

PAKISTAN-INDIA CONFLICT AND THE RIGHT OF SELF-DETERMINATION OF KASHMIR

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Abstract

The dispute in Jammu and Kashmir has been tensed by the revocation of Article 370 of the Indian Constitution by the Indian government in the end of 2019. The existence of Kashmir has become one of matters as the main focus between India-Pakistan conflicts. People are under diverse senses of de facto and de jure martial law. Estimated from 1990, thereabouts 70,000 people have been killed, 8,000 people have been subjected to enforced disappearances, thousand of them also victims of repressive laws and Indian security forces humiliate the protestors and detainees frequently. The research is normative legal research by using statute approach and case approach through literature review. The research aims to discuss and analyze the implementation of the rights of self-determination pursuant to Kashmir dispute between India and Pakistan. The results of the study indicate all the disputes should be ended by giving the right to self-determination, which should be given to the people of Kashmir, thus the disputes between the two countries can be resolved properly and making a clarity of Kashmir status.

Keywords: *Kashmir; India-Pakistan Conflict; Self-determination*

1. Introduction

Jammu & Kashmir can be categorized as one of the most beautiful places in the world, a garden of eternal spring and an iron fort to a place of kings. The main valley of Kashmir is relatively low and very fertile, surrounded by extraordinary Himalayas Mountains. Kashmir has a lucrative advantage from an economic standpoint and the tourist attraction that is famous for its natural beauty and the central of the wool industry, carpets with fertile soil. In addition, it has many large rivers flow within the State, which is very fundamental for the agricultural sector.

In contrast to its valuable nature, people in Jammu and Kashmir have been living in such inhuman situations since the dispute has remained intractable since 1947.¹ The dispute has never been easy to resolve due to the interplay of several interconnected issues. India territorial defensibility, the Pakistani state argument, and Kashmir nationalism all vie for the same space creates a high-tensioned situation which prohibits the involved parties from providing any equal winning solution. The United Nations (UN) has recognized the struggle of the Kashmiri people

¹ Hau Khan Sum; Ravichandran Moorthy; Guido Benny, "The Genesis of Kashmir Dispute," *Asian Social Science* 9, no. 11 (2013): 159.

by the UN Security Council Resolution in 1948 which addressed the plebiscite for Kashmir in order to determine its future. However, the referendum has never been conducted.

People are under diverse senses of *de facto* and *de jure* martial law.² The dispute has escalated into an incredibly tense scale. Civilians were raped, abducted, and murdered brutally by the Indian Arm Forces, the villages were set on fire even worse. Estimated from 1990, thereabouts 70,000 people were killed and 8,000 subjected to enforced disappearances, thousands also became victims of repressive laws and Indian security forces humiliate the protestors and detainees frequently.³ Even though Pakistan and India have never published any number of troops both have in the Jammu and Kashmir region, yet it assured that India has deployed hundreds of thousands of troops, of its 1.3 million active military force. In the last six years, the official count calculated there are about 25,000 people have been killed and two-thirds of them were killed by the Indian armed forces.⁴

India started to grant special autonomy to Kashmir through Article 370 of Indian Constitution which covers freedom to use its own flag, separate constitution, and internal administration in 1954.⁵ However, its specialty was ended up by the revocation of the article in the latest of 2019. Consequently, Kashmir is no longer has its autonomy and shall follow the Indian Constitution like other states in India. Thus, the withdrawal turns the situation into worse due to the public backlash and the government response by lockingdown totally and disconnecting Kashmir from the world.

From the explanation above the problem arises is how is the implementation of the right of self-determination pursuant to Kashmir dispute between India and Pakistan. The research aims to analyze and discuss how is the implementation of the right to self-determination according to the Kashmir dispute.

2. Methods

The article uses juridical normative research with international law approach and discusses how the right of self-determination should be implemented through the primary legal materials such as the UN Charter, UN Security Council Resolutions, and case laws in assessing the right to

² Hasbrouck Edward, *Kashmir, Self-Determination, and Human Rights* (New York: Avalon Travel Publishing, 2014).

³ Ibid.

⁴ The Economist, "India as a Great Power: Know Your Own Strength," *The Economist*, 2013.

