

THE KASHMIR CASE: HOW NOT TO HANDLE A CONFLICT

*Dr. Aman Hingorani**

I. INTRODUCTION

A discussion was held on 21 December 2019 at the prestigious Army War College at Mhow on *The Future Contours of Kashmir: A Whole of Government Approach*.¹ The opening paragraph of the Approach Paper for the discussion ran as under:

In a momentous decision that should mark the beginning of a new chapter in Kashmir's history, on 5 Aug 2019, the President of India issued the notification to revoke Article 370 and 35A. In one stroke, the state of J&K has transmuted from being **disputed territory to undisputed territory**, sovereign to India.

These lines capture all that has been wrong with New Delhi's approach to the Kashmir issue since 1947 till date!

The erstwhile princely state of Jammu & Kashmir ('J&K') became an integral part of India when its sovereign ruler acceded to India on 26 October 1947, and remains an integral part of India. This is not because I say so but because the very principle that created modern day India and Pakistan says so, as will be evident shortly. It is equally true that it was New Delhi which accepted such accession provisionally in 1947 and made it subject to a reference to the people of J&K. In other words, it was New Delhi that gave a 'disputed territory' tag to J&K before proceeding to then internationalize the Kashmir issue by taking it to the United Nations Security Council ('UNSC') in 1948, commit on the floor of the UNSC to hold a plebiscite in J&K under United Nations ('UN') auspices and consequently confer standing upon every member of the UN (including Pakistan) to comment on the happenings in J&K. But then, does, or can, such 'disputed territory' tag conferred by New Delhi upon J&K in 1947 get 'transmuted' to 'undisputed territory sovereign to India' by

* Aman M Hingorani is a lawyer and mediator in the Supreme Court of India and the High Court of Delhi. Dr Hingorani has also acted as an arbitrator and as adjunct faculty to teach law students and run training courses for judicial officers, lawyers and law teachers. Dr Hingorani has been invited to address national and international audiences, including various stakeholders, on the Kashmir issue. He is the author of the highly acclaimed book titled 'Unravelling the Kashmir Knot' which has inspired this article.

1 'The Future Contours of Kashmir: A Whole of Government Approach' (Approach Paper, Army War College, Mhow 2019).

the Presidential notification in 2019 to revoke Article 370 and 35A? This article examines this question and also how terribly misconceived New Delhi's policy on J&K has been from 1947 onwards.

As a point of departure, let us consider the circumstances that led New Delhi to confer the 'disputed territory' tag upon J&K in 1947. For this, I narrate the following facts, which have been set out in greater detail in my book, *Unravelling the Kashmir Knot*, with each fact being documented and referenced from authoritative sources cited in the book.

II. BRITISH POLICY TO PARTITION INDIA

Declassified British archives disclose the British colonial politics that led to the partition of the Indian sub-continent on 15 August 1947. This was facilitated in no small measure by the utter ineptitude and political naivety of eminent Indian leaders of undivided India. The British archives establish that the partition was ruthlessly scripted by the British for their own geo-strategic interests during their 'Great Game' (the precursor to the Cold War) with the then Soviet Russia, and to prevent Russian influence from travelling southwards towards the oil-rich Middle East. The British devised many strategies towards this end. One of the strategies was to use Islam as an ideological boundary, as the territory along the then Soviet Union right from Turkey to China was Islamic. The north west frontier of colonial India fell in this Islamic crescent, and included the North West Frontier Province ('NWFP') and the Gilgit region of J&K.

The British knew that they would soon have to transfer power to Indian hands, and that independent India would be governed by the Indian National Congress ('INC') which was spearheading the freedom struggle. Faced with INC not supporting Britain's Second World War effort, the British strategists found it necessary to keep a *slice of India* that would include the strategic NWFP. Hence, a friendly sovereign state, 'Pakistan', was to be created; friendly to the British and their allies for their defence and strategic purposes. And since the territory from Turkey to China straddling the then Soviet Union was Islamic, the two-nation theory was to be mouthed by the Muslim League as the justification for creating an Islamic Pakistan. The Muslim League itself was a creation of the British to give effect to its official policy to communalize Indian politics by sharpening the existing Hindu-Muslim differences; a policy unhesitatingly expressed in the telegrams exchanged between successive Viceroys on the sub-continent and successive Secretaries of State in London. It was at the instance of Victor Alexander John Hope Linlithgow, the then Viceroy, that Muhammad Zafarullah Khan, a member of the Viceroy's executive council, was asked to submit a map of the two dominions. A telling telegram is that of 12 March 1940 sent by Linlithgow to the then Secretary of State to the effect that²:

Upon my instruction Zafarullah wrote a memorandum on the subject.
Two Dominion States. I have already sent it to your attention.... Copies

² Wali Khan, *Facts are Facts: Untold Stories of India's Partition* (Sangam Books Ltd 1987) 40.

have been passed on to Jinnah.... While he, Zafarullah, cannot admit its authorship, his document has been prepared for adoption by the Muslim League with a view to giving it the fullest publicity.

Ten days later, Mohammad Ali Jinnah, the politically ambitious barrister heading the Muslim League, presented the two-nation theory at the All-India Muslim League session held from 22 March 1940 to 24 March 1940 at Minto Park, Lahore.

It mattered little to the British if such partition of the sub-continent would be drenched by communal bloodshed and lead to perpetual warfare. Witness the letter sent by Leopold Charles Maurice Stennet Amery, the then Secretary of State, to Linlithgow in the summer of 1940³:

Now India has a very natural frontier at present. On the other hand, within herself she has no natural or geographic or racial or communal frontiers—the northwestern piece of Pakistan would include a formidable Sikh minority. The northwestern part has a Muslim minority in the United Provinces, the position of Muslim princes with Hindu subjects and vice versa. In fact, an all-out Pakistan scheme seems to me to be the prelude to continuous internal warfare in India.

Yet, successive political ‘plans’ formulated by London to transfer power to Indian hands contained provisions that would inevitably fracture the sub-continent. London chose to ignore its own governors in British India, for instance, the Punjab Governor, Bertrand Glancy who had warned that ‘(i)f Pakistan becomes an imminent reality we shall be heading straight for bloodshed on a wide scale’.⁴

The blueprint of the partition plan of British India was drawn up by Archibald Wavell, the then Viceroy, in New Delhi towards the end of 1945 and communicated in a top-secret telegram to the then Secretary of State on 6 February 1946.⁵ This blueprint of the future ‘Pakistan’ was implemented almost to the letter in the form of the Radcliffe Award about 18 months later.

Jinnah announced on 27 July 1946 in Bombay that the Muslim League should ‘bid goodbye to constitutional methods’ and take ‘direct action’, that is, communal killings.⁶ He declared 16 August 1946 as the ‘direct action day’. The killings started in Calcutta. Not surprisingly, the British Brigadier in charge of law and order in Calcutta, JPC Makinlay, ‘ordered his troops confined to barracks for the day, leaving the city naked for the mobs’.⁷

3 Narendra Singh Sarila, *The Shadow of the Great Game: The Untold Story of India’s Partition* (Harper Collins 2009) 65.

4 *ibid* 187.

