



Self Rule and Demilitarisation in Kashmir

December 2005

JKCHR

**Jammu and Kashmir Council for Human Rights
NGO in Special Consultative Status
with the United Nations**

Self Rule & Demilitarisation in Kashmir Hurdles in the Way

Just as we prepare to bid adieu to the year 2005 and usher in 365 uncertain days of the new year 2006 an option of Self Rule & Demilitarisation in Kashmir has been added in the vocabulary of 128 year old Rights Movement. It is suggested by a school of politics which despised and pooh poohed it in 1996 when 'sky was the limit'.

A slaughter and a trauma has been allowed to take its toll in the intervening 9 years. Those who had a duty to conserve life privately set out to endanger it. As such a criminal liability for violating a public trust awaits them in the days ahead.

Civil Society and life spread of a common man and woman in any discipline, social, political, academic, religious and secular on the Indian side of Kashmir has been hit hard in the last 15 years. It has never been so unreal, unreliable, confused and unauthoritative in the history of the Rights Movement. It is not the same as I left it in 1973, saw it in 1985 and again observed in 1996. Hell has broken loose after 1996.

One thing that a common man and woman and their leadership avoid to admit is a simple fact that they are no more in charge of any shade of their life. They are worse off than they were at the time when they entered into a Stand Still Agreement on 15 August 1947 with the Government of Pakistan and presented an Instrument of Accession on 26 October 1947 to the Government of India.

Common man seems to have given up in favour of a post 1990 culture of politics which is unreal, private, commercialised, undemocratic and surviving either in reference to the sovereign instinct of Delhi or of Islamabad. Unreal people, unreal leaders, unreal NGOs, unreal journalists and unreal administration are the gifts that our boys brought along with a gun from the neighbourhood.

The pre 1990 spread of social, political, academic, religious and secular life in Kashmir is unrecognizable from the post 1990. Life, language and attire of the post 1990 leaders as we saw them in Islamabad, Geneva, Casablanca, New York, London, Limassol, Brussels, Muzaffarabad, Srinagar, Jammu or any part of the world has undergone a complete metamorphosis.

In Islamabad they would long for a pair of trousers (Kameez Shalwar) and in London their Bank in September 1996 would refuse to honour a Gas Bill Cheque in the sum of £112.65 (one hundred and twelve pounds and sixty five pence). As seemingly honest hermits in Srinagar, a position they faked, they

would ask us to urge Pakistan not to send money to any one in the Valley. A word that they failed to keep and a temptation that they failed to resist. The money they receive now in and around their hermitage does not corrupt any more.

Pakistan with all her best love for the Rights Movement in Kashmir may have to yield to admit that the establishment abounds in the natural resource of 'opportunism' and betrayal. It betrayed Taliban in Afghanistan, it betrayed the Sikhs in Punjab and it has betrayed the Kashmiris in the Valley.

Peace must return to Kashmir and people in India and Pakistan must move ahead in trust and good relations. So any option that takes the three people to peace, prosperity and development is a common gift. It has to be supported. However, Kashmir is a case in exception and the common man has suffered throughout history because his leader lacked the understanding of the case and he failed to exercise his mature judgement in the best interests of his people.

Kashmiri leader of today has adjusted himself in relation to Delhi or Pakistan. The one who has adjusted his understanding in reference to Delhi is secular, non violent and fairly transparent. On the contrary all others in politics, journalism, law, academia and various other disciplines of life who have either been supplanted or who have voluntarily or out of fear adjusted in reference to a common command from Islamabad, have profited from violence, from sponsoring killing, tagging people and are deceitful. They have acted as political amoebae in the last 15 years.

They oscillate in their poise and this characteristic is collateral to the needs and dictates of Islamabad.

Before one settles down to any of the options one has to address some fundamentals of the Rights Movement. The foremost of these variables cannot be nudge passed for any quick-fix or self serving interest of India, Pakistan or their supplants in politics in any administration. The best interest of the people shall have to be addressed first as a domineering factor. The various important variables embedded in the dispute are:

- (1) Issue of 128 Year old Rights Movement of the people
- (2) Title to self determination of the people of Jammu and Kashmir
- (3) Issue of Stand Still Agreement of 15 August 1947 with the Government of Pakistan
- (4) Issue of Instrument of Accession of 26 October 1947 with the Government India and the three basic stipulations
- (5) Jurisprudence of Indian Control in accordance with Instrument of Accession
- (6) Jurisprudence of Pakistani Control under UNCIP

- (7) Jurisprudence of Pakistani Control of Northern Areas under Karachi Agreement of April 1949
- (8) Jurisprudence of duality in Pakistani control of Azad Kashmir (UNCIP) and Northern Areas (KA)
- (9) Constitution of India
- (10) Constitution of Pakistan
- (11) Jurisprudence of UN Resolutions on Kashmir
- (12) Jurisprudence of the Constitutional Discipline Given by Hurriet in 1993
- (13) Jurisprudence of Militancy

The people of Jammu and Kashmir have a 128 year old Rights Movement. Before India and Pakistan became Independent in August 1947, the Rights Movement of the people of Jammu and Kashmir was phrased by the leadership (National Conference) in 1946 and submitted to the Cabinet Mission in the following manner:

“Today the national demand of the people of Kashmir is not merely the establishment of a responsible Government, but their right to absolute freedom from autocratic rule. The immensity of the wrong done to our people by the sale deed of 1846 can only be judged by looking into the actual living conditions of the people. It is the depth of our torment that has given strength to our purpose”.

People of Jammu and Kashmir (of all the three administrations) have an Instrument of Accession with Government of India. It is provisional and rests on three stipulations i.e, that “troops of the Indian Army would help Kashmiri forces to defend the territory and would protect the lives, property and honour of Kashmiri people”. The territorial integrity is one of the requirements of the Instrument of Accession. Further more, if Indian army has failed to protect the lives, property and honour of Kashmiri people, the agreement becomes unsustainable on the one hand and on the other the Government of India accrues a composite liability in respect of the lives, property and honour of the people of Kashmir. Culpability and liability is an associate element in the fundamentals of Instrument of Accession.

Pakistan as supporter of right of self determination and as a party to the dispute has wronged the people of Kashmir more than India has through a continuous practice of proxy politics. The unreliability and self interest of Pakistani establishment needs dusting and examination for a common and maximum benefit of all the three parties.