⁵ Saman Zulfqar, "Kashmir: Nature and Dimension of the Conflict," *Journal of Current Affairs* 1, no. 1 (2016): 53.

self-determination of Jammu and Kashmir. The article also uses secondary and tertiary legal materials, including books, journals, and reports. The article also uses case study approach with referring to the Pakistan-India conflict and its historical background on the right of self-determination. The method of collecting data in the article was done through library research by literature learning. The method collects the data by reading, writing, analyzing, and gathering information related to the topic of the research. After obtaining the information from the documents such as international legal instruments, books, journals, and others related to the main problem of the research.

The data were analyzed systematically through juridical normative approach. It is conducted systematically through evaluative method, where the data relating to the issues to be researched was taken. The juridical normative approach means that it would be connected to the principle of law, convention, and other regulations, so that it can be systematic and comprehensive, illustrating the facts that are valid and related to prevailing law.

3. Results and Discussion

3.1. Kashmir Past-History: Its Controversial Existence

Kashmir is a piece of land, one of the most wonderful valleys in the world. It is isolated by the Himalayan Mountains, the large amount of territory is no more than ninety miles.⁶ Rajatarangini recorded the history of Kashmir and Jammu, written in the 12th century, since a long time ago, Kashmir and Jammu valley possessors came into conflict with their surrounding area neighbor. Kashmir was a princely state for many years now, but now the land is claimed by India, Pakistan, and China.⁷ China is also being as a third-role party and possesses some regions of Kashmir. Since 1963, a region called “Trans-Karakoram Tract and Aksai Chin” possessed by Pakistan which has been recognized by China. India possesses approximately 55% area of Kashmir, which India runs its governance over the Kashmir Valley, Jammu, Siachen Glacier, and Ladakh regions. Pakistan occupied 30% of the area of Kashmir, which Pakistan holds Gilgit-Baltistan and Azad Kashmir regions. While the rest 15% area is owned by China, which China runs its jurisdiction towards Aksai Chin and the rest of the uninhabited Trans-Karakoram Tract regions.⁸ India and Pakistan were being involved in the conflict since 1947 over Kashmir

⁶ V. Schofield, *Kashmir in Conflict: India, Pakistan and the Unending War* (London: I.B.Tauris & Co Ltd, 2003).

⁷ Karen Heymann, “Earned Sovereignty for Kashmir: The Legal Methodology to Avoiding a Nuclear Holocaust,” *American University International Law Review* 19, no. 1 (2003): 158.

⁸ The Editors of Encyclopedia Britannica, “Kashmir: Region, Indian Subcontinent,” *Encyclopedia Britannica*, 2010.

territory, a land of Muslim majority, with several armed skirmishes. The Kashmir conflict was first raised in 1947. It was an internal conflict between Kashmir who would like to unite together with Pakistan and the rest are pros to India. Both countries were fighting for three battles on the Kashmir conflict, which happened in 1947, 1965, and 1999. Moreover, since 1984, these two countries have been involved in several other battles in the struggle for power over another region, Siachen Glacier.⁹

Some scholars argue that the Indian armies have been committed many human rights abuses toward Kashmiri, such as torture, killing, rape, and any other abuses. Kashmiri Pandits who stayed for over centuries forced to leave the land. As cited in Human Rights Watch in 2006 accused that Pakistan supporting insurgents in Kashmir with shelters, weapons, funding, and others.¹⁰ According to the statement given by Amnesty International, there were a lot of cases relating to human rights abuses that happened in the Kashmir region, and none of the Indian forces have been tried for their violations. Amnesty International accused that the Indian government refused to bring and prosecute perpetrators into the court for committing abuses in that region.

3.2. Involvement of Pakistan in Kashmir Conflict

It was long ago, when Kashmir and Jammu were a princely state, which governed by a Hindus, Maharaja Hari Singh, while the majority of the population were Muslim. He wanted independence over Kashmir and Jammu regions rather than affiliate with other countries. For the purpose to avoid pressure to join either side of India and Pakistan, Maharaja Hari Singh signed a standstill agreement that concluded allowed Pakistan to conduct travel and trade over Kashmir and Jammu region. Meanwhile, India did not sign any such other standstill or similar agreements where Pakistan have signed. Today, the status of Jammu and Kashmir has not changed yet very much as reported by international organizations and global media. Kashmir used to know as the mesmerizing beauty, peace, and tolerance in the world discussed as a country with a bloody

⁹ Salah Uddin Shoaib Choudhury, "Pakistani Rogue Policy on Kashmir," *Srilanka Guardian*, 2010.