5 *ibid* 194-95.

6 *ibid* 222.

7 *ibid* 223.

During their meeting on 27 September 1946, Wavell actually cited the Calcutta killings to pressurize Mohandas Karamchand Gandhi and Jawaharlal Nehru of the INC to concede to the demands of the Muslim League, warning that else ‘India is on the verge of civil war’.⁸ By the time the 46 year old Louis Francis Albert Victor Nicholas Battenberg, or simply Louis Mountbatten, the last Viceroy of India, reached the Indian subcontinent on 22 March 1947, the entire sub-continent was burning, with every fresh communal fight normalizing the most brutal and depraved actions of the previous fight. This increasing orgy of communal violence forced the INC to agree to the political agreement of partition of 3 June 1947 driven by the British and the Muslim League.

The NWFP, which was strategically crucial for Britain’s Great Game, had the largest majority of Muslims in British India. The INC was, however, the popular political body in the NWFP. In the 1936 general election held under the *Government of India Act of 1935*, the INC had routed the Muslim League all over the NWFP. In the general elections of 1945, the INC won 30 seats as against 17 seats by the Muslim League. Even in the following elections for the all-India Constituent Assembly held in July 1946, the INC won three of the four seats allotted to the province. The book details the steps taken by the British to remove the Congress influence in the NWFP for a ‘Pakistan’ to be formed, and their smokescreens to get the INC to agree, firstly, to the holding of a referendum in the NWFP in July 1947 on whether or not to join Islamic ‘Pakistan’ and, secondly, to the INC abstaining from participating in such referendum.⁹ The result of such reference was thus predetermined to enable ‘Pakistan’ to materialize.

But then, the hilly NWFP would not be viable as a sovereign state. And so, the fertile plains of West Punjab would need to be in ‘Pakistan’ along with other territory. The two-nation theory came in handy for the British to justify the partition of Punjab. The partition of the Bengal province was merely a logical consequence of the application of that theory.

Such political scheme of partition was reflected in the Indian Independence Act of 1947. Section 2 of this Act specified the territories of the new dominions.¹⁰ The territory of Pakistan was to be the territories of a partitioned Punjab and Bengal as described in the schedules to the Act, the province of Sind and the Chief Commissioner’s province of British Baluchistan. The Act provided for referendum in the NWFP and Sylhet district of the Assam province, and for such territories to form part of the territory of Pakistan should Pakistan win the referendum.

It may be noted here that as of 15 August 1947, there were two kinds of territories on the sub-continent under British rule. One was the British provinces, and the other comprised of 560 odd princely states. Following the first war of independence in 1857, the British had discontinued the policy of annexation of further Indian territory and had sought

8 Jaswant Singh, *India- Partition Independence* (Rupa and Co. 2009) 553.

9 Aman Hingorani, *Unravelling the Kashmir Knot* (Sage Publications and Co. 2017) 70, 74.

10 Indian Independence Act 1947, s 2.

that the sovereign rulers of these states must declare their allegiance to the British Crown. The British Cabinet Mission Plan of 1946 had made it amply clear that on the transfer of power to Indian hands, the British paramountcy over these states would lapse. Section 7 of the Indian Independence Act of 1947 declared that as of 15 August 1947 ‘the suzerainty of His Majesty over the Indian States lapses’.¹¹ The Government of India Act of 1935 was amended to inter alia provide in Section 6 that ‘a princely Indian state shall be deemed to have acceded to either of the dominion on the acceptance of the Instrument of Accession executed by the Ruler thereof’.¹² J&K was one such princely state.

III. J&K AND THE PARTITION

While planning the partition to secure the NWFP for the Great Game, the British had assumed that J&K, being predominantly Muslim and contiguous to Pakistan, would accede to Islamic Pakistan or at least be associated with it. The strategic Gilgit region of J&K would accordingly be within the sphere of influence of the British. However, the Dogra (Hindu) ruler of J&K did not want to accede to Islamic Pakistan. The ruler did not want to accede to India either, particularly since Sheikh Abdullah, the popular leader in the erstwhile state had been averse to the ruler and had strong affinity with Jawaharlal Nehru, India’s first Prime Minister. Nehru, on his part, had expressed the view that rulers do not count in the new mood in India. The ruler feared he would be reduced to a figure-head if he acceded to India. The ruler, therefore, wanted to retain his sovereignty. The book documents the unsuccessful efforts of Pakistan, and the British, to persuade the ruler to accede to Pakistan.¹³ This was followed by the Pakistani tribal invasion in October 1947 into J&K with British complicity, which helped the ruler make up his mind.

The ruler of J&K executed the instrument of accession in favour of India on 26 October 1947. However, such accession would adversely impact the Great Game for the British and defeat the very rationale of creating ‘Pakistan’. That said, the British did not need the whole of J&K to be kept free from Indian control. They just needed the Gilgit region for the Great Game, and the strip of land known as the supposed ‘Azad Kashmir’ to act as a buffer zone to protect Pakistan from liquidation should India go to war with Pakistan.

Consequently, the British, in violation of the aforesaid British statutes as also every conceivable principle of international law, effected a coup of Gilgit on the night of 31 October 1947, and carved out such territory which had become part of Indian territory, and handed it over to Pakistan.¹⁴

It may be recalled that India remained a British dominion till 1950 and Pakistan till 1956. The King of the United Kingdom was the formal head. Neither dominion had yet

11 Indian Independence Act 1947, s 7.

12 Government of India Act 1935, s 6.

13 Aman Hingorani (n 9) 136, 146.

14 *ibid* 138, 140.

established full control over their respective armies; rather, it was British officers which were heading the armies in both the dominions. The British general heading the Indian Army was able to stop the advance of his own army in getting the occupied territory of J&K vacated of Pakistani tribals and irregulars. The lines demarcating the supposed 'Azad Kashmir', which was occupied by Pakistani tribals and irregulars, were drawn by British officers heading the Indian and Pakistani armies. It also did not help matters that right up to 1948, New Delhi let Mountbatten, as Governor-General of independent India, formulate India's J&K policy as chair of the Emergency Committee and the Defence Committee of the Indian Cabinet. It was the Defence Committee that decided the Kashmir war policy, and not the Indian Cabinet as a whole. Accordingly, 'all the key decisions of the Government of India about Kashmir at the end of October 1947 were taken under the leadership of the Governor-General, for they were decisions in terms of defence against the tribal invasion'¹⁵, and since Mountbatten chaired the Defence Committee of the Indian Cabinet, he could support General Roy Bucher, the acting British commander-in-chief of the Indian Army, in opposing the plan of General Kulwant Singh, GOC, Kashmir Operations in November 1947 to clear the territory of J&K of the Pakistani invasion.¹⁶

Having thus earmarked and secured the two areas of J&K to be kept free from Indian control, the British sought to undo the effect of accession of J&K to India and to keep the door open for Pakistan by making the accession subject to a plebiscite. Mountbatten has disclosed in an interview that¹⁷:

I said to Nehru, here's the instrument of accession. As a Constitutional Governor-General, I'll only sign it at your request. But I also added, 'I'll countersign it on condition you offer a plebiscite'. Then we discussed the plebiscite. Nehru made one stipulation to which I agreed. That this could only be done in peaceful conditions, with the tribesmen withdrawn.... '

To place the question of plebiscite in J&K in context, it may be noted that around the time of the accession of J&K to India, there had been the somewhat controversial instances of the accession of the princely states of Hyderabad and Junagadh. Let us consider the significance of these accessions for the accession of J&K.

