
25. International treaties, conventions, agreements and International arbitration.
26. Surveys including geological surveys and meteorological organizations.
27. Establishment of standards of weights and measures.
28. Duties of customs, including export duties.
29. Taxes on corporations.
30. Offences against laws with respect to any of the matters in this Part.
31. Inquiries and statistics for the purposes of any of the matters in this Part.
32. Matters incidental or ancillary to any matter enumerated in this Part.

'Part-B'

1. Railways.
2. Mineral oil and natural gas; liquids and substances declared by Government of Pakistan to be dangerously inflammable.
3. National planning and national economic coordination, including planning and coordination of scientific and technological research.
4. Supervision and management of public debt.
5. Boilers
6. Census.
7. State Property until transfer to the Government of AJK.
8. Electricity except the power generation planned and made by Government of AJK.
9. Terminal taxes on goods or passengers carried by railway or air, taxes on their fares and freights.
10. Extension of the powers and jurisdiction of members of a police force belonging to Azad Jammu and Kashmir, or any Province of Pakistan to any area in such province or the Azad Jammu and Kashmir but not so as to enable the police of Azad Jammu and Kashmir or such province to exercise power and jurisdiction in such province or Azad Jammu and Kashmir and without the consent of the Government of that province or the Azad Jammu and Kashmir.
11. Measures to combat certain offences committed in connection with matters concerning the subjects included in this list.
12. Removal of prisoners and accused persons from Azad Jammu and Kashmir to Pakistan or from Pakistan to Azad Jammu and Kashmir.
13. Prevention of the extension from Azad Jammu and Kashmir to Pakistan or from Pakistan to Azad Jammu and Kashmir of infections of contagious diseases or pests affecting men; animals or plants.
14. Curriculum, syllabus, planning, policy, centers of excellence and standards of education.
15. Medical and other professions excluding legal profession.
16. Standards in institutions for higher education and research, scientific and technical institutions.
17. Matters concerning coordination between Azad Jammu and Kashmir and other Provinces of Pakistan.
18. The salaries, allowance and privileges of the members and including salaries and pension payable to employees of the council.
19. Jurisdiction and powers of all courts with respect to any of the matters enumerated in this list.
20. Offences against laws with respect to any of the matters in this Part.
21. Inquiries and statistics for the purposes of any of the matters in this Part.
22. Matters incidental or ancillary to any matter enumerated in this Part."

-sd-

Irshad Ahmed Qureshi
Secretary Law

APPENDIX-V**S&GAD Notification dated 23.08.1979**

AZAD GOVERNMENT OF THE STATE OF JAMMU & KASHMIR
SERVICES & GENERAL ADMINISTRATION DEPARTMENT,

‘Muzaffarabad’

Dated the 23rd August, 1979

NOTIFICATION

The 17842-60/ S&GAD / 79, in pursuance of Section 19 (5) of the AJ&K interim Constitution Act, 1974 and on the basis of the meeting held on 10th July, 1979, at Islamabad, the Government of AJ&K is pleased to notify the transfer of functions of the Excise & Taxation Department and Audit & Accounts Department to AJ&K Council for the time being on the following terms and conditions:-

1. The Income Tax commissioner and his staff stand transferred the Azad Jammu & Kashmir and Kashmir Council from 30th of June, 1979 (afternoon) alongwith all assets and liabilities. This Department will continue performing the functions as before for AJ&K Government for realization of AJ&K Government taxes for which the AJ&K Council will not ask for any service charges. The AJ&K government may establish. It's won department for these taxes whenever it so desires.
2. The Accountant General alongwith his staff stand transferred the AJ&K Council from 30th June, 1979 (afternoon).
3. As decided by the Council in its 7th session held on 21st June, 1979 any short-fall in the financial resources of AJ&K Government as a result of these Acts will be appropriately readjusted after working the net amount.
4. Necessary safeguards will be provided to the staff of the Income Tax and Accountant General Department in accordance with the rules on their transfer to the AJ&K Council.
5. The 80% share of the AJ&K Government out of net receipts from concerned taxes will be paid on monthly basis to the AJ&K Government.
6. The Accountant General, AJ&K will arrange to have separate accounts for AJ&K Council and AJ&K Government in each district of AJ&K. The Council accounts at Islamabad will be directly dealt with by Accountant General AJ&K by 1st August, 1979, at the latest. Similarly the salaries to Accountant General

Department and Income Tax Department will be paid directly out of Council funds by 1st September, 1979 at the latest and the payments made by AJ&K Government for these departments from 1st July, 1979 to 31st August, 1979, will be debited to AJ&K Council Accounts.