¹⁰ Srinagar, "India: Impunity Fuels Conflict in Jammu and Kashmir," 2006.

conflict zone.¹¹ For more than seven decades after partition, the state of Jammu and Kashmir last for the world's most militarized region.¹²

The epic contention of the Kashmiri for the realization of their internationally recognized and inviolable rights to self-determination.¹³ The prime conflict over Jammu and Kashmir happened since both countries gained independence from British rule in 1947 and divided into three different parts, India, East Pakistan, and West Pakistan. The cause of Kashmir's dispute is neither strategically significant nor geopolitical, in contrast to other conflicts between states. The roots of this conflict are found in the sense of the various ideas about the creation of a nation in South Asia. As a state, India has been engaged in a secular nationalism. Therefore, it decided to include Kashmir as one of the Muslim-majority areas to demonstrate their secularism. India argued that if a Muslim-majority region could thrive within a Hindu dominated state. The inclusion of Kashmir in his reign as home of the Muslim in South Asia was equally important in Pakistan. The rulers declared that without the inclusion of Kashmir their country is incomplete.¹⁴

3.3. UN Involvement in Adjudication of Kashmir Dispute

The UN is an intergovernmental body whose mission is to promote international cooperation, sustain world peace and safety, support social progress, human rights globally, developing friendly relations among nations, achieving international cooperation, and harmonizing the actions of nations.¹⁵ Therefore, maintaining international peace and security is one of the major objectives of the United Nations. Article 1 of the UN Charter identifies two complementary purposes of United Nations are to take effective collective measures for the prevention and removal of threats to the peace, and the suppression of acts of aggression or other breaches of the peace and to bring about by peaceful means, and in conformity with the principles of justice and international law, adjustment or settlement of international disputes or situations which might lead to a breach of the peace. Thus, both conflict prevention and

¹¹ Peer Ghulam ; Muhammad Ammad Khan Nabi, "Kashmir Conflict: Tracing the History Suggesting the Solution," *Asian Journal of Humanity, Art and Literature* 1, no. 1 (2014): 13.

¹² United Nations, *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan* (The United Nations High Commissioners for Human Rights, 2018).

¹³ Muhammad Tahir Tabassum, "Political Situation in Kashmir and Role of United Nations Studies of Changing Societies," *Comparative and Interdisciplinary Focus* 1, no. 2 (2012): 2.

¹⁴ Sumit Ganguly, "Kashmir: Roots of Conflict, Paths to Peace," *Journal of Cold War Studies* 9, no. 1 (2007): 145.

¹⁵ "UN Charter" (n.d.), chap. Chapter 1: Purposes and Principle of UN.

resolving disputes through peaceful means can be viewed as twin pillars in the foundations of the world organization which both concepts are closely interconnected.¹⁶

The First Resolution is taken on January 17, 1948, the Security Council adopted Resolution 38 on Kashmir and urged that Pakistan and India take prompt actions to improve the situation in the state. The three-member commission of Resolution 39 of January 20, 1948, composed of one elected by each party and one chosen by its third member and called for an immediate investigation into the matter fear that a worse situation could endanger international peace. In the same year, the UN Commission for India and Pakistan (UNCIP) was created by the UN Security Council Resolution 47 of 21 April 1948 replacing the Resolution of 20 January 1948. It is the duty of the commission to examine the facts of the conflict and assess the roles of the commission, and to exert some mediatory power in light of the parties' grievances. Five members of the commission noted that; both India and Pakistan desire that the question of the accession of Jammu and Kashmir to India and Pakistan should be decided through the democratic way of a free impartial plebiscite.¹⁷

It was true that the Indian Government did not claim the state as its integral part of India. However, it contradicted the attitude of the government which building up a resistance to the plebiscite. On the resolution of August 13, 1948, the first UNCIP resolution issued a three-part resolution proposing the 'material change' in the situation due to the presence of Pakistani troops in Jammu and Kashmir: 1) Simultaneously and independently India and Pakistan shall issue a cessation of fire to extend in Jammu and Kashmir to all powers under their jurisdiction and forces as soon as possible; 2) Requested a truce arrangement to withdraw its forces from that territory by the Pakistani government.