IV. ACCESSION OF JUNAGADH AND HYDERABAD

While J&K had a predominantly Muslim population and a Dogra (Hindu) ruler, the Hindu majority of the princely states of Hyderabad and Junagadh had Muslim rulers. The Nizam of erstwhile Hyderabad, like the ruler of J&K, had expressed his inclination to retain his independence. But it was in the matter of the accession of Junagadh that Jinnah

¹⁵ HV Hudson, *The Great Divide: Britain-India-Pakistan* (Hutchinson & Co. 1969) 448.

¹⁶ Narendra Singh Sarila (n 3) 358.

¹⁷ Lapierre Dominique & Larry Collins, *Mountbatten and Independent India: 16 August 1947-18 June 1948* (Vikas Publishing House 1984) 39.

outwitted the INC into laying down the policy that where the ruler of a princely state belonged to one community and the people to the other community, the people of that state should decide the future of the state. After all, since Jinnah had consistently been ‘against according any democratic right to the people who lived in the Princely States’ and since the Muslim League ‘did not consider it necessary to consult the people of the states’, it would have been uncharacteristic of the Muslim League to propound any such policy.¹⁸

If the rule contained in the British statutes was adhered to—that is, the sovereign ruler of the princely state alone was to decide the question of accession—Pakistan could, at best, secure the accession of Junagadh, whose territory was only about 4,000 square miles. Moreover, Junagadh was not contiguous to Pakistan but was surrounded by states that had acceded to India. Thus, should the Nawab of Junagadh have acceded to Pakistan, it would have been a liability for Pakistan. However, if the ‘wishes of the people’ were to be the deciding factor on the question of accession of a princely state, instead of the will of the sovereign ruler of that state, Pakistan could at least stake a claim to the Muslim-majority J&K, with a territory of 84,471 square miles. The trap was to get New Delhi to formulate and act upon such policy so that Pakistan could then take advantage of this policy for the ‘parallel case’ of J&K.

The instances of accession of Hyderabad and Junagadh were raised at the UNSC. In the case of Hyderabad, Pakistan alleged that its ruler, the Nizam, had sought to retain independence for his state but New Delhi refused to accept that position and demanded that the state should accede to India unconditionally. The *Yearbook of the United Nations, 1948-49*, records that the representative of India ‘pointed out that, as early as August 1947, the Indian Government had suggested a plebiscite on the issue of Hyderabad’s accession, but the Hyderabad Government had rejected that proposal’.¹⁹ Pakistan claimed that when the Nizam did not agree, New Delhi marched its troops into Hyderabad and announced that the Nizam had acceded to India. New Delhi denied such an allegation and contended that the Hyderabad government had been forcibly taken over as the result of a coup d’état carried out by the extremist elements in the state. New Delhi claimed that the Nizam had ceased to be a free agent and had, after being released from the control of a group of extremists, voluntarily acceded to the dominion of India.

New Delhi declared before the UNSC that it would be prepared to accept any democratic test in respect of the accession of Junagadh to either of the two dominions. Junagadh acceded to Pakistan on 15 September 1947. New Delhi termed such accession ‘as an encroachment on Indian sovereignty and territory’ and sought a plebiscite in the state.²⁰ Pakistan alleged that a ‘Provisional Government of Junagadh was set up in Indian

18 Wali Khan (n 2) 22, 169.

19 *Yearbook of the United Nations, 1948-49, The Hyderabad Question* < https://www.un.org/en/sc/repertoire/46-51/Chapter%208/46-51_08-19-The%20Hyderabad%20question.pdf > accessed 15 August 2020.

20 UNSC Verbatim Record (7 February 1950) UN Doc S/PV/463 31,32.

territory’ and then, on 9 November 1947, India ‘marched its troops into Junagadh and forcibly annexed the State which had acceded to Pakistan’.²¹ Subsequently, ‘a farcical plebiscite was held—India was in military occupation of the state—and the state was formally incorporated into the Indian Dominion’.²² New Delhi refuted this version of the happenings in Junagadh. New Delhi informed the UNSC that the Dewan (Prime Minister) of Junagadh, who was in Karachi with the Nawab of Junagadh and ‘in very close touch with members of the Pakistan Government’, wrote to the Government of India, asking the latter to take over the responsibility of the Junagadh, which had acceded to Pakistan, because the popular view in Junagadh had been that the administration of the state be handed over to the Union of India.²³

New Delhi evidently did not find it strange that the Dewan of Junagadh, sitting in Karachi with the Nawab of Junagadh and being ‘in very close touch with members of the Pakistan Government’, should write to the Government of India at all.²⁴ The trap was obvious—it was to induce New Delhi to reiterate and act upon its policy that the ‘wishes of the people’ would settle the question of accession of the princely state in the case of disputed accessions. And New Delhi did just that—it even held a plebiscite in Junagadh to declare before the world that the people had voted in favour of the accession of the state to India. New Delhi happily told the UNSC that New Delhi was quite prepared to hold another plebiscite under international auspices.

Thus, the significance of the accession of Hyderabad and Junagadh to India lay in the formulation of the policy, and that too by New Delhi, that in the case of a dispute regarding the accession of a princely Indian state to either of the dominions, the ‘wishes of the people’ would prevail. New Delhi apparently did not pause to consider that such policy was, in fact, politically unnecessary in view of the geographical location of Junagadh and Hyderabad. Indeed, as Mountbatten put it²⁵:

I always said in all the speeches I made about accession that there were certain geographical compulsions. I mean the idea that Junagadh could join Pakistan, across all the other Kathiawar states was just stupid. The idea that Hyderabad could join Pakistan was equally stupid.

V. PLEBISCITE IN J&K

It was against this backdrop of New Delhi having formulated a policy of ascertaining the wishes of the people in the case of disputed accessions that New Delhi agreed to Mountbatten’s pre-condition of a plebiscite in J&K before he (as Governor General)

21 *ibid* 33.

22 *ibid*.

23 UNSC Official Record (23 April 1948) UN Doc S/PV/287 5.

24 Wali Khan (n 2).

25 Lapierre Dominique, Larry Collins (n 17) 43.

accepted the instrument of accession. New Delhi accordingly *pledged* that it would regard the accession of J&K to be purely provisional and to be settled by a reference to the people.