-sd-

(Sardar Aftab Ahmed Khan)

Secretary,

Services & General Admin Department

Copy to:-

1. The Secretary to President, Azad Jammu & Kashmir.
2. The Principal Secretary to Chief Executive.
3. The Chief Secretary A.K.
4. The Secretary, AJ&K Council, Islamabad.
5. All Secretaries to Government.
6. Accountant General A.K Governments.
7. Commissioner Income Tax AK Government.
8. Superintendent, Government Printing Press for Publication in the Government Gazettes.

-sd-

Secretary,

Services & General Admin Department

APPENDIX-VI**S&GAD Notification dated 07.09.2012**

AZAD GOVERNMENT OF THE STATE OF JAMMU & KASHMIR
SERVICES & GENERAL ADMINISTRATION DEPARTMENT,

‘Muzaffarabad’

Dated: 07.09.2012

NOTIFICATION

The S&GAD/ G -12 (42) /2012. In exercise of the powers conferred by Section 19(3) of the AJ&K Interim Constitution Act, 1974, Azad Government of the State of Jammu and Kashmir with the consent of the AJ&K Council, has been pleased to make the following amendment in the Notification No. 17842-60/S&GAD/79 dated 23rd August 1979:

1. In the aforesaid Notification, the S.No. 5 shall be substituted as under :-

“5” The 80 % share of the AJ&K Government out of the net receipts from concerned taxes shall be paid on monthly basis through cheque issued in this behalf on 11th day of every month to Azad Jammu & Kashmir Government and no other payments, except payments for salaries, pension, POL Utility charges, Medical charges and Refund of GPF shall be made by the Council from 1st to 11th day of each month so as to ensure drawl of its due share by AJ&K Government.

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Secretary S&GAD

Copy to :-

1. Secretary to President, Azad Jammu & Kashmir.
2. Principal Secretary to Prime Minister, Azad Govt. of the State of Jammu & Kashmir.
3. PS to All Ministers/ Advisor to Govt./ Special Assistants. Azad govt. of the State of Jammu & Kashmir.
4. PS to Chief Secretary, Azad Govt. of the State of Jammu & Kashmir.
5. Secretary Azad Jammu Kashmir Council, Govt. of Pakistan, Islamabad.
6. PS to SMBR, Azad Govt. of the State of Jammu & Kashmir.
7. PS to ACS (General), Azad Govt. of the State of Jammu & Kashmir.
8. PS to Chairman PM Inspection & Monitoring Commission, Govt. of the State of Jammu & Kashmir.
9. PS to ACS (Dev) Azad Govt. of the State of Jammu & Kashmir.
10. All Secretaries to Azad Govt. Azad Govt. of the State of Jammu & Kashmir.
11. Accountant General Azad Jammu & Kashmir.
12. Commissioner Income Tax AJ&K.
13. All concerned for information Department.
14. Controller, Govt. Printing & Stationary Department.
15. M/F

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Secretary S&GAD

APPENDIX-VII**Minutes of the Cabinet Meeting Held on 17.10.2016**

No. Admin/ CS-2 (11)/2016

Azad Government of the State of Jammu and Kashmir
Services and General Administration Department

'Muzaffarabad'
14th November 2016.

To,

All Secretaries ,
Azad Govt. of the State of Jammu and Kashmir,
Muzaffarabad.**SUBJECT: MINUTES OF THE CABINET MEETING HELD ON 17.10.2016**

I am directed to refer to the above subject and to communicate the following decisions of the Cabinet meeting held on 17-10-2016, for kind perusal and further necessary action in terms of Rule 29 (1) (2) of Rules of Business, 1985:

S.No.	Agenda Item No. 2	Responsibility
1.	<p><u>Recurrent Budget</u></p> <p>TOR-1: Analysis of resource constraints of Government of AJ&K, determination of its basic reasons and recommendations for enhancement in resource base through indigenous income resources.</p> <p><u>Matters Regarding finance Division Government of Pakistan:</u></p> <ul style="list-style-type: none"> i) AJ&K Government is facing an accumulated shortfall of Rs. 18.2 billion due to gap between receipts and expenditures since last seven years. ii) Federal Taxes share is worked out on hypothetical basis from 1992-93 in the light of share awarded to Baluchistan @ 2.27% as against 5.11% to share of Baluchistan iii) Now Baluchistan share has increased from 5.11% to 9.09 % iv) AJ&K is required to be given a proportionate increase from 2.27% to 4.5 % in Federal taxes share. v) Fixation of unrealistic targets of income from AJ&K own receipts and 80% net share of Income Tax by Finance Division Government of Pakistan has resulted in accumulation of budget deficit. vi) Targets are required to be fixed on the basis of actual collection of the previous year. 	<p>(i) ACS (Dev.) (ii) Secretary Finance</p>

