



LEGITIMACY OF PLEBISCITE CONUNDRUM IN KASHMIR: IN LIGHT OF REFERENDUMS HELD OVER THE WORLD *

INTRODUCTION

“I cannot drink water; it is mingled with the blood of young men who have died up in the mountains. I cannot look at the sky; it is no longer blue; but painted red.” - Muzamil Jaleel¹

The Jammu and Kashmir (hereinafter referred as the State) conflict is still unresolved after the completion of almost six decades and even today the State continues to bleed because of this conflict. According to the official data, 40,000 people have died since the insurgency in 1989², and if we chose to go with unofficial data the number is twice of the official one.³ Thousands of Indian soldiers have been killed and it costs billions of dollars to keep the army in Kashmir. There is one soldier for every 10 Kashmiris in the Valley⁴ and daily life is a nightmare for an ordinary Kashmiri.

The State is spread in the area of 222,236 square kilometers having population of, according to the 2011 census, about 12 million, making it the 19th most populated state in India.⁵ Not all part of the State is controlled by India, only some part, called Jammu and Kashmir, makes up the southern and eastern portions of the region, totaling about 45% of Kashmir, whereas Pakistan has a control over three areas called Azad Kashmir, Gilgit and Baltistan making up the northern and western portions of the region, totaling about 35% of Kashmir and remaining part of the State is controlled by China which is an area called Aksai Chin in the northeastern part of the region, equaling 20% of Kashmir.

HISTORY

The State crisis began with the Independence of India and Pakistan. Britain while withdrawing from the subcontinent divided it into two different nations- India and Pakistan.⁶ According to the **two-nation theory**⁷, Britain carved out Pakistan from predominantly Muslim areas and

* Ms. Sakshi Baghel and Mr. Shivesh Kumar Tripathi, pursuing BA.LLB.(Hons.) 3rd year at National Law Institute University, Bhopal.

¹ Muzamil Jaleel is a Srinagar-based journalist working with The Indian Express.

² Kashmir: Nuclear Flashpoint, available at <http://www.kashmirlibrary.org> accessed on July 5, 2015 at 4:30 pm.

³ Id.

⁴ Id.

⁵ <http://www.census2011.co.in/census/state/jammu+and+kashmir.html> accessed on July 5, 2015 at 4:45 pm.

⁶ Wenning, H., Kashmir: A Regional Conflict with Global Impact, 1 NZJPIL (2003), p.198.

⁷ The *two-nation theory* is the ideology that the primary identity of Muslims in the Indian subcontinent is their religion, rather than their language or ethnicity, and therefore Indian Hindus and Muslims are two distinct

allotted the predominantly Hindu areas to India.⁸ Problem arose regarding the accession of the 562 independent princely states, including the state of Jammu and Kashmir;⁹ states were free to choose association with either India or Pakistan. However, this was not a choice *per se*, primarily because this association was based on geographical and religious identity.¹⁰ The situation in the state was convoluted by the fact that it was geographically nearer to both India and Pakistan¹¹ as well as a Hindu ruler (Maharaja Hari Singh of Dogra Dynasty) governed a predominantly existing Muslim Population of that area.¹² As a result of which the state faced a dilemma over its association with either of the countries. This chronic indecision of the Maharaja was the cause of all the turmoil to which the state was later subjected.¹³

On October 21, 1947, a large number of several thousand tribesmen armed with 'Bren gun, machine guns, mortars and flame throwers'¹⁴ attacked the frontier of the state. It is an admitted fact that the tribesmen invaded the State from Pakistan territory.¹⁵ Mr. W. E. Hall, the leading authority in International law, says:

A state must not only itself obey the law, but it must take responsible care that illegal acts are not done within its dominions. Foreign nations have right to take acts done upon the territory of a State as being *prima facie* in consonance with its will ...¹⁶

The same view was adopted by the Supreme Court of America, wherein it was held that:

From the supremacy and exclusiveness of territorial jurisdiction, it follows that it is the duty of a state, within the bonds of legal responsibility, to prevent its territory and territorial waters from being used to the injury of another State.¹⁷

Margaret Bourke White¹⁸, Lord Birdwood had also remarked "the fact that tribesmen carried a certain amount of equipment which could not have come from the limited means of the tribal factories was a proof of a leakage from Pakistan's regular force."¹⁹ This invasion caused great devastation in the state and when tribesmen moved towards Srinagar, the then capital of the State, Maharaja called for the military aid from India,²⁰ on the advice of Sheikh Abdullah.²¹ It

nationalities, regardless of ethnic or other commonalities. The two-nation theory was a founding principle of the Pakistan Movement (i.e. the ideology of Pakistan as a Muslim nation-state in South Asia), and the partition of India in 1947.

⁸ Khan, F., *Nuking Kashmir: Legal Implication of Nuclear Testing by Pakistan and India in the Context of the Kashmir Dispute*, (2001) 29 *Ga Int'l & Comp L.*, p. 361-362.

⁹ Details Information for Canadian Forces (CF) Operation United Nations Commission for India and Pakistan, available at <http://www.cmp-cpm.forces.gc.ca/dhh-dhp/od-bdo/di-ri-eng.asp?IntlOpId=263&CdnOpId=311>, accessed on July 10, 2015 at 3:26 pm.

¹⁰ *Supra* at 8, p.364.

¹¹ Ganguly, S., *The Crisis in Kashmir: Portents of War, Hopes of Peace*, Woodrow Wilson Centre Press, Cambridge, 1997, p. 9.

¹² *Id.*

¹³ Anand, A.S., J.; *The Constitution of Jammu and Kashmir: Its development & Comments* (3rd edition, 1998), p.72.

¹⁴ Mr. Nehru's statement in the Constituent Assembly of India, October 25, 1947.

¹⁵ *Supra* note at 13.

