

RIGHT OF SELF DETERMINATION FOR KASHMIRI PEOPLE; AN INTERNATIONAL LAW PERSPECTIVE

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The state of Jammu and Kashmir is known as Kashmir comprising on the area of 218,957sq. kilometers. This valley is situated in the North of Indo Pakistan subcontinent. The history shows that Kashmiri people have been under the rule of nasty rulers without their will. In 1846 fate of Kashmiri peoples was sold to Maharaja Harri Sing by the British Government which is known as the world's largest democratic nation, for the sum of seventy five lacs in an agreement, called "Treaty of Amritsar".

In 1947 when British Govt. decided to leave sub-continent and to divide India into two parts namely Pakistan and India. There were 560 princely states which were give option either to join India or Pakistan (Hussain, 1998).

The Secretary of State of India Lord Lishtowel clearly announced in British House of Lords: "We don't recognize any state as separate international entities" (Burke, 1973).

The Viceroy Lord Mountbatten suggested some important guidelines to princely states in order to decide the accession with India or Pakistan while considering the geographical situation and communal interests (Sarwar, 1960).

Rulers of princely states were compelled strictly to follow the principle of the partition and it was declared to them otherwise their action will be illegal. Keeping in mind the guidelines given by the Lord Mountbatten the state of Kashmir apart from the religious factor, lot of other factors closely linked to West Pakistan. The Kashmir state links with the world only through Pakistan because all the roads and other communication connect with Pakistan. Its postal and telegraphic services pass through Pakistan (Abdullah, 1965).

The majority population of Kashmir was Muslim and willing to join Pakistan but contrary to their wishes, maharaja had decided to accede the state of Kashmir with India finally which was the clear violation of principles of partition of India. In fact the Maharaja was blackmailed by the Indian government for accession and consequently Maharaja had signed the instrument of accession. After that Indian forces entered in Kashmir. Resultantly in reaction by the Muslims, guerrilla movement was started by the Poonchis who had served in the British Indian army. A new chapter was opened by the Dogra forces, many Muslims brutally killed and their villages were set on fire. Replying to the atrocities in Kashmiri guerillas responded by attacking the Dogra forces. The Pathan tribes men from the tribal areas of Pakistan entered in Kashmir to help the Kashmiri Muslims (Lamb, 1968).

Now India took the matter of Kashmir to the UN by instituting a formal complaint against Pakistan in the Security Council. As the situation was really intensified, the matter was taken before the Security Council and it was unanimously decided by its resolution on 5th January 1949 that the accession of the state would be decided through free and impartial plebiscite (Naqashbandi, 1992). Since that no plebiscite has been held and the fate of Kashmiri nation is still pending. The residents of this unlucky state are still looking to the above said resolution of the United Nations. They are still waiting the promise of the so called largest democratic state the India when it would be fulfilled. But unfortunately India is backed out from its promise and blatantly violating the norms of international law.

The right of self-determination is a basic norm of democratic society which is recognized universally and it provides choice to the certain individuals to decide about their future according to their own wishes. But this right is completely denied by the so claimed largest democratic country India, in the South Asia.

The concept of self-determination is enshrined under article 2 of UN Charter. The principle basically permits the peoples to choose freely their political status and to determine their own social, economic and cultural status. International law is very clear on this principle, the Article 1 of the UN charter pertains the right of self determination. Earlier it was included in Atlantic Charter and the Dambarton Oaks which evolved in the UN charter. The inclusion of this principle in the UN charter makes universal its recognition in order to maintain peaceful and friendly relations among the member states(M.G, 1975).

Right of Self Determination has particular importance in ICCPR (International Covenant on civil and Political Rights) . According to article 1 “ All peoples have the right of self-determination. The inclusion of this principle in the both above said covenants strengthen the legality of right of self determination before the international community. The most important feature is that the covenants define the right of self determination widely to all the peoples not only the people of colonized or oppressed people. If we further interpret the common Article 1 of the covenants , it gives the right of free determination of political status to all the people along with free enjoyment and exploitation of their natural economic resources and wealth.