	<p><u>Decision</u></p> <p>The Cabinet decided to approach the Government of Pakistan for additional resources to overcome financial crisis.</p>	
2.	<p><u>Matters Regarding AJ&K Council :</u></p> <p>(i) AJ&K Council does not release 80% Income Tax share in time to Government of AJ&K.</p> <p>(ii) Kashmir Council Collects taxes on behalf of AJ&K Government and charges 20% as collection charges which is too high as compared to other provinces paying less them 1% to FBR.</p> <p>(iii) The Committee recommended to approach AJ&K Council for reduction in collection charges which should not be more than 10%.</p> <p>(iv) The Cabinet was informed that under PTA rules, all mobile companies contribute to Universal Services Fund. The fund is supposed to be invested back in the province where it is collected from, to provide IT Services to the people living in backward areas of that province. AJ&K Council collects this fund but does not transfer to AJ&K.</p> <p>(v) An amount of Rs. 3.628 billion is outstanding with the AJ&K Council on account of 80% net share of Income Tax.</p> <p>(vi) Previously GSM License were granted to four different cellular companies but entire amount of US\$20 million was retained by AJ&K Council.</p> <p><u>Decision</u></p> <p>After detailed deliberations the Cabinet decided to approach AJ&K Council for :</p> <p>(i) Making an arrangement for payment of share of Income Tax to Government of AJ&K on or before 11th day of each month and ensure implementation of notification of 07-09-2012 in letter and spirit.</p> <p>(ii) Release of outstanding amount of Rs. 3.628 billion on account of 80% net share of Income Tax.</p> <p>(iii) Immediate transfer for of withheld Universal Service Fund (USF) to GOVERNMENT OF AJ&K to utilize the said funds in AJ&K territory for providing IT services in rural areas and to create job opportunities.</p> <p>(iv) Amount already collected on account of GSM licenses should be transferred to the AJ&K Government.</p> <p>(v) 3G/4G is going to be introduced in AJ&K, hence upcoming auction amount for 3G/4G facility may also be transferred to AJ&K government on similar basis.</p>	<p>(i) ACS (Dev.) (ii) Secretary Finance</p>

	(vi) Reduction of collection charges to not more than 5% (vii) Involvement of Finance Department and Planning Development Department Government of AJ&K during pre-Budget Meetings/ Sessions for preparation of AJ&K Council budget.	
3.	<p><u>Matters Regarding WAPDA/ Ministry of Water & Power Government of Pakistan.</u></p> <p>(i) WAPDA is paying Rs. 0.15 /KWh as Water use Charges to Government of AJ&K and Net Hydel Profit is not being paid. The Water Use Charges / Net hydel Profit are required to be paid at par with other provinces.</p> <p>(ii) AJ&K is not being paid Income Tax by WAPDA on power generated from Mangla Dam. WAPDA is required to be approached for payment of Income Tax, this may be in Lieu of Net Hydel profit.</p> <p>(iii) As per Tax laws of AJ&K the GST is to be levied on electricity production at Mangla Hydel Power Station but WAPDA is not paying GST to AJ&K Government while the matter is sub-judice in AJ&K High Court which is required to be vigorously followed for its early resolution.</p> <p><u>Decision</u></p> <p>The Cabinet decided to approach WAPDA/ Ministry of Water & Power for resolution of above issues. Law Department, Government of AJ&K was directed to vigorously pursue case as per recommendation contained in (iii) above in State interest.</p>	(i) ACS (Dev.) (ii) Secretary Law (iii) Secretary Electricity
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Section Officer S&GAD (Cabinet)

cc.

1. PS to the secretary S&GAD.

-sd-

Section Officer S&GAD (Cabinet)

APPENDIX-VIII**Office Memorandum No. 8/9/70**

No. 8/9/70 (cord. I.)
 Government of Pakistan
 Cabinet Secretariat

(Cabinet Division Rawalpindi, the 24th June 1970)
OFFICE MEMORANDUM

Subject :- Development of Azad Kashmir.