¹⁶ Hall, W.E., *A Treaties on International Law*, Oxford, 1924, p.64.

¹⁷ *United States v. Arizona*, (1887) 120 U.S. 479.

¹⁸ Margaret Bourke White in her *Halfway to Freedom*, said that "Certainly these miniature ballistic establishments (the small factories in the tribal areas) would hardly explain the mortars, other heavy modern weapons and the two aeroplanes with which the invaders were equipped. In Pakistan towns close to the border arms were handed out before daylight to tribesmen directly from the front steps of Muslim League Headquarters. This was not *quite* same thing as though the invaders were being armed directly by the Government of Pakistan. Still Pakistan is nation with one party- Muslim League."

¹⁹ Lord Birdwood, *Two-Nation and Kashmir*, 1956, p. 53.

²⁰ *Supra* note at 6, p.199.

²¹ *Supra* note at 13, p.72.

was quite natural for Maharaja to believe that India cannot help the State unless an instrument of accession²² is signed by him accepting the Dominion of India.²³

RISE OF CONTROVERSY

Debate as to legality of the accession triggered because of the misinterpretation over the legal stand of a letter *personally* addressed to Maharaja by Lord Mountbatten which reads as:

“... my government have decided to accept the accession of Kashmir State to the Dominion of India. In consistence with their policy that in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State, it is my Government’s **wish** that, as soon as law and order have been restored in Kashmir and its soil cleared of the invader, the question of State’s accession should be settled by a reference to the people.”²⁴

Critics of the accession have steadfastly maintained that this stipulation renders the Accession Conditional. Others, in contrast, believe that this statement *does not* and *cannot* affect the legality of the accession²⁵ and we are also in consonance with the said view for various reasons. *Firstly*, it has been nowhere mentioned in the terms of the agreement that the question of the *wish* of the people was a condition precedent for the implementation of the accession. It was merely a *wish* expressed by Lord Mountbatten which was reaffirmed by Mr. Nehru while addressing the Lok Sabha in 1952.²⁶ For any contract to be binding, law requires offer and acceptance.²⁷ In this case it would seem that Lord Mountbatten made an offer but the Maharaja did not signify his acceptance. Therefore, the contention over non-ascertainment of wishes of the people would not render the accession instrument being postponed or being declared annulled. *Secondly*, this *Instrument of Accession* was no way different from that executed by some 500 other states. As Justice M.C. Mahajan²⁸ had observed:

“The Indian Independence Act did not envisage conditional accession. It conferred on the rulers of the Indian States absolute power in their discretion to accede to either of the two Dominions. The Dominion’s Governor-General had the power to accept the accession or reject the offer but he had no power to keep the question open or attach condition to it ... Finality which is statutory cannot be made contingent on conditions imposed outside the power of the statute. Any rider which militates against the finality is clearly *ultra vires* and had to be rejected.”²⁹

²²The Instrument of Accession is a legal document executed by Maharajah Hari Singh, ruler of the princely state of Jammu and Kashmir, on 26 October 1947. By executing this document under the provisions of the Indian Independence Act 1947, Maharajah Hari Singh agreed to accede to the Dominion of India.

²³Text Of Letter Dated October 26, 1947 From Hari Singh, The Maharaja Of Jammu & Kashmir to Lord Mountbatten, Governor General of India.

²⁴ Lord Mountbatten’s letter to Maharaja of Kashmir dated October 27, 1947, *White Paper on Jammu and Kashmir*, pp. 47-48.

²⁵*Supra*note at 13, p.76.

²⁶Jawaharlal Nehru in the Lok Sabha on August 7, 1952, “We have fought the good fight about Kashmir on the field of battle... (and) ...in many a chancellery of the world and in the United Nations, but, above all, we have fought this fight in the hearts and minds of men and women of that State of Jammu and Kashmir. Because, ultimately - I say this with all deference to this Parliament - the decision will be made in the hearts and minds of the men and women of Kashmir; neither in this Parliament, nor in the United Nations nor by anybody else.”

²⁷ Section 2(b) read with sections 2(e) and 2(h), Indian Contract Act, 1872.

²⁸ Third Chief Justice of India (in office October 15, 1947- March 5, 1948).

²⁹ Mahajan, M.C. op. cit., pp. 19-21.

Therefore, the argument that accession was *unconditional, voluntary and absolute* still holds ground. And so, regarding the legality of the accession in the judicial sense of the world there is no doubt.³⁰ Indeed as Campbell-Johnson says:

“The legality of the accession is beyond doubt It should be stressed that the accession has complete validity both in terms of the British Government’s and Jinnah’s expressed policy statement.”³¹

Thirdly, in British administration the crown dealt with Maharaja alone. In monarchical form of Government, it is Monarch who personifies and represents the State.³² And the Government of India, in its relation with the Maharaja, acted in accordance with law and recognized international practice. The accession of the State cannot be called in question on any legal grounds.

KASHMIR AND SECURITY COUNCIL

As discussed above Pakistan refused to recognize the accession, *Dawn* the Muslim League’s Official Organ quoted Mr. Liaquat Ali Khan saying:

We do not recognise this accession. The accession of Kashmir to India is a fraud, perpetuated on the people of Kashmir by its cowardly Ruler with the aggressive help of Indian government.³³

A few days later the same Newspaper quoted the Prime Minister of Pakistan saying:

There is not the slightest doubt that the whole plot of accession of Kashmir to India was preplanned. It cannot be justified on any moral or political grounds.³⁴

This blame-game was not producing any result, Kashmir was still disputed territory and both countries were trying to take control over it. On observing the tension and strain over Kashmir, Mountbatten urged Nehru, “the overwhelming need for caution and restraint”.³⁵ He stressed, “How embroilment in war with Pakistan would undermine the whole of Nehru’s independent foreign policy and progressive social aspiration”.³⁶ Nehru considered Mountbatten’s advice and on his suggestion decided to lodge a complaint to the Security Council.³⁷

India invoked Article 35 of the Charter of United Nations and complained to the Security Council against Pakistan.³⁸ Under Article 35, a member is entitled to bring before the Security Council a ‘situation’ which imperils the international peace. The Government of India appealed to the Security Council, to ask the Government of Pakistan:

- 1) To prevent Pakistan Government personnel, military and civil, participating in or assisting the invasion of the State;
- 2) To call upon other Pakistani Nationals to desist from taking any part in the fighting in the State;
- 3) To deny to the invaders:
 - a) Access to and use of its territory for operation against Kashmir;

³⁰Supranote at 15, p.75.