Pakistan was the first sovereign State to gain a practical and a de jure foot hold in Kashmir on 15 August 1947. Government of Pakistan entered into a Stand Still Agreement with the Government of Jammu and Kashmir. Under this agreement the Post and Telegraph services of the State came under the control of Pakistan.

It emerges that Pakistan turned a back on the history of the long struggle of the people and ran riot to hunt with Maharaja. Pakistan failed to honour this Agreement and caused a parallel Government against the Maharaja on 4 October 1947. It reconstituted the same Government on 24 October 1947. From 15 August 1947 to 24 October 1947 the establishment in Pakistan changed three goal posts in its interest in Kashmir.

In regard to Kashmir this opportunism and abuse has remained very significant during the last 58 years. The recent short listing, approbation, rejection and disposal as toxic waste of factions in Hurriet or of non Hurriet political characters needs to be linked to a chronic itch of betrayal of the establishment dating back to November 1947.

In November 1947 Pakistan not only proposed to India to 'make a joint war' on the resistance movement in Kashmir but the Prime Minister on 24 November 1947 cabled a letter to British Prime Minister and did two major harms to the jurisprudence of the case and honour of the Kashmiri leadership.

Prime Minister of Pakistan disapproves the British Prime Minister's proposal that the President of the "International Court of Justice should be privately asked to find out whether he is of the opinion that it would be practicable and he would be willing to try to get together a small team of international experts, not connected with India, Pakistan or the United Kingdom, in the event of a joint request being preferred by the Governments of India and Pakistan for this to be done".

Prime Minister of Pakistan replied that, "Your suggestion of having recourse to International Court of Justice appears to be based on an inadequate appreciation of realities in Kashmir". Fifty-three years later in 1990 and since after, the term 'ground realities' has been profusely used as a scaring weapon against political opponents.

In para 3 of his letter Prime Minister of Pakistan savages the character of Sheikh Abdullah. He writes that "The India Government are also trying to mislead the world by stating that the people of Kashmir asked them through Sheikh Abdullah to send their troops to Kashmir. Sheikh Abdullah has been a paid agent of Congress for the last two decades and with the exception of some gangsters whom he has purchased with Congress money he has no following among Muslim masses. It is astonishing that Pandit Nehru, who knows these facts, should proclaim this Quisling to be the acknowledged leader of Muslims of Kashmir".

It was just 17 years after he was so viciously savaged that Sheikh Abdullah was invited to Pakistan in May 1964 to a historic reception. Justice M Y Saraf in his book *Kashmiris Fight for Freedom* writes that “a special PIA aircraft flew him to Rawalpindi to a welcome, unprecedented in the history of the city. On entry into Rawalpindi space, the plane was escorted by a red-painted heli-copter. Another heli-copter hovered the airport, filming the crowd; as the procession wended the nine-mile route, it circled over the route taking photographs. It was for the first time that filming was done by heli-copter on the visit of a dignitary.”

If Pakistan had the right of self determination of the people of Kashmir, as a member nation of UN, dear to its heart, it would have understood the jurisprudence of numericals and created a popular awareness around the jurisprudence of numbers in a ‘plebiscite’ or a ‘referendum’. It would have made every effort to ensure respect for right to life in Jammu and Kashmir. Violence, political killings and common killings would not have visited the homes, hearths and streets of Kashmir.

One may accept as an argument that occupation is undone by the use of a force. In that respect militant resistance against Indian security forces could be argued. But Pakistan has accepted the Indian control at the UN and the non use of any force in all her bilateral agreements with India. Therefore, any support to a militant movement was calculated to cause loss of life, violation of human rights and a loss of face for India. The immediate or aggregate interest in the Rights Movement of the people Kashmir was but of a fringe interest in the hearts and minds of the establishment.

Moreover, India does not occupy Kashmir. There is a bilateral agreement in return of defending the territorial integrity and to protect the lives, property and honour of Kashmiri people. India may have failed to keep the terms of the agreement but its control is conceded by Pakistan in her many bilateral agreements with India.

Under the terms of declaration of the provisional government of 24 October 1947 and Pakistan’s assumption of control of Azad Kashmir under its avowed responsibilities under UNCIP resolutions and Karachi Agreement of April 1949, it is the embedded duty of the Government of Pakistan to protect the interests of the people of Jammu and Kashmir.

Unfortunately Pakistan has camouflaged its embedded water interests in Kashmir in her half hearted and self serving support of the Rights Movement. Otherwise Pakistan would not have used and abused the Kashmiri leadership in the Valley, in Muzaffarabad and Gilgit and Baltistan. India has a credibility problem in the Valley but she has no such issue at hand in any other region. Pakistan has remained instrumental in accrediting and discrediting the

Muslim leadership in Kashmir. The disease of mistrust among Muslims in the Valley runs as dirty as the water in Dal Lake.

Again if Pakistan had any genuine interest in the right of self determination of the people of Kashmir it would not have allowed Kashmir to be formally deleted under Rule 11 of Procedure Rules of UN SC, from the UN Security Council Agenda in August 1996. It was there until August 1996 for 48 years as a regular and sitting pending agenda item. Now it has slipped from that position and remains there subject to an annual 'reminder' rule. Kashmir in June 19-23 India Pakistan talks moved from its position of a core issue to one of the eight other issues.

It may be that Pakistan does not see any good in UN package on Kashmir and to annex Azad Kashmir and Gilgit and Baltistan within the territorial definition of Pakistan, may be waiting for a safe opportunity to let go the annual reminder and cause a permanent deletion of Kashmir from the UN Security Council agenda. Unfortunately, Kashmiri leadership and intelligentsia have trusted Pakistan too heavily and too much and have failed to go universal on Kashmir. Therefore, it is not certain whether we may have any other member nation to assist us in following an annual 'reminder' rule to keep Kashmir on UN SC agenda.

Winds of change have hit all the three administrations of Jammu and Kashmir. People have started asserting themselves and see common sense in demanding human rights in the two administrations under Pakistani control as well. Pakistan has been able to physically insulate Azad Kashmir and Northern Areas from each other and the two administrations from rest of the world upto the morning of 8 October 2005. Unfortunately a cruel and mysterious hand of God changed the human history and habitat of Azad Kashmir. The area has been exposed to the outside world and we have UNMOGIP, other UN bodies, NATO and international NGOs camped there.