The President and Chief Martial Law Administrator has noted with concern that scant attention is paid to the problems of Azad Kashmir by various Ministries and agencies of the Central Government. On account of this neglect over a number of years the economic development of that area has been retarded and standard of living of the common man in Azad Kashmir continues, to be extremely poor. It is true that constitutionally Azad Kashmir is not a part of Pakistan, but this should not prevent the Government of Pakistan and its agencies from making a serious attempt to improve the socio-economic conditions of that area. With this object in view Government has decided to set up a high-level committee to prepare a blue print for the reorganization of the administrative structure of Azad Kashmir Government with a view to ensuring the maximum utilization of development funds to be placed at the disposal of Azad Kashmir government during the next Five- year plan.

2. The President has also been pleased to direct that the following instructions be issued for observance by all the Ministries and Departments of the Central Governments:-

- i. Although Azad Kashmir is not a part of Pakistan within the meaning of Article 1 (2) (b) of the Constitution, it should, for all practical purposes, be treated like any other province and given a fair treatment in the matter of allocation of development funds, recruitment to all Pakistan services, training facilities to officials of that Government, etc.
- ii. Azad Kashmir should be brought into the mainstream of the general administration. For this purpose the leaders and officials of that Government should be invited, at appropriate level, to attend the inter-ministerial meetings in which problems of that area are coming up for discussion.

- iii. The President of Azad Kashmir may be invited to attend meetings of the Executive Committee of the National Economic Council, Governors Conference, etc, when development schemes or other proposals concerning that area form part of the agenda.
- iv. The Ministers and senior officials of the Central Government particularly those belonging to the Ministries of Finance, Agriculture, Education, Health, Commerce and Industries should visit the Azad Kashmir territories at suitable intervals with a view to acquainting themselves with the problems on the spot and having personal discussion with the President and other officials of that Government.

3. All Ministries / Divisions should ensure that any important action taken by them in pursuance of these instructions is first cleared with the Kashmir Affairs Division, which is the administrative Division for that area.

-sd- (M. H. Sufi)
Cabinet Secretary

1. All Ministers.
2. All Secretaries/ Acting Secretaries to Government.
3. Additional Secretary, President's Secretariat.
4. President, Government of Azad Kashmir.

APPENDIX-IX**Memorandum No. 8/9/70 dated 11.05.1971****CABINET DIVISION**

D.O. No. 8/9/70-Coord. I. Government of Pakistan Rawalpindi, May 11. 1971.

My Dear Secretary,

I invite your attention to the Cabinet Division Office Memorandum No. 8/9/80 (Coord. I) dated the 24th June, 1970 in which the following instructions pertaining to the Affairs of Azad Kashmir were conveyed for observance by all Ministries and Departments of the Central Governments.

- (i) "Although Azad Kashmir is not a part of Pakistan within the meaning of article 1 (2) of the Constitution, it should for all practical be treated like any other province....."
- (ii) "Azad Kashmir should be brought into the main stream of the general administration (of the country). For this purpose the leaders and officials of that Government should be invited at appropriate level to attend inter-ministerial meetings in which the problems of that area are coming up for discussion."
- (iii)
- (iv) The Ministries and senior officials of the Central Government particularly those belonging to the Ministries of Finance, Agriculture, Education, Health, Commerce and Industries should visit the Azad Kashmir territories at suitable intervals with a view to acquainting themselves with its problems on the spot, and for having personal discussions with the President and other officials of that Government.

2. While considering the reports of the organizations Committees and of the Special Team on the programmes and priorities of the Fourth 5 years Plan, for Azad Kashmir, the President, in the weekly meeting of 28th April 1971 was pleased to observe once again that the problems of the administration and development of Azad Kashmir should no longer be looked upon as the exclusive concern of Kashmir Affairs Division and every Ministry in the field of its special responsibility should look upon and deal with Azad Kashmir as if it were another administrative unit of the country. A formal decision was also taken to the effect that while the Kashmir Affairs Division would continue to deal with the political problems of Azad Kashmir and matters relating to the settlement of the Kashmir dispute for all purposes the Central Ministries should exercise the same powers and play the same role in regard to the affairs of Azad Kashmir as they were doing in their respective fields in relation to

other administrative units of the country, (Kashmir Affairs Division of course retaining the overall role of coordinators assigned to it under the Rules of Business).

It was particularly stressed that there should be more frequent consultations with Azad Kashmir government on policy matters in the field of development and more frequent visit to Azad Kashmir by senior officers of the Central Government. All with a view, to mounting, without in any way interfering with the day to day administration of Azad Kashmir which was recognized as the role concern of the Azad Kashmir Government itself, a concerned attack on its development problems and to bring about a speedy improvement in the economic conditions of its people.