³¹ Campbell-Johnson, Alan, *Mission with Mountbatten*, p. 225.

³²*United States v. Wagner* (1867) L.R. 2 Ch. 582.

³³*Dawn*, Karachi, July 5, 1947.

³⁴ *Id.* July 17, 1947.

³⁵ *Supra* note at 15, p.81.

³⁶ Campbell-Johnson, A., *op. cit.*, p. 256.

³⁷ *Supra* note at 35.

³⁸ *Id.*

- b) Military and other supplies;
- c) All kinds of aid that might tend to prolong the present struggle.³⁹

On January 15, 1948, a letter was delivered to the Secretary General of the Security Council from the Pakistan Government emphatically rejecting the Indian charges.⁴⁰ The letter made counter charges as against India.⁴¹ These amongst others included:

- 1) A President attempt to undo the partition scheme;
- 2) A preplanned and extensive campaign of genocide against the Muslim in East Punjab and Punjab princely States;
- 3) The acquisition Kashmir's accession by fraud and violence.⁴²

On January 27, 1948, India and Pakistan submitted a draft proposal to the President of the Security Council on appropriate methods of solving the Kashmir Dispute.⁴³ It was in proposal that India agreed to the holding of a plebiscite in Kashmir as the ultimate determinant of Kashmir's status.⁴⁴ The Indian representative observed on the floor of the Council:

In accepting the accession they (India) refused to take advantage of the immediate peril in which the State found itself and informed the Ruler that the accession should finally be settled by plebiscite as soon as peace had been restored.⁴⁵

It was this statement which caused doubts in the mind of the members of the Security Council about the finality and the legality of the accession. To resolve the dispute between the countries, United Nations by resolution 39 of January 20, 1948, established United Nations Commission on Indian and Pakistan (hereinafter referred as UNCIP).⁴⁶ According to Leland Goodrich (1899-1990), American Political Scientist, the establishment of UNCIP was premised on the belief that active hostilities had to be broken off before a peaceful settlement could be achieved.⁴⁷ On August 13, 1948, UNCIP laid down certain terms and conditions to bring about a cessation of the fighting and to create proper conditions for a free and impartial plebiscite to decide whether the State of Jammu and Kashmir is to accede to India or Pakistan.⁴⁸

UNCIP submitted to the governments of India and Pakistan a three-part proposal containing recommendations for a cease-fire, a truce agreement, and a plebiscite to determine the future status of Kashmir.⁴⁹ The following principles were suggested as a basis for the truce agreement: (1) the government of Pakistan was to "withdraw its troops" and "use its best endeavor" to secure the withdrawal of tribesmen and Pakistani nationals not normally resident in the area. (2) "Pending a final solution," the territory evacuated by Pakistani troops was to be "administered by the local authorities under the surveillance of the Commission." (3) After the Commission notified the government of India that tribesmen and Pakistani nationals had withdrawn, the government of India would agree to withdraw the bulk of its forces from the state "in stages to be agreed upon with the Commission." (4) The government of India would

³⁹ Text in S.628 dated January 2, 1948, (S stands for Security Council documents).

⁴⁰ *Supra* note at 35, p.82.

⁴¹ *Id.*

⁴² S/646 dated January 15, 1948.

⁴³ Text in S/P. V. 236 (S/P.V. stands for Security Council Verbatim reports).

⁴⁴ *Supra* note at 35, p.82.

⁴⁵ S/P.V. 227.

⁴⁶ Alam, G.M. Shahidul, *Peacekeeping without Conflict Resolution: The Kashmir Dispute*, 6 Fletcher F., 1982, p. 64.

⁴⁷ Leland, M.G., *The United Nations* (New York: Thomas Y. Crowell Company), 1959, p. 208.

⁴⁸ Korbil, J., *The Kashmir Dispute and the United Nations*, International Organization, Vol. 3, No. 2 (May, 1949), p. 284.

⁴⁹ *Supra* note at 46, p. 66.

maintain, "Within lines existing at the moment of the cease-fire the minimum strength of its forces which in agreement with the Commission, were considered necessary to assist the local authorities in the observance of law and order."⁵⁰

Recently the referendum for Scottish independence that took place on 18th September 2014 has triggered the unresolved issue of conducting a plebiscite in Kashmir as was agreed upon by India in the UN Security Council. This has again drawn attention of the world on the impasse over deciding the fate of Kashmir. We have tried to analyse the distinction in state of affairs existing in India and the various aspects to suffice as to how India stands on a different pedestal from that of the other countries as far as conducting of the Plebiscite is concerned.

SCOTTISH REFERENDUM

In the eleventh century Scotland, like England itself, was occupied by the Normans and migrants from England still account for more than a tenth of the population of Scotland, Scotland has never been an English colony except in the late thirteenth and fourteenth centuries.⁵¹ Since long time it had been an independent kingdom with an ancient monarchy of its own and institutions that were not just clones of their English equivalents, but had their own distinctive origins and traditions. In legislative terms, Scotland was a foreign country.

