

# NLIU मंथन

## *Discuss, Debate and Deliberate*

### Summary of Discussion held on 28<sup>th</sup> August, 2013 in Academic Block- I

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#### *“Jammu & Kashmir: Legality of Accession, Role of Security Council and Possible Solution”*

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For the sake of discussion, the topic was divided into the following four sub-heads: The genesis of Jammu and Kashmir Dispute, Legality of Jammu and Kashmir, Role Played by Security Council in resolution of Dispute, Possible Solution to problem with focus on Article 370 of Constitution.

The discussion began by examining the genesis of Kashmir dispute and the forum tried to ascertain the legality of accession of Jammu & Kashmir to India. The root of dispute was traced in the demise of British Empire in South Asia and the partition of British India in 1947. But the most important reason for dispute lies in the failure of the British in providing a successful mechanism for integration of Princely States into India or Pakistan. The forum tried to ascertain if the Instrument of Accession executed by the Maharaja of Kashmir completed the integration of Kashmir to India and whether the integration was legal. Based on the combined reading of Section 8 (2) of Indian Independence Act of 1947 and Section 6 of Government of India Act 1935, it was argued that the power to accede to either of the two Dominions was given to the Ruler of the Princely States. It was also pointed out that non acceptance of this principle of sovereignty of Ruler over the state in case of Hyderabad and Junagadh did not affect what was legal under the above provisions as the very existence of India and Pakistan is by virtue of Indian Independence Act of 1947.

It was also accepted that in monarchical form of government, it is the sovereign who is recognized and not the subjects of the sovereign.<sup>1</sup> Also the sovereignty of Maharaja was accepted by Pakistan when it entered into Standstill Agreement with the Maharaja on 15 August, 1957. Moreover, the point that the decision to accede to either of the two Dominions was the exclusive right of Ruler was endorsed by Pakistan when it accepted the accession of Junagadh.<sup>2</sup> Also, India being a secular state and a non-believer of Two Nation Theory cannot relinquish its claim over a state just on basis of religious considerations. Even Sheikh Abdullah, the leader of National Conference, requested India for accession and thus Government of India never had / was even not authorised under the Act to make provisional accession. Thus the accession of Jammu and Kashmir is complete and completely legal. Moreover, in order to show its commitment to democratize the State, India tried to ascertain the wish of people by way of Constituent Assembly which ratified the accession of Jammu & Kashmir to India on February 15, 1954.

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<sup>1</sup> USA v. Wagner (1867) L.R. 2 Ch. App. 582.

<sup>2</sup> Hindu majority area ruled by Muslim Nawab.

The forum then discussed the role played by Security Council in resolution of Jammu & Kashmir dispute. It was argued that by the resolution of UNCIP<sup>3</sup> dated August 13, 1948, it can be inferred that by allowing India to maintain minimum forces necessary to assist local authorities in observance of law and order, UNCIP indirectly recognized the legality of accession of Jammu & Kashmir to India. It was pointed out that Security Council failed to resolve Kashmir problem because of the following reasons:

1. It looked into the problem as political dispute and failed to compel India and Pakistan to come to binding –final resolution of dispute.
2. It failed to declare Pakistan as the aggressor and just recommended withdrawal of Pakistani troops.
3. Failed to realise that wish of Government of India to settle the question of accession by reference to people was a unilateral offer made by Government of India to people of Jammu & Kashmir and Pakistan had no *locus standi* in the matter.

In relation to plebiscite it was argued that as the accession is complete, final, & legal, India cannot reopen the whole integration process by allowing for plebiscite in the present circumstances. Also the failure of Security Council to resolve the dispute had forced both the parties to shift to Bilateral Resolution of Dispute by way of Shimla Agreement. Thus Kashmir is an integral part of India even by way of Constitution of Jammu & Kashmir and thus plebiscite is no longer a feasible option.

Then the forum discussed if we need to continue with the special status given to Jammu & Kashmir under Article 370 of the Indian Constitution, 1948. It was pointed out that although Art. 370(3) allows the Central government to maintain effective control over the State, it is Art. 370 (1)(b)(i)-(ii) which is the basic hindrance in the accession of State in true sense. Also, it is this very provision which prevents people from other states from buying land and settling in Jammu & Kashmir. Thus, as Art. 370 is a temporary provision and thus respecting the intent of the Constituent Assembly we should remove this provision in steps starting with Art. 370 (1)(b)(i)-(ii) and ending with Art. 370(3). This will allow Indians to settle in Jammu and Kashmir and the uniformity of laws will ensure gradual and psychological integration of people of Jammu and Kashmir with the rest of India. In relation to the part of Jammu and Kashmir occupied by Pakistan and China it was suggested that India should continue to show these areas as part of India and should use International Forums to put China and Pakistan on the wrong side and make them responsible for the crisis.

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<sup>3</sup> United Nations Commission for India and Pakistan, 1949.