The establishment in Pakistan cannot continue to use and abuse its surrogates in politics in the Valley, in Azad Kashmir and Northern Areas for long. Many who offered, though faithfully, their shoulder for a gun, their tongue for a word and their legs to a tune, have started setting up families, running away for asylum in UK, are sending their hitherto future Mujahideen sons to work in off licence shops in London, USA, Canada or Brussels and other countries. Others who sold jihad in Saudia are desperately seeking to find a foothold in secular Britain.

Establishment in Pakistan as time passes has become corrupt around the issue of Kashmir. It seeks out on either side of LOC corrupts in the Kashmiri community as alliances. It is on this account that after causing death of a generation in Kashmir, putting our womenfolk through a shared rape, at the hands of Indian security forces and Pakistan trained militants alike, driving

the people to economic ruin, despair, starvation and prostitution, causing an unprecedented trauma, that the establishment in Pakistan has decided to turn to a new leaf of experiments and show generosity at the cost of a 'humbled' and badly beaten people.

Pakistan has supported UN resolutions for 42 years until 1990, militancy for 13 years until January 2003 and after pledging to India that it would not allow its territory or part of the territory under its control to be used against India has decided to go non UN on Kashmir. It set up a Kashmiri Alliance (APHC) in 1993 and handed them over a Constitutional discipline.

APHC has fooled a nation into a belief that they are a genuine corporate political institution pursuing a constitutional programme in the best interests of the people. It fooled the nation that it was in any way near enough to command and control of militant aspect of the resistance.

APHC fell apart when it was destined to fracture and constituents were briefed to go either way as and when required by the establishment in Islamabad. Unlike Sheikh Abdullah APHC leaders have no problem in affirming loyalty to the constitution of India in filing their passport applications, in enjoying Indian police protection at home and on the road and at the same time posing a verbal challenge to the constitution of India and in holding out a claim for 'azadi'.

Kashmiri leadership of both factions of APHC and others sharing the same purse but outside APHC have supported Self Rule and Demilitarisation idea preferred by President Musharraf towards the end of 2005. On the Azad Kashmir side the role of main stream Kashmiri leadership has remained to dry the dirty linen of Pakistani rulers. After 1990 the establishment in Islamabad succeeded through lure and threat in expanding its constituency of 'washermen' in all walks of life in the Valley. However, Mirwaiz Umar Farooq has remained the lead 'Dhobi' to wash and dry the dirty wash. He has remained the 'set and to be released' stone held in the pellet-bow by the establishment in Islamabad.

On 27 December 1992 he started as a human rights defender until on 8 March 1993 he along with some others decided to have a common political platform 'under the name and style of "All Parties Hurriet (Freedom) Conference'. Alliance gave a constitutional discipline to the people of Kashmir in July 1993. People from within and without the borders of Kashmir offered support to this political programme. Good meaning members of civil society in India and Pakistan also supported Kashmiri political struggle headed by APHC.

Ever since it cost them (people of Kashmir) the death of a generation, invited Indian security forces from remote areas into the bed rooms, precipitated a massive violation of human rights, caused rape, death under torture,

disappearances and has driven people to despair and women to prostitution in many parts of the Valley.

Now all of a sudden from no where the 'Chief Priest' seems to have had a divine revelation to jettison all that he sold from December 1992 up until his visit of Pakistan in June 2005. He has started selling Self Rule and Demilitarisation from November 2005. There is no bar on expressed opinions in politics. However, those in public life, more so, in exceptional case like Kashmir, have to remain ever ready to explain their case before the public.

A change of horse, mid stream, makes it even more important that APHC faction lead by Mirwaiz is asked to explain, a change which is too late and much inferior to an option offered by Prime Minister P V Narasimha Rao in 1996 that in autonomy or self rule 'sky is the limit'.

The phrase self-rule has to be looked upon with an added suspicion and a reasonable caution. It was first used by JKLF leader Yasin Malik in his telephonic address to an International Conference on the Right of Self-Determination organised by IHRAAM and ICHR in Geneva on 11-13 August 2000. IHRAAM had accredited Majid Trambo and he had floated ICHR when there was a serious dispute about the ownership of KCHR. He was Secretary General of KCHR but others had banned him to act in the name of KCHR.

Trambo is an interesting Kashmiri and looks at life and politics from the point of view of a businessman. His negotiation paper in seeking IHRAAM accreditation, experiments with JKCHR, KCHR, ICHR, Kashmir Foundation, Pamposh News Agency, Hameed Blood Bank, JK Liberation Council, JKLF, NLF, release and launch of some people, discovering Kashmir, discovering laws of gravitation & finally discovering Aladdin's Cave reveal it all. It ended his heartfelt remorse and lonely days in Geneva.

I was chairing the Conference session when Yasin Malik addressed the Conference. It was an interesting development at that time. Yasin Malik's negotiated release from Indian detention was a hot debate as well. There is nothing bad about a release or a negotiated release. But the trio that was involved in his release fell apart in no time. So their partnership in Malik's release was not part of their genuine concern in the loss of liberty and rights of a Kashmiri but there were other adjectives attached to the move.

I have looked at Kashmir case as a lawyer and as a Kashmiri. I take pride in the fact that I have created awareness around the jurisprudence of three administrations, five governments and five constitutions in this regard.

I distinguished between the title of the Kashmiri people to self determination and the respective claims of India and Pakistan in my paper read at the 11-13 August 2000 International Conference on the Right of Self-Determination organised by IHRAAM and ICHR in Geneva. To my knowledge Indian and Pakistani establishments were invited to this Conference. Their presence and strength could be felt and smelt in and around the conference.

I have looked at Kashmir as a case of Rights Movement ever since my booklet Kashmir Ka Waris was banned in Pakistan in July 1979 and a case under Martial Law Regulation 13 and 53 was registered against me for allegedly 'creating hatred and contempt against the Government and prejudicing the maintenance of friendly relations between the Government of Pakistan and the Government of Azad Kashmir'.

During my December 1996 visit, 11 years after I was deported in 1985 by the Kashmir administration on the advice of Government in Delhi, I met Yasin Malik at his house and a record of this meeting is carried in my report of February 1997 "Sixteen Days in Kashmir". Malik's reference to self-rule was in no way an off the cuff remark.