In 1707 an Act of Union passed by English and Scottish Parliaments provides that 'the two Kingdoms of Scotland and England shall on the 1st of May and forever after be united into one kingdom by the name of Great Britain.'⁵² These words marked the birth, of Great Britain. There were different reasons of this Union on the part of both the countries. On the English side, after the death of **James II**⁵³ there was a considerable fear among the Englishmen of French invasion through Scotland in England. For the Scots, by far the most important reason for agreeing to the union was their desperate need for access to England's rapidly growing markets. The English domestic market was much larger in the size than that of the Scottish one, and its colonial markets more important still. Also, the Scots were excluded from the right to trade with English colonies in the Caribbean and North America, and the English navy suppressed any attempt to break this monopoly. Scotland was ill-placed to compete in this world. Shortly before the union, Scotland's susceptibility was brought home to its inhabitants by the failure of an ambitious scheme of colonisation known as the **Darien Scheme**⁵⁴. There were a number of reasons for the failure of the scheme, including mismanagement, disease, Spanish hostility and absence of naval support. But the Scots blamed English indifference as the most important cause for it. In the years immediately leading up to the union of 1707, anti-English feeling in Scotland was stronger than it had been at any time since the middle ages. The union with Scotland had been the result of realistic calculations of everyday economic and political interest.

The rapid expansion of the Scottish economy in the aftermath of the Act of Union, the common belief in Protestant Settlement, the rhetoric of constitutional liberty accompanied with centuries

⁵⁰Tristram, P., Text of 1949 UN Resolution Calling for Referendum on Kashmir.

⁵¹ Crawford, J., Whewell Professor of International Law, University of Cambridge and Barrister at Law, Matrix Chambers. *Perspectives on the Scottish Independence Referendum* 2014, Cambridge Journal of International and Comparative Law, Volume 3, Issue 1 (2014).

⁵²Article 1 of the Act of Union, 1707.

⁵³He was the King of England and Ireland from 6 February 1685 until he was deposed in the Glorious Revolution of 1688.

⁵⁴ In 1695, Scotland chartered a company to find a colony at Darien on the Isthmus of Panama, in a region traditionally regarded as belonging the sphere of influence of Spain. Under pressure from the English government, which wished to maintain good relations with Spain, English financiers refused to invest capital in it. As a result, the capital was ultimately subscribed by a large number of Scottish investors. The venture was a disaster, and by comparison with the modest size of the Scottish economy, the losses were enormous.

of shared experience of government, war, colonisation and industrialisation were important factors in the creation of a common British identity.⁵⁵ In the first century and a half after 1707, Scotland enjoyed a rate of industrialisation second only to England's. The Scots have played a remarkably outstanding role in the government of the United Kingdom itself since 1850. But gradually this feeling of commonness and shared experience began to fade and counts for less now than it did a generation ago because of the following reasons:

Firstly, the decline of Britain's sense of its own historic destiny and global relevance had brought a remarkable change in the relatively short period since the Second World War, an event which marked perhaps the climactic moment of England's and Scotland's shared history.⁵⁶ Secondly, the institutions at the heart of Scottish life which contributed most to sustaining belief in the union in the eighteenth and nineteenth centuries recently lost much of their influence. Thirdly, the existence of a range of social problems, to some extent specific to Scotland, arising from the speed of Scotland's industrialisation in the nineteenth century, and of its de-industrialisation since the last war.

Thus, as a result of all these factors there has been a growing demand for conducting of the referendum which had finally taken place on 18th of September, 2014. It is worth remembering that this referendum effectively originated in Prime Minister Tony Blair's decision in 1997 to allow an earlier referendum on broader Scottish autonomy, resulting in the creation of the Scottish Parliament two years later,⁵⁷ although support for the Scottish National Party began to grow as early in 1974, with the decline of Scottish heavy industry and discovery of oil.⁵⁸ The outcome was that voters in Scotland had backed the union by 55% to 45%, in the referendum. Thus the majority of the people have expressed their will to remain a part of the United Kingdom instead of being recognised as a separate state.

THE CRIMEAN IMBROGLIO

Since the declaration of Ukraine's independence on 24th August, 1992 there has been a question of reviewing of borders between Ukraine and Russia, the Crimean peninsula being the most contentious one.⁵⁹ The Crimea has a long history of independence, and more recently a strong affiliation with Russia.⁶⁰ Crimea which was transferred from the RSFSR⁶¹ to Ukraine in 1954 has now become enmeshed in Ukrainian-Russian dispute over the Black Sea Fleet.⁶²

The Crimean state continued to be a part of the Russian Empire and then the Soviet Union until its breakdown and Ukrainian independence in 1992.⁶³ Subsequently, it became one of the twenty-four administrative regions into which the nation was divided. Being at odds with national powers, Crimean leaders declared the independence of the peninsula and passed a constitution that proclaimed Crimea to be a republic within Ukraine, provided that Crimean

⁵⁵ Ernest Renan theory of nationhood according to which nation is "a daily referendum" and nations are based as much on what the people jointly forget, as what they remember.

⁵⁶ As suggested by Rogers Smith, American political scientist born on September 20, 1953.

⁵⁷ Bennhold, K., On Road to Scotland's Decision, Gambles and Fateful Steps, N.Y. Times, Sep. 18, 2014.

⁵⁸ Devolution and Nationalism: Let England Shake, The Economist, Sep. 27, 2014.

⁵⁹ Solchanyk, R., The Politics of State Building: Centre-Periphery Relations in Post-Soviet Ukraine, Europe Asia Studies, Vol.46, No. 1, 1994, p. 47.

⁶⁰ For a detailed overview of Crimean History, see *Nicholas v. Riansanovsky*, the History of Russia (5th edition, 1993)

⁶¹ Russian Soviet Federative Socialist Republic commonly referred to as Soviet Russia established on July 7, 1917 as a sovereign state.

⁶² *Supra* note at 59, p. 47.