The emergence of the self-determination of nations dates to the periods of bourgeois revolution. In the 19th century bourgeoisie proclaimed the “principle of nationality” in Europe but it was not recognized even in European international law and some of European multinational empires against the principle of self-determination (Clyde, 1953). The influence of the Soviet Union on international community, the democratic and national liberation movement against the fascism during the Second World War included the principle of self-determination in the UN Charter.

The right of self-determination is part of decolonization process which has been promulgated after the emergence of UN charter of 1945. It is basic duty of the UN respect the right of self determination.

In order to further argue the right of self determination, the ICJ opinions and verdicts can be analyzed for the implementation of right of self determination. Mr. H. Wilson notes that ICJ gives full acknowledgement to the right of self determination in its Namibia opinion (1971) and said that right of self determination made part of international law while including it in the charter of the United Nations and furthermore in the Declaration on the Colonialism which is a strong reference for the right of self determination. The court further arguing the right of self determination said that the right of self determination no doubt is necessary principle of contemporary international law (Western Sahara Case,1975). Jurists are agreed that right of self-determination is norm of jus cogen which is general principle of international law. These norms are supposed to be obeyed all the times. The views and ideas of International court of justice and Inter-American Commission on Human Rights of the Organization of American States justifies that the principle of right of self determination has legal status of erga omnes which mean “flowing to all”. It is the general rule of international community that when a principle gets the status of erga omnes then the other international community falls under the mandatory duty to obey it in all the circumstances. Unfortunately international community therefore has strongly suppressed the people who are demanding right of self-determination (Nanda,2000).

In fact the colonial powers are in favour of right of self determination. Its mean that people have a right in their own state . The principle of self determination started from the de colonization process because in that process the people were not under the control of their own governance and they were being controlled by the illegitimate governing authority. A full sovereignty can be granted to the people living in the territory in the perfect colonization process. When they are granted full sovereignty then these people have their own government with membership in the United Nations and enjoys all the other status of international law (Parker,2000).

The definition of the right of self determination of peoples with regard to freely determine their political, social, economic and cultural status and development does not exclude ethnic sections in the political community. Presently the peoples living in the sovereign states who are demanding their right of self determination is clearly demonstrates their identification as national, religious and ethnic minorities. The Declaration regarding Minorities defines that the right to enjoy culture and religion and also

to use their language in all the walks of minorities is a fundamental right which should be allowed to enjoy with free environment.

This provision was supplemented by the article 55 which explained the role of the principle of equal rights and the right of self determination in order to their stability. And for the implementation of this right the duty is imposed on all the members of the organization in article 56 of the charter. The paragraph 2& 3 are explaining that have right of self determination and lack of political, economic, social or educational backwardness could not stop the independence. The paragraph 5 of the resolution further urges the immediate transfer of power to the peoples of territories with out any condition for the enjoyment of their freedom and also the resolution further demanded the speedy end of colonialism in all its forms. The next evolutionary step was the common article 1 of the both covenants , ICCPR and ICCER. The paragraph 3 of the said article is very clear that the concept grew the colonial context. This shows that why india expressed its reservation to article 1 because this article is confined to the colonial situations and it may applicable in the case of Kashmir but this Indian reservation was objected by some counties saying that this against the concept of the covenants (Thomas,2000). The most important development was made of the concept of universality of the right of self determination in 1970 when the general assembly adopted the resolution 2625. This appears that the Declaration 1970 was consensus among the international jurists for the international of secessionist self- determination. The whole analysis shows that the right of self determination which started from political right subsequently taken the shape of legal right. As initially it was applicable to the decolonization process but with the adoption of Declaration of 1970 it became applicable to the post colonial states (Victor Bulmer,1989).