I met Malik again at a 2 Day Conference "Next step in Jammu and Kashmir: Give Peace A Chance" 25-26 November 2000 organised jointly by the International Centre for Peace Initiatives, Mumbai, India and Institute of Regional Studies, Islamabad, Pakistan at Bristol Hotel, in Gurgaon, India.

I had seen Malik in Rawalpindi and Muzaffarabad many a time. Both of us may have been over busy and uninterested in each other in our own ways in early 1990s. However, I knew about the last meeting that he had with late Khawaja Samad Wani and some other friends before returning to Srinagar as part of his plan to launch his own JKLF faction. At Bristol Conference Shabir Shah had been deliberately kept out and Malik represented APHC at the 2 Day Conference.

A gossip was floated by one of the participants from London (one time member of KCHR) that Bristol Conference was organised to launch Yasin Malik as a favourite in Kashmiri politics. It upset us and I called a meeting which was attended by Prof. Nazir Nazish and Prof. Abdullah Raina. We discussed this matter and other associate issues.

We watched the Conference events with an added degree of interest. I was surprised to see that Malik who had advocated a self rule in Geneva Conference did not object on the 10 principles in the document prepared by two think tanks of India and Pakistan. The principles accorded a role for the Kashmiris in consultation and kept them out of any substantive role in the decision making.

Phase 1 Part II of the process stated that “Talks between GOI and APHC besides other Kashmiri groups should be with a limited agenda – “to discuss the process and not substance of resolving the Kashmir conflict”. More surprising was point 5 in phase 4 which read – “...Parallel meetings between the heads of Inter-Services Intelligence (ISI) and Research and Analysis Wing (RAW) should take place to ensure peace in areas of their jurisdiction.”

Malik stayed throughout the two day duration of the Conference but did not voice any disagreement on the process paper and did not seek any substantive role for the people of Kashmir either. (Please see my paper read at the Gurgaon Conference in November 2000 annexed at the end of this report).

Self Rule has re-emerged once again after August 2000. In fact the option was first tendered by Prime Minister Rao in 1996 and APHC pooh poohed it at that time. If it is an option now it was more valid in 1996 and we would have saved Kashmir from a substantive loss of life, destruction and trauma.

Moreover the announcement is not clear in regards to Mirwaiz’s understanding that in case of a Self-Rule in Kashmir, to what extent and in what manner it has to be a Shared Rule with India and Pakistan. How is this notion going to encompass the three administrations of Jammu and Kashmir and reconcile with the jurisprudence of 128 year old Rights Movement, accession with India, Pakistan’s assumption of control under UNCIP resolutions, Karachi Agreement of 1949 and the UN package on Kashmir.

Chandigarh in India, a Union Territory (federal district) is an example of self-rule and shared rule arrangements. It serves simultaneously as the capital of two states, Punjab and Haryana. Its buildings are literally divided in half, so that on each floor one wing houses a particular function serving Punjab, and the other wing the parallel functions serving Haryana.

Devolution or home rule is the granting of powers from central government to government at regional or local level. It differs from federalism in that the powers devolved are temporary and ultimately reside in central government, thus the state remains unitary. Any devolved assemblies can be repealed by central government in the same way as an ordinary law can be. Federal systems differ in that subnational government is guaranteed in the constitution.

The devolution can be mainly financial, e.g. giving regions a budget which was formerly administered by central government. However, the power to make legislation relevant to the area may also be granted.

In the United States, the District of Columbia offers an excellent illustration of the nature of devolved government. The District is separate from any state, and has its own elected government; in many ways, on a day-to-day basis, it

operates much like another state, with its own laws, court system, Department of Motor Vehicles, public university, and so on.

However, the governments of the 50 states have a broad range of powers reserved to them by the U.S. Constitution, and most of their laws cannot be voided by any act of the U.S. federal government. The District of Columbia, by contrast, is constitutionally under the sole control of the United States Congress, which created the current District government by statute. Any law passed by the District legislature can be nullified by Congressional action, and indeed the District government could be significantly altered or eliminated entirely by a simple majority vote in Congress.

In the United Kingdom, devolved government was created following referenda in Wales and Scotland in September 1997. In 1999, the Scottish Parliament, National Assembly for Wales, Northern Ireland Assembly and Greater London Assembly were established. The move came eighteen years after similar proposals were defeated in referenda in Wales and Scotland on March 1979.

England remains without regional government. Following the defeat of plans for a regional assembly in the North East of England in 2004, Tony Blair's Labour Government abandoned plans for English devolution. The West Lothian question still remains unresolved.

There is also a system of home rule in Denmark for Greenland and the Faroe Islands. The term Home Rule appears in the first stanza of the English language version of the National Anthem of the Isle of Man.

The Isle of Man in the Irish Sea is not actually part of the United Kingdom but is, legally, a dependency of the British crown. Occupying 220 square miles the island is surrounded to the north by Scotland, to the east by England, to the south by Wales and to the west by Northern Ireland.

The island has a governmental body of its own in the Tynwald which passes laws subject to royal consent. The island produces its own coins and notes in UK currency denominations. It has a population of 65,000 and the original language of Manx (Which was closer to Scottish than Irish Gaelic) has been virtually extinct since the 1970's with English becoming the dominant language.

The Isle of Man was a Norwegian territory until 1266 when it was ceded to Scotland. It came under British administration in 1765. The island's capital is Douglas, with other major towns being Ramsey and Peel. Man is now a parliamentary democracy. Elections are held without official party attribution, but some members of parliament represent the Alliance for Progressive Government (APG) and the Manx Labour Party (MLP).

Before taking up a Self Rule option one has to see whether the Rights Movement from 1877 upto 1946 and again from October 1947 upto 1990 and from 1992 to 2005 has any hue of a struggle for a Self Rule? It has surfaced in 1996, 2000 and 20005.

Jurisprudence of Indian Control.

Maharaja of Jammu and Kashmir entered into a bilateral agreement with the Government of India on 26 October 1947. It is an appeal for military aid, which in view of 'special circumstances' was duly accepted. Indian troops were despatched to help Kashmiri forces to defend 'territory and to protect the lives, property and honour of the people'.

The other express caveat has been that "in the case of any State where the issue of accession has been the subject of dispute, the question of accession should be decided in accordance with the wishes of the people of the State".

Government of India slated an express commitment that "as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the State's accession should be settled by a reference to the people".

According to this bilateral agreement Government of India took upon to defend the 'territory', protect 'lives', 'property' and honour of the people. The Territory of the State is defined in Part II Section 4 of The Constitution of Jammu and Kashmir (Indian administered) adopted on 17 November 1956.