⁶³ Buchanan, K., Crimean History, Status, and Referendum, available at <http://blogs.loc.gov/law/2014/03/crimean-history-status-and-referendum/> accessed on July 2, 2015 at 3:40 pm.

laws would have priority over Ukrainian laws, established Russian as the official language of the territory, and allowed Crimea to conduct its own foreign policy.⁶⁴

According to the Constitution of Ukraine⁶⁵ and the Ukrainian law⁶⁶ "On all-Ukrainian referendum", territorial changes can only be approved via a referendum where all the citizens of Ukraine are allowed to vote, including those that do not reside in Crimea. The Crimean Constitution of 1998, which is currently in force, applies all provisions of the national Ukrainian legislation and confirms that Crimean affairs, including referendums, shall be conducted in accordance with the Constitution of Ukraine.⁶⁷ The jurisdiction of the Crimean authorities is defined by the Ukrainian Constitution, which lists all areas⁶⁸ where the Autonomous Republic of Crimea can exercise its independence. No legal provisions foresee a possibility for the secession of a Ukrainian territory and its transfer to another state, or for the discussion or determination of this issue through a local referendum.⁶⁹

The existence of conflicting interests of both Ukraine and Russia in Crimea has led to the determination of its position through referendum. *Firstly*, there exists an articulate ethnic Russian minority that helps to clearly define the parameters of the conflict. *Second*, Ukraine has an extremely tenuous historic claim to the Crimea and third, Russia has expressed interest in the welfare of the Russian minority in the Crimea.⁷⁰ This conflict interest can be supported by the fact that when Ukraine held its national referendum on the country's independence in December 1991, Crimea registered the lowest rates of approval in the entire country.⁷¹ Misguided attempts at 'Ukrainization' of Crimea and threats to expel the Russian Black Sea fleet from the peninsula shattered any sense of the republic's belonging to Ukraine and further estranged ethnic Russians.⁷² It is important to recognize that since Ukraine left the Soviet Union and became an independent state, the Russian language has never enjoyed the status of the official state language in the country. A new language law passed by the government formed after the ouster of **Yanukovich**⁷³ discouraged its use even at the regional level.⁷⁴ This terrific failure on the part of Ukrainian Government to build bridges and foster a sense of national unity premised on ethnic equality and mutual respect ultimately alienated Russians living in Crimea. Thus, on March 16, 2014 in a hastily organized referendum, the overwhelming majority of Crimea's residents voted in favour of secession from Ukraine and admission into the Russian Federation. It is important to note, that the referendum and Russia's

⁶⁴ Id.

⁶⁵ Article 73 of the Constitution of Ukraine, 1996

⁶⁶ Article 3 of the 2012 Ukrainian Law of Referendum.

⁶⁷ *Supra* note at 62.

⁶⁸ It includes agriculture, forestry, and irrigation; public works, crafts, and charity; urban planning; tourism; museums, libraries, theaters, historic sights, and other cultural institutions; hunting and fishing; public transportation and road maintenance; and sanitary services and public health.

⁶⁹ *Supra* note at 63.

⁷⁰ Chase, P., Conflict in the Crimea: An Examination of Ethnic Conflict under the Contemporary Model of Sovereignty, Colum. J. Transnat'l L. 34, 1996, pp.219-221.

⁷¹ Starr, F., The Legacy of History in Russia and the New States of Eurasia, Armonk, NY: M.E. Sharpe Inc., 1994, p.148.

⁷² Salushev, S., Annexation of Crimea: Causes, Analysis and Global implications Global Societies Journal, Vol 2, 2014 available at <http://escholarship.org/uc/item/5vb3n9tc>.

⁷³ Ukrainian politician who served as the fourth President of Ukraine from February 2010 until his removal from power in February 2014 on account of his refusal to sign an association agreement with the EU choosing instead to pursue a Russian loan bailout and closer ties with Russia. This led to popular protests and the occupation of Kiev's Independence Square, a series of events dubbed the "**Euromaidan**" by young pro-European Union Ukrainians.

⁷⁴ *Supra* note at 72.

annexation of Crimea were declared illegal by the United Nations General Assembly on March 27, 2014.⁷⁵

Moreover, the result of the referendum did not express the views and opinions of all the people living in the peninsula. For instance, the majority of Crimean Tatars chose to boycott the vote and opposed the peninsula's reunification with Russia.⁷⁶

Russia's annexation of Crimea must be understood in the context of tenacious historic links of Russian people with the peninsula and the Ukrainian nationalist politics that alienated the country's ethnic Russian community.⁷⁷ Thus, the Crimean people were unhappy by the coup⁷⁸ in Kiev and voted to be reunified with Russia. Alas, the economic and political future of the modern Crimea under Russian governance is very uncertain.

SELF DETERMINATION IN EAST TIMOR

East Timor was a Portuguese colony since 16th century⁷⁹, until it was invaded by Indonesian Government on December 7, 1975.⁸⁰ Article 73 of the 1945 UN Charter demanded that colonising countries heed the aspirations of colonised countries and gradually introduce autonomy.⁸¹ Portugal Government had taken two steps in this regard- First, accommodation of demands for self-determination by East Timorese through political efforts.⁸² Second, when its strategy of self-determination for East Timorese failed, and in order to reserve the Indonesian *fait accompli*, it tried to keep the question politically alive.⁸³ During April, 1974 to June 1974 unstable political situation arose in Portugal. Amid the mounting domestic political turmoil, Portugal faced almost immediately a dilemma concerning how to reconcile two opposing interests.⁸⁴ On the one hand, according to the new democratic principles adopted following the **Carnation Revolution**,⁸⁵ there was Portugal's interest in allowing self-determination of the colonies while, on the other hand, there was Indonesia's interest in incorporating East Timor.⁸⁶ On November 28, 1975, the Revolutionary Front for an Independent East Timor (FRETILIN) unilaterally proclaimed the independence of the territory. As a consequence, on December 7,

⁷⁵U.N. General Assembly declares Crimea secession vote invalid."The Reuters, March 27,2014<http://www.reuters.com/article/2014/03/27/us-ukraine-crisis-un-idUSBREA2QIGA20140327>accessed on July 6, 2015 at 4:30 pm.