Both Government of India and Pakistan with the State of Jammu and Kashmir define its future status in compliance with the will of the citizens stating that in Jammu and Kashmir, India and Pakistan negotiated a free and fair plebiscite to determine either to join India or Pakistan. The plebiscite will take place once the ceasefire and truce agreement enforced and the plebiscite arrangement concluded. However, the resolution was not adopted since India claimed that the UN-mandated withdrawal of Pakistani troops and raiders had not taken place. Therefore, India would not reduce its troops in Jammu and Kashmir. As a result, the UN-supervised plebiscite was not implemented, as both sides not proceeded. After the UNCIP mediation steps were

¹⁶ Michael Freeman, "The Right to Self-Determination: Philosophical and Legal Perspective," *New England Journal of Public Policy* 31, no. 2 (2019): 3.

¹⁷ Tabassum, "Political Situation in Kashmir and Role of United Nations Studies of Changing Societies."

unsuccessful, arbitration held on points of discrepancies between Pakistan and India and the arbitrator.

The desire of citizens of Jammu and Kashmir for free and impartial plebiscite affirmed in the resolution of 91 on 30 March 1951.¹⁸ There was a twelve-point proposal was submitted to the current United Nations Representative for Kashmir. Furthermore, The Council instructed the governments of India and Pakistan to enter directly into talks on the specific number of powers on either side of the cease-fire at the end of the demilitarization period under the leadership of the United Nations Representative for India and Pakistan. Nevertheless, the Council acknowledged that consensus had not been achieved on a strategy to demilitarize the Country, as the governments of Pakistan and India had not fully agreed on the twelve-point recommendations.¹⁹ On Resolution 98 of 23 December 1952, the United Nations Security Council mandated within 30 days India and Pakistan agree on the demilitarization of Kashmir in respect of the specific number within the parameters of the military field specified. During all of these passages of the United Nations Resolutions, a significant event was supported by the Indian Government, which approved Kashmir's accession to India on 6 February 1954.²⁰

UN officials have produced different reports on the various positions and arguments to related countries. One thing that still stands out is that Kashmiris have the right to decide their future, which is a matter of visits and reports. For more than twenty exclusive UN Resolution in dealing with Kashmir disputes. The Security Council seemed to be disengaged from its mediating role, which it had played since the beginning of the dispute, until 1965, when the Cold War was at its peak and the UN was very busy elsewhere and due to its repeated absence of demilitarization of Kashmir. The conflict was mainly resolved bilaterally after 1965, India and Pakistan. The aforementioned Kashmir dispute between India and Pakistan illustrates four important issues such as the accession question, the problem of aggression, the issue of self-determination, and last of all, the topic of the resolutions of the UN.

President of both countries concluded through bilateral negotiations and other methods, signed the 1972 Simla Peace Agreement, to settle the differences through peaceful means. Pakistan lost its East part during the war that led to Bangladesh's nascent formation. Once the Simla Agreement has taken up in India, the Simla Agreement substituted the UN's resolutions as

¹⁸ Ibid.

¹⁹ Muhammad Abdul Qadeer, "United Nations Resolutions on Kashmir and Their Relevance," *Journal of Strategic Affairs* 2, no. 2 (2018): 81.

²⁰ Sahabat Akram, "UN Mediation on Kashmir Dispute: Past and Future," *International Journal of History and Philosophical Research* 3, no. 2 (2015): 5.

a framework for settling the Kashmir dispute. However, India stated that is once a bilateral dispute that should be settled without international intervention or by any third party. Pakistan argues that both countries are not bound but merely to find the bilateral solution through the agreement. The United Nations has neither the authority nor the obligation to pursue a resolution in the Kashmir dispute; it can only advise and suggest. The root of the Kashmir dispute cannot be identified, except in intervention, in the Security Council discussion; it resides in India and Pakistan's internal politics.²¹ On behalf of India's government, Syed Akbaruddin emphasized what goes around in Kashmir is the internal issue of India.²² However, the international community does not see this never-ending dispute as a mere internal issue. Nothing positive even a concrete outcome is perceived by the Kashmiri people even after the case has been running for decades and dozens of documents have been issued by the UN.