But that was not enough for the British, since such promise of plebiscite was made to a section of the Indian people, and hence was within India's domestic jurisdiction. The book details how Mountbatten went on to persuade New Delhi to involve the UNSC on the pretext of stopping the fighting in J&K, but with the purpose of taking the Kashmir issue out of India's domestic jurisdiction and to confer the international community (including Pakistan) standing with respect to J&K.²⁶ The British strategy was to have the UNSC call for cease-fire without requiring Pakistan to first vacate the areas of J&K that it had occupied through aggression – which it did – and to have the UNSC look the other way when Pakistan consolidated its control over such occupied territory - which again it did. New Delhi was thus compelled by the UNSC to respect the ceasefire line and to helplessly watch Pakistan consolidate its control over the occupied territory. Thus, in the guise of the UNSC directed cease-fire, Pakistan (and through Pakistan, the British) got to retain precisely those areas of J&K that the British needed for the Great Game.

Mountbatten also succeeded in persuading New Delhi to commit before the UN a plebiscite in J&K under international auspices. The UNSC would then bypass India's complaint of aggression and hold India to its offer of plebiscite in J&K – which yet again it did. It was a trap laid by the British at the UNSC for New Delhi to confer a 'disputed territory' status upon J&K, and New Delhi fell for it. India is the only country in history that has gone to the UN complaining of aggression against its territory and returned with a commitment to hold a plebiscite to first decide whether that territory even forms part of the country.

VI. TERRITORIAL STATUS QUO

New Delhi soon realized that the UNSC was being subverted by the political expediency of its members, but by then it was too late—the UNSC had tied India's hands and pre-empted it from recovering a substantial portion of the state. And so, New Delhi took the easy way out—it simply disowned the occupied territory of J&K and its unfortunate people, who happen to be citizens of India under the Indian Constitution but continue to remain under foreign rule. New Delhi sought to avoid the UNSC resolutions for plebiscite by pointing out that such resolutions were premised on Pakistan vacating the occupied territory of J&K, and since Pakistan had failed to do so, New Delhi was not bound to hold the plebiscite. Moreover, as per New Delhi, there had been changes in circumstances over the years, releasing New Delhi from any such international engagement.

Instead, New Delhi now followed the policy of territorial status quo – India would keep that part of J&K which was with it, and Pakistan could keep the occupied territory of J&K. New Delhi even indicated its inclination to partition J&K along the lines recorded in the

26 Aman Hingorani (n 9) 198, 208.

UN Yearbooks. New Delhi, therefore, went on to tell the UNSC on 15 February 1957 that it considered that it had ‘a duty not to re-agitate matters’ and had decided to ‘let sleeping dogs lie so far as the actual state of affairs is concerned’.²⁷ And so, when the Indian forces reclaimed Haji Pir (part of the territory of J&K) during the 1965 Indo-Pakistan war, New Delhi actually handed back such Indian territory to Pakistan in 1966 at Tashkent. Earlier, when Pakistan cheekily gifted a part of the occupied territory to China in 1963, New Delhi confined itself to making formal, and impotent, protests. Such territory is a part of the Aksai Chin region of J&K that China quietly occupied in the 1950s.

New Delhi unilaterally decided that the UNSC had nothing to do with J&K. It somehow forgot that it was the one who had taken the Kashmir issue to the UN. New Delhi adopted the position that the Kashmir issue must be resolved bilaterally with Pakistan in terms of the Simla Agreement of 1972 and the Lahore Declaration of 1999. New Delhi even forgot that the Kashmir problem is an international issue – it cannot but be one when the territory of the erstwhile state is under the control of three sovereign countries, India (about 45%), Pakistan (about 35%) and China (about 20%). New Delhi jumps with joy at the slightest hint of any country endorsing the Kashmir issue to be a ‘bilateral’ one with Pakistan and it terms it as a major diplomatic victory. All of New Delhi’s energies have been frittered away in seeking to check the internationalization of the Kashmir issue at considerable national cost, little realizing that each time it terms the Kashmir issue to be a bilateral one, it reiterates that Pakistan has a standing in the matter other than as an aggressor.

New Delhi continues to emphasize the ‘inviolability’ of the Line of Control (‘LOC’) at every conceivable occasion in light of the Simla Agreement of 1972 and to strive, though unofficially, for the conversion of the LOC into the international border, notwithstanding the Parliamentary Resolution of 1994 requiring Pakistan to vacate the occupied territory of J&K.²⁸ It is content with lodging protests at the annexation by Pakistan of the Gilgit region and at Pakistan directly administering the supposed ‘Azad Kashmir’. Indeed, New Delhi’s protest was equally low key against the recent seven-judge decision of the Pakistan Supreme Court in *Civil Aviation Authority v Supreme Appellate Court Gilgit-Baltistan* which in effect gives the Gilgit region the status of a Pakistani province and treats its residents as Pakistani citizens.²⁹ Nor has New Delhi been particularly worried about the China Pakistan Economic Corridor being conceived through the Gilgit region i.e. Indian territory. China has vigorously launched its One Belt, One Road (‘OBOR’) initiative and continues to invest heavily in the region and to attract international support. More than 100 heads of state are reported to have attended China’s OBOR agenda in Beijing in April

²⁷ UNSC Verbatim Record (15 February 1957) UN Doc S/PV/769 38.

²⁸ Parliamentary Resolution, *Resolution on POK* (Parliamentary Resolution No. 2977, 1994).

²⁹ *Civil Aviation Authority v Supreme Appellate Court Gilgit-Baltistan* (*Live Law*, 17 January 2019) <https://www.livelaw.in/pdf_upload/pdf_upload-360488.pdf> accessed 15 August 2020.

2019.³⁰ New Delhi seemed satisfied by just staying away from the meet.

VII. FALLOUT OF NEW DELHI'S POLICY ON J&K

The crucial fallout of such stand of New Delhi on the accession of J&K to India has been on world opinion which still feels that it is India that has refused to honour its word—a perception that has altered the entire international political discourse on the Kashmir issue. When Pakistan makes itself hoarse, protesting against the denial of 'the right to self-determination' of the Kashmiri people, one does not even expect a rebuttal from New Delhi, having itself introduced the 'wishes of the people' to determine accession. Despite being the aggressor, Pakistan has been able to paint India, the victim, black. Indeed, the current international opinion is that while it may not be feasible to hold a plebiscite in J&K today, the erstwhile state remains a 'disputed territory' between India and Pakistan and that the Kashmir issue must be resolved keeping in mind the wishes of the Kashmiri people.

With New Delhi disowning the residents of the occupied territory of J&K, it is not even in the public consciousness in India that such residents are Indian citizens living under foreign rule. Indeed, even such residents have forgotten their identity as Indian citizens. As a result of New Delhi's unofficial policy of territorial status quo and conversion of the LOC into the international border, Pakistan has merrily consolidated its control over the occupied territory of J&K while staking a claim to the part of J&K with India. The further fallout of New Delhi's policy has therefore been to distort what constitutes the Kashmir issue by confining it to only that part of J&K which is with India, and more specifically to the Kashmir Valley – an area which is just about 9% of the entire J&K!