⁷⁶Crimea exit poll: About 93% back Russian Union, March 16, 2014<http://www.bbc.com/news/world-europe-26598832> accessed on July 6, 2015 at 5:00 pm.

⁷⁷*Supra* note at 72.

⁷⁸President Vladimir Yanukovich was ousted from power.

⁷⁹ History of East Timor available at <http://www.easttimorgovernment.com/history.htm> accessed on July 2, 2015 at 3:57 pm.

⁸⁰ Jardine, M.,*Pacification, resistance, and territoriality: Prospects for a space of peace in East Timor*, GeoJournal, Vol. 39, No. 4, Post- Modernity and the Territorial Discourse of Peace (August 1996), p. 397.

⁸¹ Chapter XI: Declaration Regarding Non-Self-Governing Territories, UN Charter, 1945.

⁸² Gorjao, P., The End of a Cycle: Australian and Portuguese Foreign Policies and the Fate of East Timor, Contemporary Southeast Asia, Vol. 23, No. 1 (April 2001), p. 102.

⁸³ *Id.*

⁸⁴ *Id.* P. 103.

⁸⁵ The Carnation Revolution was a military coup in Lisbon, Portugal, on 25 April 1974 which overthrew the regime of the Estado Novo. The revolution started as a military coup organized by the Movimento das Forças Armadas (Armed Forces Movement, MFA), composed of military officers who opposed the regime, but the movement was soon coupled with an unanticipated and popular campaign of civil resistance. This movement would lead to the fall of the Estado Novo and the withdrawal of Portugal from its African colonies and East Timor.

The name "**Carnation Revolution**" comes from the fact that almost no shots were fired and when the population took to the streets to celebrate the end of the dictatorship and war in the colonies, carnations were put into the muzzles of rifles and on the uniforms of the army. The Portuguese celebrate the national holiday of Freedom Day on 25 April every year to celebrate the revolution.

⁸⁶*Supra* note at 82, p. 103.

1975, in order to overturn FRETILIN'S *fait accompli*, Indonesia launched its long-planned invasion of East Timor.⁸⁷

Portugal decided to break diplomatic relations with Indonesia as military resistance to Indonesia was out of question for Portugal and Jakarta had tried to establish a *fait accompli*.⁸⁸ Therefore, Portugal immediately brought Indonesian political and military action in East Timor to the United Nations (UN). Invoking UN General Assembly Resolution 3485, on December 12, 1975, and the UN Security Council Resolution 384, on December 22, 1975, Portugal Government argued for the withdrawal of Indonesian Military from East Timor.⁸⁹

The Purpose of Plebiscite is to function as a legally binding dispute resolution through democratic means.⁹⁰ The UN Secretary-General's involvement as moderator of the East Timor plebiscite confirms the United Nation's acceptance of plebiscite as legal solution to self-determination conflict.⁹¹ Despite the efforts of UN self-determination was not possible until the fall of Soeharto and the succession of his Vice President B.J. Habibie as the new president of Indonesia which provided a ray of hope for self-determination of East Timor.⁹² Finally, the referendum, held on August 30, 1999, gave a clear majority (78.5%) in favour of independence, rejecting the alternative offer of being an autonomous province within Indonesia, to be known as the Special Autonomous Region of East Timor (SARET).⁹³ Directly after this, Indonesian-backed paramilitaries as well as Indonesian soldiers carried out a campaign of violence and terrorism in retaliation.⁹⁴ According to Noam Chomsky, "In one month, this massive military operation murdered some 2,000 people, raped hundreds of women and girls, displaced three-quarters of the population, and demolished 75 percent of the country's infrastructure".⁹⁵

The East Timor plebiscite provides a good model for the basic requirement of a secure UN monitored plebiscite.⁹⁶ These requirements include: (1) unqualified consent of all the parties; (2) a detailed layout of all aspects of the plebiscite and monitoring efforts; (3) international support; and (4) adequate security arrangements.⁹⁷

The plebiscite in East Timor evidences both the positives and possible negatives to the use of a plebiscite.⁹⁸ On the positive side, the referendum provided the people with a free choice

⁸⁷ Id.

⁸⁸ Id.

⁸⁹ Id.

⁹⁰ Gegory H. Fox, *Election Monitoring: The International Legal Setting*, 19 Wis. Int'l L.J., 2001, p. 303 (stating that "International law has taken a significant leaf forward in positioning a link between democratization and effective implementation of norms").

⁹¹ *Question of East Timor: Report of the Secretary-General*, UN GAOR, 53d Sess., Annex II, at 24, UN Doc. A/53/951 (1999) (Detailing the UN Secretary-General's role as the primary facilitator of the East Timor ballot).

⁹² *Supra* note at 81, p. 111.

⁹³ History of East Timor available at <http://www.easttimorgovernment.com/history.htm> accessed on July 2, 2015 at 3:57 pm.

⁹⁴ Id.

⁹⁵ Id.

⁹⁶ Toole, J., *A False Sense of Security: Lesson Learned from the United Nations Organisation and Conduct Mission in East Timor*, 16 Am. U. Int'l L. Rev., 2000, pp. 251-65 (proposing that, in taking into account the mistakes in Est Tmor, there are specific steps that future plebiscite should take).

⁹⁷ Id. p. 255 (stressing the requirement that all parties involved negotiate the details of the plebiscite agreement).