Regardless of the gross human rights, violations, and many victims have fallen throughout the long-standing dispute, the unwilling stance of the Indian government and Pakistani government never changed to settle the dispute by peaceful means. UN stated the government is lack of cooperation. They keep renouncing the access of international human rights institutions to Jammu & Kashmir as they have conducted in the last three years continuously. In 2016, they rejected a representative of the UN High Commissioner for Human Rights, as delivered by Ra'ad Al Hussein, both India and Pakistan refused to enable unconditional access for the commission to conduct the investigation pertaining to the conflict. The same thing occurred in both 2017 and 2018. The Pakistani Government only offered that it would grant conditional access only if the Indian government does the same thing. Aside from being a lack of cooperation, the government of India is also lack of response. Before the UN Special Rapporteurs conducted communication regarding the arbitrary killings committed by Indian armed forces which estimated kill 20 civilians during protests in Jammu & Kashmir in 2016²³, UN Special Procedures in 2016 and early 2017 also attempted to communicate with the Indian government, yet it exhibits a low-key response. Thus, they condemned the unresponsiveness of the government.²⁴

²¹ Fayaz Ahmad Wani, "Role of UNO in Kashmir Issue," *The International Journal of Scientific Development and Research* 2, no. 6 (2017): 188.

²² Nimisha Jaiswal, "UN Security Council Discusses Kashmir, China Urges India And Pakistan to Ease Tensions," 2019.

²³ Tariq Osman Hyer, "Kashmir: Self-Determination versus State Terrorism," *Korean Journal of Defense Analysis* 14, no. 1 (2002): 153.

²⁴ Rashmi Sehgal, "Kashmir Conflict: Solutions and Demand for Self-Determination," *International Journal of Humanities and Social Science* 1, no. 6 (2011): 190.

3.4. The Right of Self-Determination under International Law Perspective

The principle of 'self-determination' plays a salient role in modern political thoughts and practices.²⁵ It is a contentious issue and its application has always been more controversial than its content. It was a powerful principle and a vital justification for many people's freedom, especially independence from any colonial rule. Self-determination also the complete right of people and fundamental human rights in international law²⁶ and can only be claimed by "people" not by an individual²⁷ to decide their fate in international orders without any interference and conquest. Moreover, in 1970, the right recognized as one of the main principles in a Declaration of Principles adopted by the General Assembly.²⁸ It is a central legal precept deriving from universal customary law, and is also accepted as a concept of general law, and codified under various international conventions and protocols. People and/or communities considered to perform lives with no force under foreign domination or under a certain rule that there is no willingness of the people to be subjected. People of every state have the right to self-determination, based on UN Resolution 1514 (XV) of 1960. Wilson stated:

“National aspirations must be respected; peoples may now be dominated and governed only by their consent. ‘Self-determination’ is not a phrase it is an imperative principle of action....”

The right to self-determination is defined as people shall obtain internal liberty in determining their fate in terms of political status and freely pursue their economic, social, and cultural developments.²⁹ Furthermore, the concept of self-determination is also the capability of developing further; include the right from secession from existing states.³⁰ The right is also applicable in various ways such as in the form of a choice between two existing States as the exposition of by Committee Jurists in the Aaland Island case during the League of Nation era.³¹ Under the principle of self-determination also occupies in the era of the UN that the recognition of it identifies as a new development of international law. It is explicitly mentioned in Article 1 paragraph (2) of the UN Charter stated that:

²⁵ Malcolm Evans, *International Law* (Oxford: Oxford University Press, 2018).

²⁶ Sardar M. A. Waqar Khan Arif, “Legitimacy of Right to Self-Determination under International Law,” *Pakistan Journal of Humanities and Social Sciences* 7, no. 1 (2019): 16.

²⁷ Ibid.