What makes such a state of affairs even more unfortunate is the fact that New Delhi's J&K policy is contrary to the constitutional law that binds New Delhi. Let us briefly consider the legality of New Delhi's stand of holding a referendum to settle the accession of J&K, and its subsequent stand of territorial status quo and conversion of LOC into the international border.

VIII. LEGALITY OF NEW DELHI'S POLICY ON J&K

While India is an ancient civilization, it is evident from the above narration that modern day India and Pakistan are creations of the partition agreement of 3 June 1947, which was crystallized in the British statutes mentioned earlier. However, as per these very statutes, all the princely states were to regain full sovereignty and such sovereignty vested in the ruler, regardless of the religious complexion of the people of the state concerned. It was the ruler alone who could decide to accede to India, Pakistan or remain independent. These British statutes were accepted by both India and Pakistan. Indeed, there is no doubt about the legitimacy of the states of India and Pakistan created by such statutes, and that such

30 Aman Hingorani, 'Pakistan SC Decision: Another Wake-Up Call for New Delhi' (*Live Law*, 2 May 2019) <<https://www.livelaw.in/columns/pakistan-sc-decision-another-wake-up-call-for-new-delhi-144700>> accessed 13 August 2020.

statutes comprised the constitutional law governing both India and Pakistan.

The sovereign ruler of J&K unconditionally acceded to India on 26 October 1947 in the manner prescribed under the aforesaid constitutional law. As noted above, New Delhi viewed the accession as being purely provisional and subject to the wishes of the people. By doing so, New Delhi overlooked the fact that once a political decision (the partition agreement) had been crystallized into law (the British statutes), the executive created by that law could not act contrary to the terms of that very law. It is well settled that a state cannot, by making promises, clothe itself with authority which is inconsistent with the constitution that gave it birth. The constitutional law creating modern day India mandated that it was *only* the sovereign ruler who could decide on the accession of his state to India. New Delhi had no power to lay down a contrary policy that the accession would be decided by the wishes of the people.³¹ Further, since the accession of J&K to India by its ruler was in terms of the same constitutional law that created Pakistan, it would be fair to say that the law that gave birth to Pakistan itself made J&K a part of India. Moreover, it is not open in international law for a state (Pakistan) to challenge the accession made by a sovereign state (J&K) to another sovereign state (India), such accession being an Act of State. The ruler of J&K has never challenged the accession as being fraudulent or based on violence. Rather, the ruler acceded to India unconditionally in the areas of external affairs, defence, communications and ancillary matters and expressly retained his sovereignty qua the remaining matters. The UN, and every state ‘contracting’ with India (including Pakistan) are held in international law to have had the knowledge that New Delhi exceeded its powers under the said constitutional law by pledging to hold a plebiscite in J&K to settle the question of accession, and, that too, in the absence of its sovereign ruler. As a result, not only was New Delhi’s ‘pledge’ of holding a plebiscite in J&K unconstitutional and not binding on India, the UNSC resolutions for holding the plebiscite were themselves without jurisdiction and in violation of the UN Charter.

As regards the policy of territorial status quo, it is implicit in such policy that New Delhi may cede national territory. New Delhi apparently failed to notice that it lacks competence under the Indian Constitution to do so. The Supreme Court had held in *Berubari Union*³² that Parliament could amend the Constitution to cede national territory, such power of cession being an essential attribute of sovereignty. However, in the later thirteen-judge decision in *Keshavananda Bharti*³³, the Court took the view that Parliament lacked the power to tinker with the basic structure of the Constitution, which the Court

31 This view will not enable Pakistan to re-open the accession of the erstwhile states of Junagadh or Hyderabad to India in as much as plebiscite in Junagadh was tacitly approved by its sovereign ruler while the plebiscite in Hyderabad was followed by its sovereign ruler executing the instrument of accession in favour of India.

32 *Reference by the President of India under Article 143(1) of the Constitution of India on the implementation of the Indo-Pakistan Agreement relating to Berubari Union and Exchange of Enclaves* AIR 1960 SC 845, 856.

33 *Keshavananda Bharti v State of Kerala* AIR 1973 SC 1461, 1628.

identified to include the unity and territorial integrity of the country. The Court, in its nine-judge decision in *S.R. Bommai*, reiterated that '(d)emocratic form of Government, federal structure, *unity and integrity of the nation*, secularism, socialism, social justice and judicial review are basic features of the Constitution'.³⁴ As a result, Parliament cannot amend the Constitution to give away Indian territory. New Delhi has evidently been barking up the wrong tree by following its unofficial policy of territorial status quo or seeking to convert the LOC into the international border.

Further, the inevitable consequence of the territorial status quo policy has been that New Delhi has at least from the 1950s onwards focused only on the happenings in the part of J&K with India, a process that has culminated in the Presidential notification of 5 August 2019. In order to appreciate how terribly misguided, and unnecessary, the Presidential notification is, let us summarily consider the constitutional and political developments in J&K since its accession to India.

IX. CONSTITUTIONAL AND POLITICAL DEVELOPMENTS IN J&K

J&K was an independent and sovereign state as of 15 August 1947 as per the British statutes creating modern day India and Pakistan, and has been held to be so by the Supreme Court in its Constitution Bench decision in *Prem Nath Kaul*³⁵. It was in terms of such law that the ruler of J&K, who was the sole repository of power in the erstwhile state, chose to accede to India through the instrument of accession of 26 October 1947 making J&K an integral part of India. Such accession by the ruler, though unconditional, was only in matters of external affairs, communications and defence and certain ancillary matters. The instrument of accession expressly declared that nothing therein would affect the continuance of the sovereignty of the ruler in or over J&K. The eleven-judge decision of the Supreme Court in *Madhav Rao*³⁶ held that the instrument of accession was an Act of State on the part of the sovereign ruler of a princely state and bound all concerned, and that relations between the princely state and India were strictly governed by such instrument. Indeed, the Supreme Court observed in *Prem Nath Kaul* that it was not, and could not have been, within the contemplation, or competence of the Constitution makers to impinge even indirectly, on the plenary powers of the ruler of J&K. Indeed, it is settled law that independent states may 'have their sovereignty limited and qualified in various degrees, either by the character of their internal constitution, by stipulations of unequal treaties of alliance, or by treaties of protection or of guarantee made by a third Power'.³⁷ There are judicial precedents in common law for the proposition that 'a state may, without ceasing to be a sovereign state, be bound to another more powerful state by an unequal alliance'.³⁸

34 *SR Bommai v Union of India* AIR 1994 SC 1918, 2045.

35 *Prem Nath Kaul v State of Jammu and Kashmir* AIR 1959 SC 749.

36 *Madhav Rao v Union of India* (1973) 3 SCR 9, 37.

37 *Duff Development Company Limited v Government of Kelantan and Anr* 1924 AC 797, 830.