The territory of the State comprises all the 'territories which on the fifteenth day of August, 1947, were under the sovereignty or suzerainty of the Ruler of the State". The preamble of the Kashmir constitution makes a declaration in full cognizance of the "accession of the State to India which took place on 27 October 1947".

The Constitution under Part II Section 3 states that "The State of Jammu and Kashmir is and shall be an integral part of the Union of India". It conflicts with the principal commitment that "as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the State's accession should be settled by a reference to the people".

It further conflicts with 24 January 1957 Security Council Resolution. It declared that the convening of a Constituent Assembly and any action it might have taken or might attempt to take to determine the future shape and affiliation of the State of Jammu and Kashmir or any action taken to support such action by that Assembly would not constitute a disposition of the State in accordance with the principle enunciated in earlier resolutions.

India too in her letter of 9 August 1957 addressed to the UN SC and in the debate while rejecting the Pakistani allegations made in their letter of 5 August further, expressed its anger on the use of the term "India-held zone". Indian representative said that it (India-held zone) had no sanction in the Security Council or UNCIP resolutions.

He said that it was a patent misrepresentation of the facts. Pakistan, he said, was in occupation of the territory of the Union of India by aggression and continued to be in occupation of that territory in violation of the Council's resolution of 17 January 1948 and the two UNCIP resolutions.

The Territorial jurisdiction taken upon by the Government of India to defend is further confirmed in Chapter VI Section 48 of the Constitution of Jammu and Kashmir. Under the title 'Provision relating to Pakistan occupied territory' it reads that "Notwithstanding anything contained in Section 47, until the area of the State under the occupation of Pakistan ceases to be so occupied and the people residing in that elect their representatives:- twenty four seats in the Legislative Assembly shall remain vacant and shall not be taken into account for reckoning the total membership of the Assembly; and the said area shall be excluded in delimiting the territorial constituencies under section 47.

On 22 February 1994 Indian Parliament has unanimously confirmed its territorial interest in respect of Jammu and Kashmir. The resolution has described it in the following manner:

"This House notes with deep concern Pakistan's role in imparting training to the terrorists in camps located in Pakistan and Pakistan Occupied Kashmir, the supply of weapons and funds, assistance in infiltration of trained militants, including foreign mercenaries into Jammu and Kashmir with the avowed purpose of creating disorder, disharmony and subversion;

Reiterates that the militants trained in Pakistan are indulging in murder, loot and other heinous crimes against the people, taking them hostage and creating an atmosphere of terror;

Condemns strongly the continued support and encouragement Pakistan is extending to subversive and terrorist activities in the Indian state of Jammu & Kashmir;

Calls upon Pakistan to stop forthwith its support to terrorism, which is in violation of the Shimla Agreement and the internationally accepted norms of inter-State conduct and is the root cause of tension between the two countries;

Reiterates that the Indian political and democratic structures and the Constitution provide for firm guarantees for the promotion and protection of human rights of all its citizens;

Regards Pakistan's anti-India campaign of calumny and falsehood as unacceptable and deplorable;

Notes with deep concern the highly provocative statements emanating from Pakistan urges Pakistan to refrain from making statements which vitiate the atmosphere and incite public opinion;

Expresses regret and concern at the pitiable conditions and violations of human rights and denial of democratic freedoms of the people in those areas of the Indian State of Jammu and Kashmir, which are under the illegal occupation of Pakistan;

**On behalf of the People of India,
Firmly declares that-**

"The state of Jammu & Kashmir has been, is and shall be an integral part of India and any attempts to separate it from the rest of the country will be resisted by all necessary means;

India has the will and capacity to firmly counter all designs against its unity, sovereignty and territorial integrity; and demands that -

Pakistan must vacate the areas of the Indian State of Jammu and Kashmir, which they have occupied through aggression; and resolves that -

all attempts to interfere in the internal affairs of India will be met resolutely."

The Resolution was unanimously adopted. February 22, 1994

Prime Minister Vajpayee on 23rd October 2001 made a substantial statement on the 'condition', 'democracy', 'rights of the people', elections and transfer of 'power' in the 'area occupied by Pakistan'. It is an overwhelming statement and supports the Indian responsibility under the instrument of accession. Indian Prime Ministers' reference to Pakistan as an 'opportunist country' and other issues around Afghanistan, are equally interesting for an examination.

It goes without dispute, that no single version or view on Kashmir is sacred. Views are planted, pseudo and advocated by many monkeys in the circus of Kashmir politics. Kashmiri leaders twirl and twitch, at the command of their master.

We can equally argue the locus of the Indian Government in the affairs of Azad Kashmir. Does Prime Minister of India have a locus to makes a substantive reference to the 'condition', 'democracy', 'rights of the people', 'elections' and transfer of 'power' in the 'area occupied by Pakistan'.

Yes, there is a locus. Prime Minister Vajpayee, is a party to the Kashmir dispute and more so every member nation of UN has charter obligations. The condition of a people, the kind of democracy, the rights of the people,

elections and the transfer of power are a legitimate concern of any member nation of UN. Indian concern in Azad Kashmir is more direct and immediate, than the general concern under Charter obligations.

United States of America invoked the principle of 'sic utere tuo ut alienum non laedas' in 1891 on the question of Jews in Russia by drawing the Czar's attention to the injury it was suffering as a result of the arrival on its territory of the large numbers of Jewish refugees who were attempting to escape persecution.

Outside UN Charter there is another very important regime of Laws - The Laws of Humanity. Red Cross Movement is based on this regime of laws. The laws of humanity were invoked by Britain and France in Morocco in 1909.

India invoked article 35 of the UN Charter on 1 January 1948, in her letter (S/628) addressed to the President of the Security Council, calling for an immediate action of the Security Council to avoid a breach of 'international peace'. She accused Pakistan of sending invaders and tribesmen for operations against the State of Jammu and Kashmir.

India urged an urgent action of the Security Council and that she treated Pakistani assistance, an act of aggression against her. She also made a pointed reference, to her being compelled in self-defence to enter into Pakistani territory to take military action against the invaders. This is the first direct threat, served by sovereign State of India against another sovereign State of Pakistan, in the early hours of her independence.