3. I am to bring these instructions and decision once again to your notice for guidance and necessary action.

-sd-

(Ghulam Ishaq Khan)
HQA, S. PK.GSP
Cabinet Secretary

APPENDIX-X**Memorandum No. 6/7/88, dated 06.06.1988**

CABINET DIVISION
 No. 6/7/88-GC
 Government of Pakistan
 (Rawalpindi)

The 6th June 1988

My dear Secretary Incharge,

I invite your attention to the Cabinet Division's d.o. letter No. 8/9/70-Coord.I. dated Rawalpindi, May 11, 1971 (Copy enclosed for facility of reference).

I would like to reiterate to advice conveyed in the above mentioned d.o letter that AJ&K should be brought into the mainstream of the general administration and the various Ministries/ Division should directly entertain communication and proposal emanating from the Government of AJ&K. The Kashmir Affairs and Northern Affairs Division would continue to play its co-coordinating role as well. **Although Azad Kashmir is not a part of Pakistan under the Articles 1 (2) (d) of the Constitution, it should, for all practical purposes, be treated like any other province of the Federation.**

The Representatives of Government of Azad Jammu & Kashmir should invariably be invited to attend all those meetings in which Provincial Governments are represented or / and proposal concerning that area forms part of the agenda.

With regards,

Yours Sincerely,
 -sd- (Hassan Zaheer)
 Cabinet Secretary

Mr. Safdar Hussain Kazmi,
 Secretary Incharge,
 Kashmir Affairs & Northern Affairs,
 Islamabad.

APPENDIX-XI

Office Memorandum dated 11.08.1992

Government of Pakistan
Finance Division

OFFICE MEMORANDUM

SUBJECT: NEW FINANCIAL ARRANGEMENTS BETWEEN GOVERNMENT OF PAKISTAN AND AJ&K.

The undersigned is directed to refer to Finance Division's O.M.No.F.1 (1) WG (AK) 71-1218 dated 20-06-1973 on the subject of "outstanding issues of the AJ&K Government" and to convey the approval of the President to this following financial arrangements between the Government of Pakistan and AJ&K in supersession of the provisions of the above quoted OM, with effect from the fiscal year 1992-93.

- a) The fixed annual grant of Rs. 13.3 crore forms the Government will henceforth be replaced by a variable grant to the worked out each year on a hypothetical basis in the light of the share awarded to Baluchistan, a province with population comparable to AJ&K. For 1992-93 this grant has been worked out as Rs.754.6 million.
- b) For working out the above hypothetical share the Income Tax (collected by the AJ&K Government) will be excluded from the pool of Taxes and Excise duties.
- c) The sales tax collected by the AJ&K Government and the difference of rates on taxes and excise duties as applicable in Pakistan and AJ&K will be deducted from the pool of taxes.
- d) AJ&K Government will mobilize resources and the rates excise duties/ education cess levied by AJ&K in lieu of excise duty would be brought at par with Pakistan. However, the additional resources generated from excise duties/ education cess would remain at the disposal of AJ&K Government for topping up their development programmes and will not be adjusted by the Federal Government against AJ&K revenue deficit.

- e) The AJ&K Government will continue to receive the cash development loans/grants, ways and means advances as at present.
- f) The revenue deficit grant would be worked out on the basis of an average growth of 14 per cent non-development expenditure each year.
- g) The AJ&K will take steps for bringing the rating of taxes and items chargeable, tax laws and policies in conformity with those adopted by the Government of Pakistan and will improve their system with the assistance and cooperation of CBR.
- h) The AJ&K will get increase in rupee allocation each year in their ADP.
- i) Major power generation projects should be financed in such a way that foreign aid component does not affect the rupee component of normal ADP and sufficient funds are provided to such projects.

2. It has further been decided that the AJ&K Government would closely coordinate operational policies with CBR in Pakistan by obtaining technical assistance. The officers will be borne on the strength of CBR and would assist the Government of AJ&K in reforming their taxation structure.

3. All concerned are requested to take necessary action for the implementation of the above decisions.

-sd-

(M. Asif Zanan Ansari)
Joint Secretary
Tele: 822540

1. Kashmir Affairs Division
(Mr. Ahmed Sadik, Secretary),
Government of Pakistan,
Islamabad.
2. Chief Secretary, AJ&K Government.
(Mr. Shamsher Ali).
Muzaffarabad.
3. AJ&K Government
(Khursheed Ahmed Khan, Secretary),
Finance Department,
Muzaffarabad.