38 *ibid* 807-808; *Gurdwara Sahib v Piyara Singh* AIR 1953 Pepsu 1(B).

It may be stated here that the instrument of accession executed by the ruler of J&K was identical to the instruments of accession executed by the rulers of the other princely states, and all such instruments were limited to the same three matters. However, other princely states executed supplementary instruments ceding further subjects and also executed instruments of merger, merging their territory with the Indian Union. Such merged territory was subsequently reorganized through the *States Reorganisation Act of 1956*. However, the ruler of J&K did not execute any supplementary instrument nor any merger instrument in favour of India.

Even so, it was not contemplated that a ruler would remain the constitutional head of a state within a democratic Indian republic. Hence, there was to be a transfer of power from the ruler of J&K to a duly elected state constituent assembly. And so, the Indian Constitution itself contemplated in Article 370 that J&K would have its own constitution framed by its own constituent assembly.³⁹ However, there was still to be a transition from monarchy to a form of government that was to be decided by a state constituent assembly which was yet to be set up, and which would also finally determine the constitutional relationship of J&K with the Indian Union. Thus, Article 370 was described as a temporary provision and placed under Part XXI of the Indian Constitution which deals with ‘Temporary, Transitional and Special Provisions’. To appreciate such import of the temporariness of Article 370, one needs to only go through the decision of the Constitution Bench of the Supreme Court in *Prem Nath Kaul*. Significantly, the Supreme Court emphasized that it was for the state Constituent Assembly to finally determine the constitutional relationship of J&K with the Indian Union.⁴⁰

Accordingly, the Indian Constitution was made applicable to J&K only through Article 370, and it was through Article 370 that Article 1 of the Constitution (which lists the States of India and their territories) was extended to J&K. Article 370(1) provided that Parliament could make laws for J&K only with respect to matters in the Union and Concurrent Lists which, in consultation with the J&K government, are declared by the President to correspond to the matters specified in the instrument of accession. Parliament was empowered to make laws in respect of such other matters in the said Lists as, with the ‘concurrence’ of the J&K government, the President may specify. Further, the President could apply other provisions of the Constitution to J&K relating to matters specified in the instrument of accession as identified above but only in ‘consultation’ with the J&K government, while such application in respect of other matters required the ‘concurrence’ of the J&K government. Article 370(2) stipulated that whenever the state government gave its ‘concurrence’, before the state Constituent Assembly for the purpose of framing state Constitution was convened, it shall be placed before such Assembly for such decision as it may take thereon. The proviso to Article 370(3) mandated a recommendation from the same state Constituent Assembly to the President to declare Article 370 inoperative before

³⁹ The Constitution of India, art 370.

⁴⁰ Prem Nath (n 35) [38].

he could do so.

Article 370, therefore, was enacted to give effect to the terms of the instrument of accession and left it for the state Constituent Assembly to finalize the constitutional relationship with India. It was the instrument of accession, and not Article 370, which formed the basis of the relationship between J&K and the Indian Union. Article 370, in fact, did not confer 'special status' on J&K nor use any such term. Rather, there was nothing in Article 370 that could have prevented the state Constituent Assembly from ceding all matters to the Indian Union or merging the territory of J&K into the Indian Union, had it chosen to do so.

The state Constituent Assembly, set up in 1951, regarded the constitutional relationship of J&K with the Indian Union as one of an autonomous republic within the Indian Union. This relationship was later crystallized in the Delhi Agreement, 1952, which was duly ratified by the Indian Parliament on 7 August 1952 and the state Constituent Assembly on 21 August 1952. This inter alia permitted the state legislature to make laws conferring special rights and privileges upon the state subjects.⁴¹ The President of India, in exercise of the power under Article 370, then issued the Constitution (Application to Jammu & Kashmir) Order, 1954, which inserted provisions like Article 35A to give effect to the Delhi Agreement and also applied further articles of the Indian Constitution to J&K (with modifications).⁴²

Another provision inserted by this 1954 Order was the proviso to Article 3 of the Indian Constitution. This provision mandates that 'no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of that State.'⁴³ In other words, J&K did not only not merge its territory into the Indian Union, it explicitly preserved its territorial integrity as well as identity.

The state Constituent Assembly framed the Constitution of Jammu & Kashmir by 1956, and effected the transfer of power from the ruler to the people of the erstwhile state. The state Constitution declared J&K to be an integral part of India. The state Constituent Assembly dispersed without making a recommendation that Article 370 should cease to be operative.

It appears that, initially, New Delhi did honour such autonomous status of the part of J&K with India. Thereafter, successive regimes at New Delhi issued a series of executive Presidential Orders under Article 370(1) over the decades to apply almost the entire Indian Constitution to J&K, and that too, often with modifications that would have been impermissible for other parts of the country. Thus, ironically, the part of J&K with India did

41 Delhi Agreement 1952 <<http://jklaw.nic.in/delhi1952agreemnet.pdf>> accessed 14 August 2020.

42 Constitution (Application to Jammu & Kashmir) Order 1954, CO 48.

43 The Constitution of India, art 3.

get a ‘special status’, though certainly not that of an autonomous republic within the Indian Union. Rather, it found itself at the other end of the spectrum, with mere executive directions by New Delhi deciding its fate. New Delhi justified its actions, as also the introduction of draconian penal laws, to the generous export of cross border terrorism by Pakistan. The book documents how the reckless strategies adopted by Pakistan to wrestle the part of J&K with India has reduced Pakistan to become a breeding ground for terrorism. That does not, however, absolve New Delhi from emasculating the constitutional guarantee of Article 370 conferred by the Indian Constitution itself or introducing penal legislation like the Armed Forces Special Powers Act 1958, which not only gave the security forces virtually a licence to kill, but also provided a legal cover to shield them from prosecution. The Supreme Court has unfortunately upheld such coercive laws.⁴⁴ The book analyses the fatal infirmities in these judicial decisions, including the overlooking of larger binding precedents, that would have compelled the Court to strike down such laws as unconstitutional.⁴⁵

X. THE KASHMIR ISSUE AND ARTICLE 370

Such focus of New Delhi only on the part of J&K with India led to differing perceptions in India about what comprises the Kashmir issue. The Indian polity, faced with demands for autonomy in J&K, the proxy war by Pakistan and the turmoil in the Kashmir Valley, started equating the Kashmir issue with Article 370. The Indian security forces viewed the Kashmir issue as a law and order problem, with Pakistan stoking mischief in the Valley. Many in the Valley saw the Kashmir issue in terms of the dilution of Article 370, enforcement of draconian penal laws and human rights violations. The Kashmiri Hindus (Pandits) defined the Kashmir issue through the prism of the terrible happenings in the early 1990s, which rendered them as refugees in their own country. For the majority in Jammu and Ladakh, the Kashmir issue was about breaking the hegemony of the Valley and equal representation and even development in J&K.