India through her communication of 1 January 1948 S/628 has submitted itself to a finding under Article 34 of the UN Charter. Powers and responsibilities have developed upon India and Pakistan by reason of existing resolutions of Security Council and by reason of the agreement of the parties embodied in the resolutions of the UN and UNCIP of 13 August 1948 and 5 January 1949.

She has a number of bilateral agreements with Pakistan namely Tashkent Declaration, Shimla Agreement, Lahore Agreement and the Islamabad Agreement of January 2004. Government of India has in addition to the instrument of accession entered into other bilateral agreements with the Government and the leadership of Jammu and Kashmir.

India carries a sack load of obligations under the Instrument of Accession, UN Security Council and UNCIP resolutions, bilateral agreements with Pakistan and bilateral agreements, direct or indirect, with the people of Jammu and Kashmir. The jurisprudence of each of these considerations is primarily and heavily in favour of the people of Jammu and Kashmir. The litmus test in each

case is the responsibility of Indian Government to defend territory and protect the lives, property and honour of the people.

The other immediate associate responsibility of the Government of India is to ensure that "as soon as law and order have been restored in Kashmir and her soil cleared of the invader, the question of the State's accession should be settled by a reference to the people". And these people live in three administrations on either side of Line Of Control.

Governments of India and Pakistan have accrued a common responsibility and joint liability in view of the warning of Noel Baker United Kingdom representative to the United Nations on the Rights of the People. He voiced his concern and asked "What is really at stake today in Jammu and Kashmir? What is that the two Governments care about?

What are they seeking to promote? It is not territorial aggrandizement; it is not the addition of population, it is not new sources of wealth for exploitation; it is not the false glory of victory by arms; it is not the old pernicious mirage of national prestige. Those are all discredited nineteenth century imperialistic ideas".

He said that "The stake in Kashmir, what both Governments want, is the happiness, the peace and the prosperity of their people - Muslims and non-Muslims alike. They want their people to live, to worship and to be governed as they desire. How could that purpose justify war? How could war promote that purpose?"

"Kashmir has a population of 4 million. They are now suffering the anguish and destruction which fighting always brings. If the conflict spreads and continues, it will take a generation for them to recover". It is a further elaboration of the responsibility of Indian Government to defend territory and protect the lives, property and honour of the people.

The fact that India and Pakistan have made Kashmir a theatre for their shared practice of proxy politics and proxy war, loss of a generation and a continued loss of property and honour of the people, more so since 1990 has created a jurisprudence of criminal liability for India and Pakistan and against Kashmiri leadership at home and abroad. The use of violence by one school of opinion against another too carries a criminal liability.

Moreover, special provisions concerning the State were made in Article 370 of the Indian constitution. Under it the whole of the Indian constitution was not made applicable to the State of Jammu and Kashmir. Although not in keeping with the embedded essence of the provisional Instrument of Accession, the history of the Rights Movement and responsibilities developed under UN

resolutions on Kashmir, Indian union continued with a growth of the union-state relationship and with the growth of an integration process.

The territorial area of the State can neither be increased nor decreased under a plan for a reorganisation without the consent of the State Legislature followed by an Act of Parliament under Article 3 of the constitution. Applying the rule laid down by the Supreme Court in *Re Berubari Union No. 12*, the Government of India cannot unilaterally cede any part of the State to any foreign State either. Pakistan controlled territories of the State therefore remain “part of the Indian Union in perpetuity”.

However, under various orders, the constitutional relationship between the union and the state has constantly been adjusted. President has promulgated a number of Orders specifying the provisions of the constitution which apply to the State. The first of such Orders was made in 1950, which was superseded by an Order made in 1954, namely the Constitution (Application to Jammu and Kashmir) Order, 1954, made following the Delhi Agreement of May 1954. This order has since been amended, successively, in 1958, 59, 60, 64, 67 and 1971 in consultation and concurrence of the State Government.

The question in argument would be whether the Government in office at Srinagar which has concurred to these Orders represents the ‘territories and the people’ envisaged in the Instrument of Accession of 26 October 1947 and instantly in Part II Section 4 of The Constitution of Jammu and Kashmir (Indian administered) adopted on 17 November 1956.

The concurrence has to overcome many other difficulties caused by an obligation under agreed items, if not disputed and more specific under UN SC resolution of 24 January 1957. It declares that the convening of a Constituent Assembly and any action it might have taken or might attempt to take to determine the future shape and affiliation of the State of Jammu and Kashmir or any action taken to support such action by that Assembly would not constitute a disposition of the State in accordance with the principle enunciated in earlier resolutions.

India has a massive obligation under this resolution because it embraces in its jurisprudence the strengths of resolutions of 21 April and 3 June 1948, of 14 March 1950 and 30 March 1951 and the UNCIP resolutions of 13 August 1948 and 5 January 1949. India is a plural democracy and a responsible member of United Nations. The composite jurisprudence of UN resolutions cannot be so easily coughed away and India has to chin up to it.

Jurisprudence of Pakistani Control.

Pakistan is the first country which accepted the Sovereign authority of Maharaja of Jammu and Kashmir and confirmed a bilateral agreement on 15 August 1947 with the Government of Jammu and Kashmir. According to this it took over the control of Post and Telegraph services in Jammu and Kashmir. However, Pakistan failed to hold on to the terms of this agreement and it failed.

At this point in time the people of Azad Jammu and Kashmir or those living in any part defined under The Territory of the State in Part II Section 4 of The Constitution of Jammu and Kashmir (Indian administered) adopted on 17 November 1956 have no accession with Pakistan.

Section 2 of Azad Jammu and Kashmir Interim Constitution Act 1974 defines Azad Jammu and Kashmir as “the territories of the State of Jammu and Kashmir which have been liberated by the people of the State and are for the time being under the administration of Government and such other territories as may hereafter come under its administration”. Government means the Azad Government of the State of Jammu and Kashmir.

Article 257 of the Constitution of Pakistan sets out the wisdom of the future relations between the State of Jammu and Kashmir and Pakistan. According to this stipulation “When the people of the state of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and the State shall be determined in accordance with the wishes of the people of that State”.

It signifies that there will be no automatic merger of the territories of the State with Pakistan and the conditions under which other States acceded to Pakistan will not necessarily apply to the State, if the people of the State are not in favour of such application. The terms of instrument of accession will be determined by mutual agreement.