⁹⁸ Skehan, C., *Alatas Gives Vote Seal of Approval*, THE AGE (Melbourne), Sept. 1, 1999, at 13 (confirming that Indonesia's Foreign Minister, Ali Alatas, endorsed the referendum and its outcome as a success). Foreign Minister Alatas proclaimed the referendum's success. *Id.* The numbers of voters, along with their enthusiasm and lack of intimidation, were symbolic of a successful referendum. *Id.*

between two alternatives.⁹⁹ They could form a special autonomous region under the rule of Indonesia or they could form an independent state.¹⁰⁰ Unfortunately, East Timor is also a good example of possible plebiscite downfalls that can occur when the parties do not carefully lay out the details in the agreement.¹⁰¹ The May Fifth Agreement between the Republic of Indonesia and the Portuguese Republic on the Question of East Timor detailed the forthcoming plebiscite, but there was no consultation of the East Timorese leaders.¹⁰² If there had been consultation of these leaders, the East Timorese might have objected to giving Indonesia control over security.¹⁰³ This mistake cost hundreds of East Timorese people their lives.¹⁰⁴

COMPARITIVE ANALYSIS

Indian position though is compared recently to that of Scotland but the question over the plebiscite of Jammu and Kashmir can be attributed to be on religious identities or irredentism whereas Scotland's choice was largely upon the differences in governance of the two countries while in Crimea the referendum was largely based upon the interests of ethnic Russian community in relation to the non-recognition of Russian as official language and certain other discriminatory policies of the Ukrainian government. Similarly, in East Timor the referendum was held because Timorese wanted an independent state and there was no dispute as such between the Portuguese and Indonesian regime. Timorese hadn't tasted the freedom yet, and Indonesia wanted Timorese to give up their freedom and acknowledge the Indonesian control over them. But, in Jammu and Kashmir the situation is totally different. On the first hand, it was already an independent state and India never used force to incorporate it under its (Indian) dominion.

In Scotland, the institutions that led to the Union between the two countries began to appear gradually while there was no such case with India. The union of India from the time of its inception continues to share the same relation with the State of Jammu and Kashmir granting it special status under Article 370. While in Ukraine there is a provision as per Article 73 of its constitution all the issues of altering its territory are resolved exclusively by an All-Ukrainian referendum there is no such provision mentioned in the Constitution of India.

⁹⁹ Agreement Between the United Nations and the Governments of Indonesia and Portugal Regarding the Modalities for the Popular Consultation Through a Direct Ballot, U.N. SCOR, 53d Sess., Annex II, at 24, U.N. Doc. S/1999/513 (1999) (affirming the existence of two choices for the referendum).

¹⁰⁰Id. (proposing the following questions: "Do you accept the proposed special autonomy for East Timor within the Unitary State of the Republic of Indonesia?" or "Do you reject the proposed special autonomy for East Timor, leading to East Timor's separation from Indonesia?"). The people of East Timor chose independence. See Minh T. Vo, For UN and East Timor, A Chance to Start Over, CHRISTIAN SCIENCE MONITOR, Oct. 15, 1999, at 7 (proclaiming that the East Timorese people "overwhelmingly" decided on independence).

¹⁰¹*Supra* note at 96, pp. 241-45 (discussing the "fatal flaws" of the East Timor agreement).

¹⁰² East Timor was not a signatory to any of the main instruments addressing its future status. See Agreement between Indonesia and Portugal on the Question of East Timor, U.N. SCOR, 53d Sess., Annex I, at 4, U.N. Doc. S/1999/513 (1999); East Timor Modalities, Agreement Between the United Nations and the Governments of Indonesia and Portugal Regarding Security Arrangements, U.N. SCOR, 53d Sess., Annex III, at 29, U.N. Doc S/1999/513 (1999).

¹⁰³*Supra* note at 96, p. 216 (describing the campaign of violence and intimidation launched against the East Timorese people after the vote); *see also* Report of the High Commissioner for Human Rights on the Human Rights Situation in East Timor, U.N. ESCOR, 4th Special Sess., paras. 14-46, U.N. Doc. E/CN.4/S-4/CRP. 1 (1999) (detailing the human rights abuses by the Indonesian militia including wanton killings, forced displacement, rape, involuntary disappearances, and destruction of property).

¹⁰⁴*Supra* note at 96, pp. 245-46 (specifying the consequences that followed the East Timorese plebiscite).

Even after Scotland referendum results are clear, Alex Salmond, Scottish minister himself expressed dubiousness over the referendum results.¹⁰⁵ Thus, the condition of stability could not be ensured even after holding of the plebiscite. Likewise in Crimean referendum too the economic and political condition of Crimea under Russian governance is very doubtful.

It has been a preconceived notion that the Muslim majority living in Kashmir wants its merger with that of Pakistan. However, this is not what is exactly demanded. A normal Kashmiri like any other Indian citizen seek employment opportunity, right to safe and secure environment, freedom of expression, freedom of the press and freedom from the awesome presence of the army and its pickets.¹⁰⁶ Although Indian Army is much maligned in Kashmir, the rescue operations carried out by in the devastating floods that had hit the Kashmir valley on September 2014 seem to have changed that mindset.¹⁰⁷ Prime Minister of India, Narendra Modi offered an assistance of INR 745 crore¹⁰⁸ to the state government; this was in addition to INR 1100 crore¹⁰⁹ already earmarked for the disaster.¹¹⁰ It has always been considerate for the people of Kashmir.

Three wars fought over the disputed territory of Kashmir in the years 1947, 1965 and 1999. Three instances where Pakistan was the aggressor and the international community sided with India because of its political stability, economic policy credibility and well developed human resource base.¹¹¹ Therefore India has got a stand all over the global arena.