APPENDIX-XII**Finance Division Office Memorandum dated 16.04.2018**

GOVERNMENT OF PAKISTAN
 FINANCE DIVISION
 (PF Wing)

No F 5 (11)PF.II/2017-18/105

Islamabad, the 16th April, 2018**OFFICE MEMORANDUM**

Subject: **NEW FINANCIAL ARRANGEMENTS BETWEEN GOVERNMENT OF PAKISTAN AND AJ&K**

The undersigned is directed to refer to the above mentioned subject and to convey the approval of the President to the following financial arrangements between the Government of Pakistan and Government of the Azad State of Jammu & Kashmir.

- (i) Government of the AJ&K shall be entitled to receive variable grant in lieu of share from FBR taxes. The variable grant shall be worked out based on multiple indicators as adopted in the NFC Award. The percentage so worked out is 3.64%. The variable grant for the AJ&K Government for the next financial year will be based on the provincial share in the divisible pool taxes of the current financial year e.g. the variable grant for FY 2018-19 shall be based on the Budget Estimate of divisible pool tax of FY 2017-18.
- (ii) Revenue Deficit Grant as provided in the financial arrangements of 1992 shall be discontinued.
- (iii) Federal Government expects that Government of the AJ&K will gear up its efforts for full exploitation of potentials available in the collection of income tax and provincial taxation. AJ&K Government shall also ensure budgeting of the current expenditures realistically and will exercise utmost financial discipline and austerity on the analogy of the Federal Government. With the enhanced variable grant and water user charges, sufficient resources would be available with the AJ&K Government for utilization towards developmental activities in the area.
- (iv) AJ&K Government will exercise full financial autonomy by remaining within the resources availability position. No additional grant shall be provided by the Federal Government for current expenditures.



THE PRESIDENT

-2-

2. The above financial arrangements will be applicable with effect from 1st July 2018. The Variable Grant (in lieu of share from FBR taxes) for the FY 2018-19 has been worked out to be Rs 49.0 billion (Rupees forty nine billion only).

3. The Financial Arrangements of 1992 issued vide OM No.F.5(11)PF.II/89-718 dated 11.03.1992 shall be deemed to have been modified to the above extent.



(Abdul Malik Balghar)
Deputy Secretary (PF)

- 1 Secretary,
Kashmir Affairs and Gilgit-Baltistan (KA/GB) Division,
Government of Pakistan,
Islamabad
- 2 Chief Secretary
Azad Government of the States of Jammu and Kashmir
Muzaffarabad
- 3 Secretary,
Finance Department
AJ&K Government
Muzaffarabad

APPENDIX-XIII

Instrument of Ratification of ICCC P

APPENDIX-XIV

Instrument of Withdrawal of Reservations dated 11.09.2011



Minister of State for Home Affairs
Government of India

INSTRUMENT OF WITHDRAWAL OF RESERVATIONS

WHEREAS, the Government of India, by a Resolution dated the 11th September, 2011, in the 15th year of the reign of Shri Shri Narendra Modi, the Hon'ble Prime Minister of India, has decided to withdraw the reservations made by the Government of India, in respect of the Constitution (Scheduled Areas) Order, 1956, in the State of Jharkhand.

WHEREAS, the State Assembly of Jharkhand has passed a resolution in this regard, on the 11th September, 2011, and the same has been approved by the Hon'ble Prime Minister of India, on the 11th September, 2011.

Now, therefore, in pursuance of Article 253 of the Constitution of India, the Government of India, by the instrument annexed hereto, does hereby withdraw the reservations made by the Government of India, in respect of the Constitution (Scheduled Areas) Order, 1956, in the State of Jharkhand.

Article 253
Instrument annexed hereto, shall be deemed to be the instrument of withdrawal of the reservations made by the Government of India, in respect of the Constitution (Scheduled Areas) Order, 1956, in the State of Jharkhand.

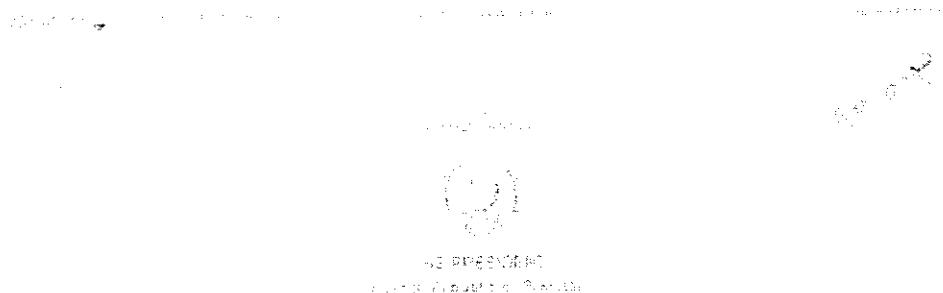
Article 253
The instrument annexed hereto, shall be deemed to be the instrument of withdrawal of the reservations made by the Government of India, in respect of the Constitution (Scheduled Areas) Order, 1956, in the State of Jharkhand.