²⁸ Jan Klabbbers, *International Law* (Cambridge: Cambridge University Press, 2017).

²⁹ Alina Kaczorowska, *Public International Law*, 5th ed (Abingdon: Routledge, 2016).

³⁰ Malcolm N Shaw, *International Law* (Cambridge: Cambridge University Press, 2017).

³¹ Norman J. ; K. Gosta A. Andersson Padelford, “Aaland Island Question,” *The American Journal of International Law* 33, no. 3 (1939): 468.

“friendly relations among nations based on respect development of equal rights and self-determination of peoples, and to take care of other appropriate measures to strengthen universal peace.”³²

Additionally, the most crucial evolution of the right is constituted in the Article 1 of both covenants, namely the International Covenant on Civil and Political Rights (ICCPR) and the International Covenant on Economic, Social and Civil Rights (ICESCR). Richard Falk differentiates types of self-determination claims as summarized in the table 1.

Self-determination has remained indivisible even though its existence has never been easy to be implemented for a state to define its independence for the people within it due to many frictions that will arise, between the state and aspiration of the people to gain the independence. Although it has been recognized since its emergence a long time ago and recognized as a core principle of international law³³ and human rights, yet it is rare to find a state that has the willingness to simply let a part of it to secede. The unwillingness of the state can be seen through wars, violations of human rights, and other kinds of conflicts that occur ensuring the claim of self-determination by the people. Moreover, self-determination tends to be marked as a violation of domestic laws and the treason of a state's sovereignty. Thus, it keeps gaining more controversy rather than its content because it will come up with a range of new and complex issues.³⁴ Nevertheless the debatable existence, self-determination encompasses obligation under international law and regards *raison d'être* of the right to self-determination, where people are attributed right to govern themselves, to determine their status in many facets such as in terms of economic, cultural, social, moreover politics.

³² UN Charter, pt. Article 1 para. (2).

³³ Edward McWhinney, “Self-Determination of Peoples and Partition of States in Contemporary International Law,” *The Journal of Modern Hellenism* 30 (2014): 6.

³⁴ Deborah Z. Cass, “Re-Thinking Self-Determination: A Critical Analysis of Current International Law Theories,” *Syracuse Journal of International Law and Commerce* 18, no. 1 (1992): 22.

Table 1.
Types of Self-Determination Claims

Orders	Type A: Claims of Secession and Autonomy	Type B: Claims of Human Rights and Democracy
First Order	Decolonization; elimination of foreign rule (e.g., Indonesia, India, Tunisia)	The option of colonial status (e.g., Falklands)
Second Order	Secession by federal units in relation to a central government (e.g., Slovenia, Croatia, Bosnia and Herzegovina, Slovakia, Kashmir, Aceh, and Quebec)	The option of federalism
Third Order	Administrative subunits (e.g., Chechnya, Kosovo, Dagestan)	The option of legal regimes of guaranty and protection that confer rights of access, participation, and equality
Fourth Order	Indigenous communities or nations (e.g., Cree, Navajo, Zapatistas)	The option of fiduciary arrangements administered by a traditional territorial sovereign, with an undertaking to preserve traditional rights to sacred land (including hunting and fishing rights), and the ways of life of minorities and indigenous peoples

Source: Richard Falk, *Self-Determination and National Minorities*, 1997.

3.5. Components of Kashmir Right of Self-Determination and International Law Perspective

Kashmir may claim for self-determination in terms of its (1) a definable land with an independence or self-government history; (2) a different society; and (3) the desire and potential to regain sovereignty. Notwithstanding Kashmir, India and Pakistan have lived together in relative harmony, and significant conflicts among local major Muslims, Hindus, Sikhs, and Buddhists have been comparatively uncommon. It had a long history of self-government before the colonial era. All people have the right to self-determination; by virtue of the freedom, society may freely decide their political position and practice their physical, social, and cultural activities so as mentioned in the UN General Assembly Resolution 1514. Therefore, the Kashmiri people may count as such “people” under the very limited definitional principle of international law to have self-determination.³⁵ Those distressed people, legally, have the right to external self-

³⁵ Leonel Che Ako, “The Right to Self-Determination and Secession: Analysing the Catalan Case,” *Independent Student Journal* 1 (2018): 12.