The State is heavily dependent on subsidies from the Indian government - needing subsidies even to pay official salaries - and therefore economic development is untenable.¹¹² As a result it needs the help of a strong and stable economy for its sustenance, the want that could be only fulfilled by the Indian nation as Pakistan continues to remain engrossed by its own internal political and economic disruption. The State has a growth rate of about 23% which slightly exceeds the national growth rate of about 17% in 2011.¹¹³ Literacy rate in Jammu and Kashmir has seen upward trend and is 67.16 percent as per 2011 population census. The Gross Domestic Product (GDP) of India is about 8 times healthier than that of Pakistan.¹¹⁴ Pakistan's GDP rests at a paltry \$210.6 billion, as compared to the relatively massive Indian GDP of \$1.676 trillion.¹¹⁵

¹⁰⁵ Extracts from Salmond's speech made after the declaration of referendum results: "The position is this. We lost the referendum vote but can still carry the political initiative. More importantly Scotland can still emerge as the real winner."

¹⁰⁶ Jung, N., What Kashmir Wants, Aug 30, 2010 available at <http://timesofindia.indiatimes.com/edit-page/What-Kashmir-wants/articleshow/6456777.cms> accessed on July 7, 2015 at 1:00 pm.

¹⁰⁷ Indian Army turns saviour, wins the praise of flood-hit Kashmiris, but will the perception change? Sep. 10, 2014 available at <http://ibnlive.in.com/news/indian-army-turns-saviour-wins-the-praise-of-floodhit-kashmiris-but-will-the-perception-change/497758-3-245.html> accessed on July 7, 2015 at 1:15 pm.

¹⁰⁸ (US\$120 million)

¹⁰⁹ (US\$180 million)

¹¹⁰ "Flood situation grim in J-K, PM offers Rs. 1,000 crore assistance", Hindustan Times, September, 7, 2014 retrieved on 2 July, 2015.

¹¹¹ Zafar, S., Kashmir may never become a part of Pakistan February 5, 2014, <http://blogs.tribune.com.pk/story/20903/kashmir-may-never-become-a-part-of-pakistan/> accessed on July 7, 2015 at 1:00 pm.

¹¹² Evans, A., Why Peace Won't Come to Kashmir, p. 171 <http://proquest.umi.com/pqdweb?did=70990603&Fmt=6&clientId=48347&RQT=309&VName=PQD> accessed on July 7, 2015 at 1:30 pm.

¹¹³ As per Jammu and Kashmir Population Census data, 2011.

¹¹⁴ Shah, S., In 65 years, India excels Pakistan in many fields, INT'L The News, July 10, 2010.

¹¹⁵ These figures are taken from the American Central Investigation Agency's World Fact Book 2012.

CONCLUSION

Time and again there has been a record of a number of controversies pertaining to the addition, secession, alteration of the boundaries of different countries all over the world. Many a times the prerogative of residing in a particular territory is vested in the hands of the local people by deciding it through a public referendum. However, wherein some countries the circumstances following the plebiscite improves, there exist the others where even after the determination of the general will of the public, the state of affairs continue to maintain the status quo or else deteriorate further. Thereby, in addition to its fulfillment of the purpose of self-determination it certainly has some limitations attached to it.

Firstly, Plebiscite, in itself cannot be said to be the real will of the people as it is a 'once and for all choice' given to the people which infact keeps on changing from time to time with the change in the perception and priorities of the people as is in the case of elections wherein the people keep shifting their will to choose a government. Secondly, while serving the interest of the majority, it undermines the will of the minority whose wish was not in consonance with that of the majority, thereby making it an imposed choice rather than the one determined through free will. Thirdly, Plebiscite could not be the sole panacea for all the problems. Many a times it fails to establish peace and stability as is desired out of it as has happened in the case of East Timor.

It is not within the competency of the Security Council to reopen the question of accession of the State either at the instance of India or of Pakistan, the only party who had the say over this matter was the ruler of Kashmir who had signed the Instrument of Accession or his successor. The Instrument of Accession did not give to the Dominion of India any power to barter the future of the State. As such it would seem that the undertaking given at the floor of the Security Council "wholly *ultra vires* the Independence Act and the Constitutional powers of the two dominions."

Article 253 of the Constitution of India deals with the power of Parliament to make laws, for the whole of India or any part of its territory for giving effect to any International agreements. This Article applies to the State with effect from May 14, 1954, with the proviso which provides that after the commencement of the Constitution (Application to Jammu and Kashmir) order, 1954, no decision affecting the disposition of the State shall be made by the Government of India without the consent of that state. Thereby, making it clear that Government of India was not authorised to raise the issue of Plebiscite which might lead to the disposal of the territory without the consent of the State Government.

Moreover, holding such a Plebiscite in the State is not constitutionally valid as is enunciated in various constitutional provisions and Supreme Court judgment. Firstly, in the landmark case of *Berubari Union*¹¹⁶ the Supreme Court has observed that there is no provision in Constitution of India which provides for secession of a national territory. Their lordship had observed in this case "as law of Parliament relating to Article 3 of the constitution (which deals with alterations in internal boundaries) would be incompetent in that a law of Parliament relating to Article 368 is competent and necessary." Moreover, as the Preamble to the Constitution of the State reads, "... define the existing relationship of the State with the Union of India as an *integral part* ..."

Hence, the statement made by the Indian representative in the Security Council hold no legal grounds as per the Indian Constitution, and thus invalidates the accepted myth about holding Plebiscite as a condition precedent for the accession of the State to India.

¹¹⁶*In re Berubari Union*, AIR 1960 SC 845.

The will of the people need not be ascertained only through a Plebiscite. Democratic elections are a recognised means of ascertaining the wishes of the people and the people of the State of J&K have repeatedly participated in such elections, the highest ever turnout of 66.4 % recorded in 2014 polls which gives us the indication that people of Kashmir are largely happy with India. As has been persistently suggested by veterans and scholars the solution to Kashmir lies in the simple mode of establishing peaceful and harmonious relations between the two nations, a task which would indeed demand genuine efforts from both sides.



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