Article 253
The instrument annexed hereto, shall be deemed to be the instrument of withdrawal of the reservations made by the Government of India, in respect of the Constitution (Scheduled Areas) Order, 1956, in the State of Jharkhand.

Given at the Ministry of Home Affairs, New Delhi, on the 11th September, 2011.

Kiren Rijiju
Minister of State for Home Affairs
Government of India

APPENDIX-XV

Instrument of Ratification of ICESCR

INSTRUMENT OF RATIFICATION

TO ALL TO WHOM THESE PRESENTS SHALL COME CERTIFICATE

KNOW YE, that whereas an International Covenant on Economic, Social, and Cultural Rights (ICESCR) was adopted by United Nations General Assembly on 16th December, 1966 at New York, the Government of Pakistan has signed the ICESCR on 1st November, 2004.

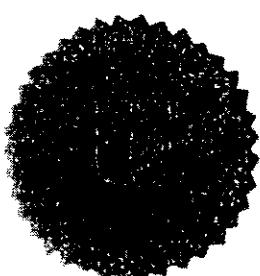
AND, WHEREAS, the Government of the Islamic Republic of Pakistan has decided to ratify the said Covenant.

NOW, THEREFORE, to witness, that I, Pervez Musharraf, President of the Islamic Republic of Pakistan, do by this instrument of Ratification, certify that the Government of Pakistan has ratified the said Covenant.

IN WITNESS WHEREOF, I have hereunto set my hand and caused the Seal of the Islamic Republic of Pakistan.

DONE at Islamabad this 1st day of April, 2008, in the year of two thousand and eight.

(PERVEZ MUSHARRAF)



APPENDIX-XVI

UNSCIP Resolution No.122 of 1957RESOLUTIONS ADOPTED AND DECISIONS TAKEN
BY THE SECURITY COUNCIL IN 1957RÉSOLUTIONS ADOPTÉES ET DÉCISIONS PRISES
PAR LE CONSEIL DE SÉCURITÉ EN 1957

Part I. Questions considered by the Security Council under its responsibility for the maintenance of international peace and security

Première partie. Questions examinées par le Conseil de sécurité en tant qu'organe responsable du maintien de la paix et de la sécurité internationales

THE INDIA-PAKISTAN QUESTION¹

Decisions

At its 761st meeting, on 16 January 1957, the Council decided to publish the documents submitted by the representative of Pakistan as annexes to his statement.²

At its 762nd meeting, on 23 January 1957, the Council decided to publish the documents submitted by the representative of India as annexes to his statement.³

122 (1957). Resolution of 24 January 1957
[S/3779]*The Security Council.*

Having heard statements from representatives of the Governments of India and Pakistan concerning the dispute over the State of Jammu and Kashmir,

Reminding the Governments and authorities concerned of the principle embodied in its resolutions 47 (1948)

LA QUESTION INDE-PAKISTAN¹

Décisions

A sa 761^e séance, le 16 janvier 1957, le Conseil a décidé de publier les documents que le représentant du Pakistan présentait comme annexes à sa déclaration².

A sa 762^e séance, le 23 janvier 1957, le Conseil a décidé de publier les documents que le représentant de l'Inde présentait comme annexes à sa déclaration³.

122 (1957). Résolution du 24 janvier 1957

[S/3779]

Le Conseil de sécurité.

Ayant entendu des exposés des représentants des Gouvernements de l'Inde et du Pakistan au sujet du différend concernant l'Etat de Jammu et Cachemire,

Rappelant aux gouvernements et autorités intéressés le principe énoncé dans ses résolutions 47 (1948) du 21

¹ Resolutions or decisions on this question were also adopted by the Council in 1948, 1949, 1950, 1951 and 1952.

² See *Official Records of the Security Council, Twelfth Year, Suplement for January, February and March 1957*, document S/PV.761/Add.1.

³ *Ibid.*, document S/PV.762/Add.1.

¹ Question ayant fait l'objet de résolutions ou décisions de la part du Conseil en 1948, 1949, 1950, 1951 et 1952.

² Voir *Documents officiels du Conseil de sécurité, douzième année, Supplément de janvier, février et mars 1957*, document S/PV.761/Add.1.