determination, and external self-determination ensures that these communities have the ability to remedial separation and freedom.³⁶

Kashmir has granted internal autonomy under British colonial rule. The territory of Kashmir is clearly defined for centuries. The demographical alteration of Kashmir may have significant implications for Kashmir's assertions of independence. On the cultural subject, the Kashmiri people speak Kashmiri, whereas all Indo-European languages use Sanskrit as the root. It is a different language from either Hindi or other languages, which are spoken in India, Urdu, and other Pakistani languages. Kashmiri culture, in terms of people, clothes, customs, and cuisine are equally distinct from other cultures. In respect to economic, social, and cultural development can be set as the grounds for people to determine the extent and the pace of development.³⁷ The Kashmiri citizens have had a strong common desire to re-establish self-rule, most essential for their self-determination when it is as a nation that is oppressed by another thus creates rights in order to rise against that oppression and construct its government to express the aspirations of the community.³⁸ The people of Kashmir resisted British rule and maintained independence. Under international law, two opposing components are equally important, and they include self-determination. First, sovereign equality, territorial integrity, and refusal to intervene. It requires a duty under international law to uphold the integrity of an independent state by not using coercion or intervening in other respects in its internal affairs. The second aspect concerns the nature and the *raison d'être* of the right to self-determination, which is known that people have a right, if they are not self-governing, to govern themselves.³⁹ In the virtue of the right to self-determination, governments are required to secure the interest of distinct sections of people.⁴⁰

The right to self-determination was enacted after the emergency of the UN Charter of 1945 as part of the decolonization process.⁴¹ In the knowledge and practice of the theory of universal self-determination, it is important to point out that in both postulation and implementation under

³⁶ Milena Sterio, "On the Right to External Self-Determination: 'Selfistans' Secession and the Great Powers' Rule," *Minnesota Journal of International Law* 19, no. 1 (2010): 2.

³⁷ M. Ya'kub Aiyub Kadir, "Revisiting Self-Determination Conflicts in Indonesia: An International Law Perspective," *Indonesia Law Review* 5, no. 2 (2015): 124.

³⁸ Joshua ; Jérémie Gilbert Castellino, "Self-Determination, Indigenous Peoples and Minorities," *Macquarie Law Journal* 3 (2003): 159.

³⁹ Vladyslav Lanovoy, "Self-Determination in International Law: A Democratic Phenomenon or an Abuse of Right?," *Cambridge Journal of International and Comparative Law* 4, no. 2 (2015): 391.

⁴⁰ Johan D. Van der Vyer, "The Right to Self-Determination and Its Enforcement," *ILSA Journal of International & Comparative Law* 10, no. 421 (2004): 430.

⁴¹ Ademola Abass, *Complete International Law: Texts, Cases, and Materials*, 2nd ed (Oxford: Oxford University Press, 2014).

international law; there are two fundamental elements of the self-determination theory of operational. Under the UN Charter, self-determination is regarded in Article 1 of the UN Charter and Article 2 of the UN Charter enshrines the concept. The theory essentially allows people freely to select their national, economic, and cultural position and to determine their social status. Moreover, in Article 55 of the UN Charter, self-determination of people cited as a principle on which 'peaceful and friendly relations among nations' are conceived to be based.

For the application of the right to self-determination, the ICJ decisions and judgments can be reviewed to further claim the right to self-determination. Mr. H. Wilson noted that in his Namibia opinion (1971) the ICJ fully recognizes the right of self-determination, stating that self-determination was part of international law, including it in the United Nations Charter. Furthermore, there is considerable reference to the right of self-determination in the Declaration on Colonialism. The Court further argued that there is no doubt in the right to self-determination as a principle of contemporary international law.⁴²