A build up of events from 12 August 1947 to the announcement of a ‘Provisional Republic of Jammu and Kashmir’ on 4 October and re-constitution on 24 October 1947, as a parallel authority to Maharaja’s Government, sent Maharaja reeling to seek military aid from India and sign an Instrument of Accession on 26 October 1947.

During the Security Council discussions between 16 January and 21 February 1957, the representative of Pakistan made the point that the dispute between his country and India involved, in essence, the right of the people of the State of Jammu and Kashmir to self-determination. Until a plebiscite had been held, he contended, the territory was neither part of India nor of Pakistan, despite the de facto situation whereby India occupied part of the State and the authority of Azad Kashmir prevailed over the remaining portion of the State.

UN Security Council considered Kashmir during its eleven meetings held between 1 February and 22 June 1962. The representatives of Pakistan and India were invited to participate in the discussions.

The representative of Pakistan after reviewing the events relating to the question of Jammu and Kashmir and the lack of progress in its solution came out with an 'improved stand' on the question of Kashmir and said "...Moreover, the fundamental question was the question of self-determination of the people of Kashmir. Even assuming that Pakistan was at fault, the people of Kashmir continued to have their inherent right to determine their own future...The people of Kashmir should not be deprived of their inherent right to self-determination".

These two positions in favour of territory (the territory was neither part of India nor of Pakistan) and the people (should not be deprived of their inherent right to self-determination) maintained at the UN do not add up to the actual and the three variable positions of treatment held out by the Government of Pakistan in respect of the three administrations of Jammu and Kashmir at Srinagar, Muzaffarabad and Gilgit.

Government of Pakistan felt uncomfortable with the first Provisional Government of 4 October 1947 set up at Muzaffarabad. On the one hand it reconstituted it on 24 October 1947 and on the other did not allow it to follow the jurisprudence of the 'Provisional Declaration' authored by the establishment itself.

The 'provisional declaration' a secular and genuine charter of obligations, seems to have been a cover to blind any future view of the oppression which was going to engulf the people. The State of affairs in Azad Kashmir and Gilgit Baltistan reverted back to the early days of suppression of Maharaja, which the people on the other side of cease fire line had left way behind after forcing Maharaja to hand over to a 'responsible government'.

The rules of business in place to govern the transaction of government departments were treated as a Constitution. This position was held by the High Court in P.L.D. 1957 AJK 33.

According to these rules first enforced on 15 January 1951, President as well as his Ministers were to be nominated by the Supreme Head who was also to determine their portfolios. They were made responsible to him and were to hold office at his pleasure. The rules were revised in October 1952.

Under rule 5 sub rule (a), "The President shall hold office during the pleasure of the General Council of the All Jammu and Kashmir Muslim Conference,

duly recognised as such by the Government of Pakistan and the Ministry of Kashmir Affairs”.

It is important to point out that the politics and leadership in Azad Kashmir administered by Pakistan came under a dual control of Government of Pakistan and the Ministry of Kashmir Affairs. Of course the Government of Pakistan included an inherent interest of the army.

The leadership in Azad Kashmir failed to cohere as one and position itself in the interests of the three people in general or at least the two people under the administrations of Muzaffarabad and Gilgit in particular. Ministry of Kashmir Affairs successfully created a local-muhajir divide. Sardar Qayyum became the front man to lead the divide and profit by labelling the ‘refugees’ as potential Indian spies.

Although the rules of October 1952 were revised again on 29 November 1958, rule 5 controlling the politics in Azad Kashmir remained intact. Nobody bothered to advance on the course chartered in the provisional declaration of 24 October 1947.

In October 1961 a Basic Democracies System was introduced in Azad Kashmir. President was elected by an Electoral College of 2400 Basic Democrats, who were themselves elected on an adult suffrage. Refugees enjoyed an equal share in the Electoral College. However, a struggle for democratic rights and for the redress of economic grievances started at the same time. There was a period of mass arrests of political activists and cancellation of news-paper declarations as part of suppression from 1950-1960.

Under the 1964 Act, the State Council could not undertake any legislation without the prior consent of the Chief Advisor. No law could take effect unless the Chief Advisor directed so by a Notification. He was also empowered to restrict its application to any part of the territory and make any changes.

The six members of the State Council elected from Azad Kashmir in 1961 were constituted as State Council. It existed on paper only. Chief Advisor meant the officer so appointed or in his absence the officer who had been allowed by the Ministry of Kashmir Affairs to work on his behalf. MKA was one of the Ministries in the Government of Pakistan. Under rule 21 of the Rules of Business for Azad Kashmir Government the Ministry of Kashmir Affairs had the general supervision over Azad Kashmir Government in matters of policy and general administration.

It is interesting to note that under the Rules of Business for Azad Kashmir Government for the purposes of exercising administrative and financial

powers the Chief Justice of the High Court came second after the Chief Advisor. The appointment of the Chief Justice and judges of the High Court of Judicature for Azad Kashmir vested in the President in consultation with the Government of Pakistan and the Ministry of Kashmir Affairs and they were to hold office during his pleasure in accordance with rules framed for this purpose.

The Azad Jammu and Kashmir Government Act 1968 was passed on 17 September 1968. Under this the refugee representation in the 12 member State Council was reduced to 4, two each from Jammu and Kashmir refugees. The 8 members from Azad Kashmir were elected by Basic Democrats, elected under the Azad Jammu and Kashmir Basic Democracies Act 1960 and the 4 refugee members were to be nominated by the Chief Advisor from amongst the refugees of the State of Jammu and Kashmir residing in Pakistan. The term of the State Council, unless it was sooner dissolved, was five years.

There were demonstrations for the repeal of the Act 1968. In Muzaffarabad, a huge demonstration was staged outside the office of the President demanding its repeal forthwith.

In consequence, three workers of the Liberation League, Khawaja Ghulam Nabi Pandit, Khawaja Abdul Khalique Dar and Khawaja Ghulam Muhammad Lala were arrested on 1 January 1969 and banished for a month to 7000ft high Leepa Valley. They had to walk on foot to a 11500ft high snow-clad Birthwar pass.

A significant and far reaching change in the constitutional frame work of Azad Kashmir came into being in 1970 through Azad Jammu and Kashmir Government Act 1970. A democratic set up was introduced through the Act, where-under a legislative assembly and President of Azad Jammu and Kashmir State were elected on the basis of adult franchise by the people of Azad Jammu and Kashmir and the refugees of Jammu and Kashmir settled in Pakistan.