Forgotten in such varying, albeit important, perceptions was the fact that the Kashmir issue is not only about the part of J&K with India, but the entire erstwhile state. The Kashmir issue is not about Article 370. The genesis of the Kashmir issue is not located in Article 370 nor its solution. In my view, the abrogation of Article 370, as has been sought to be done by the Presidential notification and subsequent steps taken by New Delhi, is, therefore, not of much relevance from the point of view of finding a solution to the Kashmir issue.

Without getting into the merits (or otherwise) of New Delhi’s justification – that Article 370 was the root of terrorism in J&K, had stalled its integration and development, prevented proper health care and education and blocked industries; and so on so forth – I believe that New Delhi’s move is, even otherwise, constitutionally vulnerable. Let us consider what New Delhi has done.

⁴⁴ Aman Hingorani (n 9) 446-474.

⁴⁵ *ibid.*

Legality of New Delhi's moves on Article 370

On 5 August 2019, the President, in exercise of his power under Article 370(1), issued the Constitution (Application to Jammu & Kashmir) Order. This Presidential notification superseded the 1954 Order and further inter-alia provided that all the provisions of the Indian Constitution shall apply to J&K along with a 'Clause 4' inserted in Article 367. Clause 4 made certain provision pertaining to the Governor of J&K and in effect replaced in the proviso to Article 370(3) the expression 'Constituent Assembly' with 'Legislative Assembly'.⁴⁶

Post such Presidential notification, Parliament enacted the Jammu & Kashmir Reorganisation Act of 2019, which bifurcated J&K into two Union Territories – J&K with a legislature and Ladakh without a legislature.⁴⁷ The President, on the recommendation of Parliament, also issued the 'Declaration under Article 370(3) of the Constitution' in exercise of his powers under Article 370(3) read with Article 370(1), to declare that all clauses of Article 370 would cease to be operative from 6 August 2019, except the clause to the effect that '(a)ll provisions of this Constitution, as amended from time to time, without any modifications or exceptions'⁴⁸ shall apply to Jammu & Kashmir (J&K), notwithstanding anything contrary contained in the Constitution or the J&K constitution or 'any law, document, judgement, ordinance, order, by-law, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under Article 363 or otherwise'.⁴⁹

The consequences of these measures has been three-fold - firstly, it superseded the 1954 Order that had given effect to the preferential status of J&K and applied the entire Indian Constitution to J&K; secondly, it has bifurcated J&K into Union Territories; and thirdly, it has made the state legislative assembly (instead of its Constituent Assembly) the competent authority to make the recommendation to the President to declare Article 370 inoperative.

At the outset, it may be noted that New Delhi has dealt with Article 370 at a time when J&K was under President's Rule contemplated in Article 356 of the Constitution. Article 356 is an emergency provision that empowers the President to assume the functions of the state government and Parliament to exercise the powers of the state legislature in a situation in which the governance of the state cannot be carried out in accordance with the Constitution.⁵⁰ Article 356 is not meant to be used to take far reaching decisions but is to be resorted to sparingly. Furthermore, the exercise of the power under Article 356 is limited by time as provided in Article 356 itself. It is a temporary arrangement only until

46 Constitution (Application to Jammu & Kashmir) Order 2019, GSR 551(E).

47 Jammu and Kashmir Reorganisation Act 2019, s 3.

48 Declaration under Article 370(3) of the Constitution 2019, GSR 562(E).

49 *ibid.*

50 The Constitution of India, art 356.

the government of the state can be carried on in accordance with the Constitution.

Coming to the legality of New Delhi's moves, let us consider each measure one at a time. The first measure was the supersession of the 1954 Order and the application of the entire Indian Constitution to J&K. But then, almost the entire Indian Constitution had anyways been made applicable to J&K much before the Presidential notification of 5 August 2019. Article 370 had virtually been emptied of its contents over the decades. Be that as it may, it may be recalled that Article 370 requires the 'concurrence' of J&K with respect to matters not specified in the instrument of accession. Since J&K was under President's Rule, New Delhi exercised the powers of the state government and state legislature. Hence, the President, apparently with the 'concurrence' of his own nominee, the J&K Governor, who has been equated with the state government, issued the Presidential notification superseding the 1954 Order that had given effect to the preferential status of J&K, followed by the application of the entire Indian Constitution to J&K.

As regards the bifurcation of J&K into Union Territories, it is true that the Indian Constitution does not guarantee the territorial integrity of the constituent states of the Indian Union. Article 3 of the Constitution provides that Parliament may by law form a new State and alter the areas, boundaries or names of any State. The proviso to Article 3, however, provides that no Bill for such purpose will be introduced in Parliament unless the Bill has been referred by the President to the state legislature for expressing its views thereon when the proposal contained in the Bill affects the area, boundaries or name of that state.⁵¹

The only exception so far was J&K. Article 370 applied Article 1 to J&K thereby recognizing it as a constituent state within the Indian Union. The 1954 Order applied Article 3 to J&K with an additional proviso as aforesaid that mandated that 'no Bill providing for increasing or diminishing the area of the State of Jammu and Kashmir or altering the name or boundary of that State shall be introduced in Parliament without the consent of the Legislature of that State.'

Assuming the Presidential notification (which supersedes the 1954 Order and applies the entire Indian Constitution to J&K) to be valid, Parliament could have by law altered the areas, boundaries and name of J&K without the consent of the state legislature. However, it was still a requirement of the proviso to Article 3 for the J&K Reorganization Bill to have been referred to the state legislature for expressing its views thereon.

But then, with J&K being under President's Rule, there was no state legislature that could have expressed its views on the J&K Reorganization Bill. Instead, Parliament exercised the power of the state legislature to effectively dismember the state itself! In this context, it may also be noted that while the Indian Constitution is not strictly federal in nature, it is also not strictly unitary in nature – it is often described as quasi-federal. In fact,

51 The Constitution of India, art 3.

the state in relation to which the Constitution was closest to being federal was J&K, due to historical reasons. The thirteen-judge decision of the Supreme Court in *Keshavananda Bharati* has gone to the extent of viewing the federal character of the Constitution as part of its basic structure.⁵² Parliament, by exercising the power of the state legislature to bi-furcate J&K into Union territories, has plainly violated the federal structure of the Constitution.

Coming to New Delhi's measure of making the state legislative assembly the competent authority to make the recommendation to the President to declare Article 370 inoperative, it may be recalled that the proviso to Article 370(3) mandated a recommendation from the state Constituent Assembly (which was to be convened for the purpose of framing the state Constitution) to the President to declare Article 370 inoperative before he could do so. Since the state Constituent Assembly dispersed after framing the state Constitution by 1956, without making any such recommendation, it follows that the competence of any organ of the Indian State to declare Article 370 inoperative no longer existed.

Now, the Presidential notification adds to Article 367 of the Indian Constitution (an Interpretation clause) a provision to the effect that the state Constituent Assembly referred to in the proviso to Article 370(3) shall be read as the state legislative assembly. Simply put, New Delhi has sought to exercise the power under Article 370(1) to nullify or circumvent the protection given to J&K by Article 370(3). That runs counter to the elementary proposition of law that a constitutional provision cannot be used to defeat another constitutional provision or to render it nugatory.