The ICJ justifies that the right of self-determination is unquestionably a concept of jus cogens in contemporary international law. Jus cogens norms are the highest rules of international law and must be strictly obeyed at all times. In the view of the International Law Commission, if a state refuses to satisfy a responsibility that has a value of jus cogens in a severe manner, the states are restricted from identifying as lawful the resulting situation, and from assisting in maintaining the situation.⁴³ Moreover, ICJ views that the principle of self-determination also has the legal status of *erga omnes*. The international community as a whole is thereby indebted to *ergas omnes* obligations of a State. If the concept exceeds the level of *erga omnes*, the other international community has a mandatory obligation to respect it under certain conditions in its connection. On political matters, before the revocation of Article 370, Kashmir was one of the states in India, which had special autonomy to run its governance. According to a statement from the International Court of Justice, states that a country deserves to declare self-determination as a right that is controlled by people, not the government. Additional factors that become a consideration for the country to determine themselves as a sovereign state is when they have an ability to govern themselves, distinct culture, and defined territory. In other considerations, the government of Kashmir has done such kind of activities, as follows: 1) Government were done

⁴² Gentian Zyberi, "Self-Determination through the Lens of the International Court of Justice," *Netherlands International Law Review* 56, no. 3 (2009): 435.

⁴³ Matthew Saul, "The Normative Status of Self-Determination in International Law: A Formula for Uncertainty in the Scope and Content of the Right," *Human Rights Law Review* 11, no. 4 (2011): 634.

to developing for economic and socio-economic; 2) Government were done to improving infrastructure for public services; 3) Private Institution has been increased in the region; 4) Government is working to increase the numbers of jobs for local youth; and 5) Solar energy plant is going to be established.

Article 55 reinforced the clause that clarified the position and self-determination of the concept of fair protection as part of its stability. To clarify the application of the right in Article 56 of the Charter the responsibility placed upon all members of the organization. Moreover, paragraph 2 and 3 clarify that the right to self-determination and the absence of backwardness in governance, culture, community, and schooling will not deter sovereignty.⁴⁴ Therefore, it shows that the right to self-determination of the Kashmiri is apparent.

According to those statements above, it clears that Kashmir has a right to determine their position whether the tendency is to be affiliated with India, Pakistan, or becoming an independent state. According to a statement from the International Court of Justice (ICJ), Kashmir has been fulfilling the requirements to have a right to self-determination. In its Namibian opinion of 1971, the ICJ fully acknowledges the right of self-determination and stated that the right of self-determination was part of international law. The strong references for right are further explained in the Declaration on the Colonialism. Furthermore, the court argued regard to the right of self-determination is a necessary principle of contemporary.⁴⁵

The problem has now deteriorated to a point where some sort of international diplomatic involvement is required. But it is not to suggest it self-determination does not have a core position to perform. A solution to the Kashmir conflict needs something more than a mere exercising the freedom of self-determination. Throughout the early decades, self-determination was once known so as the Kashmiri people to be a part of either India or Pakistan. However, over the past few years, there has been a different level of it. Therefore, self-determination is now about Kashmiri people have a right to establish their independence, sovereign state of Jammu and Kashmir which is part of neither Pakistan nor India.

⁴⁴ Muhammad Mumtaz, "Right of Self-Determination for Kashmiri People: An International Law Perspective," *International Journal of Business, Economics and Law* 1, no. 1 (2012): 137.

⁴⁵ Mohamed Daadaoui, "The Western Sahara Conflict: Towards a Constructive Approach to Self-Determination," *The Journal of North African Studies* 2, no. 2008 (13AD): 151.

4. Conclusions

The crisis in Kashmir is continuing *ad infinitum*, and the entire analysis reveals that the Kashmir dispute poses multiple legal issues such as accession, aggression, and self-determination. Even though the UN has issued many resolutions regarding the self-determination to settle the dispute and give the Kashmir rights to determine their own future, however, both the India and Pakistan governments seem consistently try to refuse to implement the right and destiny over Kashmiri. Neither India nor Pakistan does not want to let Kashmir secede by impeding the plebiscite to be conducted, nevertheless, the Jammu and Kashmir Plebiscite Party was formed to prepare the plebiscite, yet it has still never held. Aside from that, the non-compliance to withdraw both troops and raiders in Kashmir as another ground the plebiscite cannot be done. India and Pakistan should stick with the Resolution issued by the United Nations on giving the right to self-determination for Kashmir. In case both governments do not deliver the right, so Security Council may request the International Court of Justice or the international community to pay more attention and put the pressure on the related state in the name of justice over the Kashmiris.

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