When we talk about Kashmir it is clear that Kashmiri people should have right of self-determination. The leaders of Pakistan and India reached on agreement with British government that the people of Kashmir would have full right to decide their future and to affiliate with India or Pakistan. The Indian contention is that the promise of plebiscite which was made in the United Nations and with Pakistan was lapsed when free and impartial election was held in 1951 in the Kashmir valley with constituent assembly as body of kashmiris. Hence no further right of self determination can be exercised by the people of Kashmir. If we trace the answer of this Indian contention is that the constituent assembly was being made for the approval of the stamp of accession of Kashmir with India. Whereas Security Council was also activated on the ground that the proposed step is the violation of the previous resolutions of the UN on Kashmir. But besides the reassurance of Indian government regarding plebiscite the Council was not satisfied. The apprehension of Pakistan regarding the constituent assembly was justified by the representatives of other countries especially UK when in 1956 the constituent assembly declared that the valley of Kashmir is an integral part of India(Akhter,1991).

The Indian government's point of view is that the Indian constitution is bar to holding of a Plebiscite in Kashmir. This view can be negated while examining the provisions of article 3 of the Indian constitution which invests the Indian parliament with the power to create new states and alter the areas, boundaries and names of the existing ones. There is no provision in the Indian constitution for the final decision of Jammu & Kashmir. The Indian state is bound to observe the international norms as referred by the Vienna Convention on the Law of Treaties. Article 27 of this convention declares that a party cannot invoke the provisions of its internal law as justification for its failure to perform a treaty. This article shows that the satte cannot back out from the international commitment on the ground that it is the violation of its national law (Bose,2003) .

It quite clear from the UN resolutions that accession of the valley of Kashmir can only be decided through fair and impartial plebiscite by the democratic method but unfortunately the promise of plebiscite is still not fulfilled by the Indian government. The disposition of the Kashmir is still pending and could be decided legally. This state is not an integral part of India. The Kashmir people are involved in brutal war with Indian armed forces because lot of innocent citizens are being killed by extra judicial methods. The cases of disappearances are very prominent in the region (Hussain,1998). Many draconian law are introduced by the Indian government in order to exploit the freedom movement and deprive the people of this valley from the international right of self determination. The forces have been involved in violation of various provisions Geneva Conventions ,

general laws and the customary international law. This area has been very rich in self governance pre colonial era. The territory of Kashmir has been strongly and clearly identified in the history of the sub continent. The people of this region are distinct in all aspects from the India like language , culture, custom, religion and traditions. Their literature has also significant identification in the area. There are lot of political parties in Kashmir with clear manifesto and having a good leadership. Many of the leaders of these parties have been sent jail by the Indian forces. Most of the Kashmiri political parties have been joined together in the shape of All Parties Hurriyat Conference (APHC).

Finally it can be concluded that right of self determination is being discouraged by many states in the world. States are openly violating the rules of jus cogens and erga omnes obligations in order to suppress the voices for the right of private self determination. The activists of this right are being taught brutally and being charged for the heinous offences like terrorism. In order to suppress the right of self determination in Kashmir the Indian government has introduced many black law laws like TADA and AFSPA which gives immense power to the armed forces for the extra judicial killing of innocent Kashmir peoples. The whole study shows that the Kashmir dispute is raising lot of legal issues like accession, aggression and self determination but in this scenario india is continuously refusing to submit the dispute before the international court of justice. I would also suggest that both India and Pakistan should make a request before world court for not only an actual settlement of the dispute but also for indicating the guidelines on the basis of which they would then resolve the dispute by bilateral negotiation and the example is present in the North Sea Continental shelf case where such request was made to the world court. I want to also draw the attention of the international community to pay attention on this issue and put pressure on the concerned state for the grant of right of self determination in the interest of justice for the people living in the Kashmir. Furthermore pressure should also be raised on the Indian government to stop the violation of international law and the treaties, and to repeal all those black laws which are enforced to suppress the voices of Kashmiri peoples, because these laws are black spot on the efforts of international community, and other human rights activists who working for the protection of human rights in the world.

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