Further, recourse is usually taken to an interpretation clause where there is ambiguity, thus requiring the aid of interpretation. There is no ambiguity in Article 370, which expressly states that it is the state Constituent Assembly (convened to frame the State constitution) which would be the competent authority to make a recommendation to the President to declare Article 370 inoperative. There is, accordingly, no warrant to use Article 370(1) to substitute the reference to the state Constituent Assembly in Article 370(3) with the state legislative assembly. Clearly, the intent was to denude the protection guaranteed by Article 370(3). To allow New Delhi to do so would amount to it indirectly amending Article 370(3) – which in turn would violate Article 370(1) (c) and (d) that mandate that the provisions of Article 370 shall apply to J&K and that it is only other provisions of the Constitution that may be modified in their application to J&K.

The effect of the Presidential notification, with J&K under President's Rule, is that the power to make the requisite recommendation has been taken away from the state Constituent Assembly and vested in the state legislative assembly only to have been eventually exercised by Parliament. And so, New Delhi (Government of India) needed a 'yes' only from New Delhi (Parliament) to declare Article 370 inoperative! Surely that cannot be the position in law.

52 (n 33).

The crux of New Delhi's measures has been to let New Delhi define the constitutional relationship of J&K with the Indian Union; instead of J&K deciding such relationship. This action is therefore inconsistent with the binding terms of the instrument of accession, the constitutional mandate of Article 370, the Delhi Agreement and also the view taken by the Supreme Court, notably in *Prem Nath Kaul*.

Fallout of New Delhi's moves on Article 370

Regardless of the legality of New Delhi's action, India and the world have been presented with a *fait accompli*. New Delhi has already got away with what it wanted to do. However, the fallout of such action by New Delhi has again been on the world opinion, not least because of the attendant communication lockdown in J&K being the longest in history and detention of political leaders there. India has yet again lost the public relations battle, with its international standing as a country wedded to the rule of law and protection of human rights taking a huge hit. What is even more unfortunate is that New Delhi still does not appreciate that the abrogation of Article 370 or conversion of J&K into Union Territories will not get rid of the 'disputed territory' tag conferred upon J&K by New Delhi. New Delhi has kept on harping about J&K being an integral part of India – the rest of the world has simply not agreed. Abrogation of Article 370 or bifurcation of J&K into Union Territories will not convince the world community that the entire erstwhile state is Indian territory or that Pakistan and China must vacate the occupied territory. Nor will it help New Delhi recover the occupied territory of J&K or reclaim the residents of such territory as Indian citizens or even stop cross border terrorism. Abrogation of Article 370 or conversion of J&K into Union Territories is premised on the view that the Kashmir issue is confined to the happenings in the part of J&K with India, and discounts the occupied territory of J&K. Such J&K policy, due to the very parameters within which it is formulated, cannot 'transmute' J&K 'from being disputed territory to undisputed territory, sovereign to India'.

XI. CONCLUSION

The Kashmir case serves as a good example of how not to handle a conflict. Due to numerous misconceived policies on J&K since 1947 till date, New Delhi does not really have a military, diplomatic, economic or political solution to get rid of the 'disputed territory' tag on J&K or to even break the political stalemate with Pakistan and China who have continued to occupy more than 50% of J&K for decades. And so, if New Delhi wants to seriously attempt to resolve the Kashmir issue, it must aim to change the current political discourse surrounding this vexed problem, both internationally and nationally. The book pieces together a practical and realistic way forward, which includes having the principal judicial organ of the UN, i.e. the International Court of Justice ('ICJ'), examine eight propositions formulated in the book to give an authoritative pronouncement to the effect that the entire erstwhile state is Indian territory in terms of the very law that created

modern day India and Pakistan.⁵³ Since it was New Delhi that had, in the first place, created doubts about the unconditional nature of the accession of J&K to India, internationalized the Kashmir issue and conferred a 'disputed territory' status on J&K, it is New Delhi that needs, as a first step, to confirm, as it were, its title deeds to J&K so as to remove the 'disputed territory' tag on J&K. Given that India is entitled in law to the entire territory of J&K, it lies in India's interest to have the ICJ examine the Kashmir issue, regardless of the issue of enforceability of ICJ decisions or the dynamics of international politics. Such examination is not precluded by the Simla Agreement or any other bilateral agreement between India and Pakistan.

In light of India's past experience with the UNSC, one can understand the concerns of Indian observers at the prospects of taking the Kashmir issue to the international stage. But then, the UNSC is a political body, while the ICJ is a judicial one. India already has in place its Commonwealth reservations to the jurisdiction of the ICJ which it can cite to block any possible widening of the scope of examination by the ICJ at the instance of Pakistan beyond the eight propositions. Simply put, the ICJ can be asked to examine only what New Delhi would want it to examine.

And so, New Delhi should not shy away from taking the Kashmir issue to the ICJ, it being an effective way of depoliticizing the matter. While the Kashmir issue is certainly a political one, it is possible for New Delhi to separate the legal from the political aspect of the issue, so that it can vindicate its claim to the entire territory of J&K based on legal rights. If the ICJ gives a verdict in India's favour, and it is likely to do so in view of the legal principles formulated in the book, the very presence of Pakistan and China in the territory of J&K would constitute 'aggression' under international law, and the international community would be under an obligation to put an end to that illegal situation as illustrated by the ICJ decision in *Namibia*.⁵⁴ No country can then extend even 'moral' support to the supposed 'freedom struggle' in J&K. New Delhi must realize that it needs the international community to pressurize Pakistan to vacate its aggression and to stop cross-border terrorism. But for that to happen, New Delhi must first obtain a finding from the ICJ, whose views are authoritative for the world community, to confirm that the entire territory of J&K is a part of India.

Further, in the unlikely event that the ICJ decides against India by opining that the future of J&K will be decided by the wishes of the people, New Delhi still stands to lose nothing. New Delhi has always maintained that the people of J&K have endorsed the accession of J&K to India, as is evident from the resolution of 15 February 1954 of the elected state Constituent Assembly. Indeed, the Assembly, which had been set up in 1951 by the sovereign ruler of J&K, framed the Constitution of Jammu & Kashmir by 1956

53 Jaswant Singh (n 8) 368-405.

54 *Legal Consequences for States of the Continued Presence of South Africa in Namibia (South West Africa) notwithstanding Security Council Resolution 726 (1970), Advisory Opinion*, ICJ Reports 1971, 52.

declaring J&K as an integral part of India. New Delhi can simply fall back on its official stand.

It is true that law alone cannot resolve the Kashmir issue, but a confirmation of the correct legal position by the ICJ will help alter the current political discourse, both nationally and internationally, and swing political opinion in India's favour to create a momentum for winning the confidence of the people of J&K and for bringing peace to the region. New Delhi must take steps to regain the moral authority to be in J&K and to undo past mistakes, as detailed in the book, its success being dependent on the character of the Indian State and of the men and women who run it.