³ *Ibid.*, document S/PV.762/Add.1.

of 21 April 1948, 51 (1948) of 3 June 1948, 80 (1950) of 14 March 1950 and 91 (1951) of 30 March 1951, and the United Nations Commission for India and Pakistan resolutions of 13 August 1948⁴ and 5 January 1949⁵ that the final disposition of the State of Jammu and Kashmir will be made in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations.

1. *Reaffirms* the affirmation in its resolution 91 (1951) and declares that the convening of a constituent assembly as recommended by the General Council of the "All Jammu and Kashmir National Conference" and any action that assembly may have taken or might attempt to take to determine the future shape and affiliation of the entire State or any part thereof, or action by the parties concerned in support of any such action by the assembly, would not constitute a disposition of the State in accordance with the above principle.

2. *Decides* to continue its consideration of the dispute.

*Adopted at the 765th meeting
by 10 votes in favor, with
1 abstention - Union of Soviet
Socialist Republics.*

avril 1948, 51 (1948) du 3 juin 1948, 80 (1950) du 14 mars 1950 et 91 (1951) du 30 mars 1951, ainsi que dans les résolutions des 13 août 1948⁴ et 5 janvier 1949⁵ de la Commission des Nations Unies pour l'Inde et le Pakistan, à savoir que le sort définitif de l'Etat de Jammu et Cachemire doit être décidé conformément à la volonté des populations, exprimée au moyen de la procédure démocratique d'un référendum libre et impartial tenu sous l'égide de l'Organisation des Nations Unies.

1. *Confirme* la déclaration qu'il a faite dans sa résolution 91 (1951) et déclare que la convocation d'une assemblée constituante dans les conditions recommandées par le Conseil général de la « Conférence nationale de l'ensemble de l'Etat de Jammu et Cachemire », ainsi que toutes les mesures que cette assemblée pourrait avoir prises ou pourrait s'efforcer de prendre pour déterminer la structure et les associations futures de l'ensemble de l'Etat de Jammu et Cachemire ou d'une partie quelconque dudit Etat, ou toute action des parties intéressées pour appuyer les mesures susvisées, ne constituent pas des moyens propres à régler le sort dudit Etat conformément au principe mentionné ci-dessus.

2. *Décide* de poursuivre l'examen du différend.

*Adopté à la 765^e séance par
10 voix contre zéro, avec une
abstention - Union des Répu-
bliques socialistes soviétiques*

123 (1957). Resolution of 21 February 1957

[S.3793]

The Security Council.

Recalling its resolution 122 (1957) of 24 January 1957, its previous resolutions and the resolutions of the United Nations Commission for India and Pakistan on the India-Pakistan question.

1. *Requests* the President of the Security Council, the representative of Sweden, to examine with the Governments of India and Pakistan any proposals which, in his opinion, are likely to contribute towards the settlement of the dispute, having regard to the previous resolutions of the Security Council and of the United Nations Commission for India and Pakistan; to visit the subcontinent for this purpose; and to report to the Security Council not later than 15 April 1957;

2. *Invites* the Governments of India and Pakistan to co-operate with him in the performance of these functions;

⁴ *Ibid.*, Third Year, Supplement for November 1948, document S/1100, para. 75.

⁵ *Ibid.*, Fourth Year, Supplement for January 1949, document S/1196, para. 15.

123 (1957). Résolution du 21 février 1957

[S.3793]

Le Conseil de sécurité.

Rappelant sa résolution 122 (1957) du 24 janvier 1957 et ses résolutions antérieures ainsi que les résolutions de la Commission des Nations Unies pour l'Inde et le Pakistan relatives à la question Inde-Pakistan,

1. *Demande* au President du Conseil de sécurité, représentant de la Suède, d'examiner avec le Gouvernement indien et le Gouvernement pakistanais toutes propositions qui, à son avis, sont de nature à contribuer à un règlement du différend compte tenu des résolutions antérieures du Conseil de sécurité et de la Commission des Nations Unies pour l'Inde et le Pakistan; de visiter à cette fin la péninsule; et de faire rapport au Conseil de sécurité le 15 avril 1957 au plus tard.

2. *Invite* le Gouvernement indien et le Gouvernement pakistanais à collaborer avec le President du Conseil de sécurité pour l'aider à s'acquitter de sa mission.

⁴ Voir Procès-verbaux officiels du Conseil de sécurité, troisième année, Supplément de novembre 1948, document S/1100, par. 75.

⁵ *Ibid.*, quatrième année, Supplément de janvier 1949, document S/1196, par. 15.