Assembly consisted of 24 members elected directly on the basis of adult franchise and one co-opted lady member. Act 1970 introduced a democratic form of government through Presidential system. President was the Chief Executive of the Azad State of Jammu and Kashmir, while all legislative powers were vested in the assembly. Except defence, security, current coin and responsibilities of the government of Pakistan under UNCIP resolutions, the assembly could make laws on all subjects and the executive authority of the government extended to all the matters on which the assembly had the power to make laws.

It was a first big leap in giving internal autonomy to the Azad State. Fundamental rights were guaranteed to the State Subjects and writ powers

were given to the High Court for their enforcement. The system under the Act 1970 worked for about 4 years when a switch over was made to parliamentary system in 1974.

Act 1970 was repealed and re-enacted with certain modifications through Interim Constitution Act 1974. Three important departures were made from Act 1970, first, parliamentary system of government is introduced with the prime minister as the chief executive of the state; secondly, Azad Jammu and Kashmir Council is created which is given legislative powers over the subjects mentioned in schedule three of the Act, along with executive authority over those subjects and thirdly the institution of joint sitting is created as a constituent assembly. The council is designated to perform the functions of federal set up with the same subjects at its disposal, as the federal government of Pakistan has vis-à-vis the provinces.

The Act 1974 recognises a Legislative Assembly of 48 people. Forty are elected - 28 from Azad Kashmir and 12 from the refugees in Pakistan. 5 women, 1 member from Ullm-e-Din or Mushaikh, 1 member from amongst the Jammu and Kashmir State Subjects, residing abroad, and 1 member from amongst technocrats and other professionals are elected by the directly elected members.

The 12 member refugee representation in a house of 48 has an ineffective and unimpressive history in protecting the rights of the refugees and advancing the benefit of the case of Kashmir. These representations have done more damage to the Jurisprudence of the case and the failure has converted a Rights Movement into an India-Pakistan dispute.

They have never represented vox-populi in the Assembly but have remained a tagged gift of the party in power in Islamabad to its affiliate in Muzaffarabad.

The single seat in the AJK Assembly for the Jammu and Kashmir State Subjects residing abroad has remained in the open market for the highest bidder. Barring two exceptions during Pakistan Peoples Party Government it has been sold in the open market.

Muslim Conference has initiated the sale of this seat and it has continued undaunted with the practice. Around the time of elections individuals travel with their cheque books and brief case full of cash to Muzaffarabad and Islamabad. Favour and corruption remains associated with the election of 5 women and 1 member from Ullm-e-Din or Mushaikh elected by the directly elected members.

[Article 48 of The Constitution of Jammu and Kashmir [Indian administered], relates to the territory of Azad Kashmir [Pakistan administered]. Under this article 24 seats are reserved for the people living in these territories].

Act 1974 recognises the constitution of an 11 member [5 nominated and 6 elected] Azad Jammu and Kashmir Council, with Prime Minister of Pakistan as its Chair and the President of Azad Kashmir as the vice Chairman.

Prime Minister of Pakistan nominates five members from time to time from amongst Federal Ministers and members of Parliament. The other six members are elected by the Assembly from amongst the State Subjects in accordance with the system of proportional representation by means of the single transferable vote. The Federal Minister of State for Kashmir Affairs and Northern Affairs is the ex-officio member of the Council.

The role of the Prime Minister of Pakistan as the Chairman of AJ & K Council and his five member numerical representation, nominated from time to time from amongst Federal Ministers and members of Parliament is exceptionally intriguing in terms of their legislative powers in the face of article 257 of the constitution of Pakistan.

Article 4 (7) (2) of Interim Constitution Act 1974 runs repugnant to freedom of association and the wisdom set out in article 257 of the constitution of Pakistan. It has introduced a constitutional restraint according to which “No person or political party in Azad Jammu and Kashmir shall be permitted to propagate against, or take part in activities prejudicial or detrimental to, the ideology of the State’s accession to Pakistan.

Section 4 (7) (2) of Interim Constitution Act 1974 badly savages the Pakistani position maintained at UN Security Council debates held between 1 February and 22 June 1962 when the representative of Pakistan said “...Moreover, the fundamental question was the question of self-determination of the people of Kashmir. Even assuming that Pakistan was at fault, the people of Kashmir continued to have their inherent right to determine their own future...The people of Kashmir should not be deprived of their inherent right to self-determination”. It is instantly repugnant to the wisdom of section 8 of Azad Jammu and Kashmir Government Act 1970 and section 11 of the Interim Constitution Act 1974.

Sections 4(7) (2), 19 (2), 31 (3) and 56 of the Constitution Act 1974, remain at variance to the provisions of the declaration of 24th October 1947, jurisprudence of the Preamble of the Interim Constitution Act 1974 and the duties and obligations developed from UN resolutions. These restraints militate against the wisdom of article 257 of the constitution of Pakistan.

The jurisprudence of Section 4 (7) (2) is an exercise in pre-determination, in isolation and without reference to the rest of the people of Jammu and Kashmir. It nudges passes the cumulative 70 years achievement made until 12 August 1947 and is a serious breach of the jurisprudence of UN resolutions on Kashmiri's right of self determination.

These constitutional restraints on the basic rights of a disputed people were introduced in bad faith by the local leadership to lure the unimaginative bureaucrats and lowly politicians in Pakistan. The aim has been to seek their trust against 'muhajir' leadership in particular and other nationalists in general. K H Khurshid, a distinguished associate of Quaid-e-Azam and trusted leader of refugees from Jammu and Kashmir, who sought the recognition of the Government of Azad Kashmir to further the Jurisprudence of UN Resolutions was battered with this treacherous arrow.

Khurshid's slogan for the recognition of Azad Kashmir Government was used against him. A fake charge-sheet which among other items included that the President had charged T.A. by car while the journey had been performed by rail was brought against him. He was arrested and humiliated as a common criminal in the notorious detention centres in Azad Kashmir. Refugee intellectuals and political activists came under dense cloud of official mistrust and dislike.

Khawaja Sona Ullah Aftab editor weekly Kashmir was arrested along with four others in March 1957 for his expressed opinions. His lawyer challenged the vires of his arrest in the court on 6 March 1957. To avoid embarrassment the Government of Azad Kashmir had him arrested during the night of 7-8 March and handed him over to the army of Pakistan. Aftab and his colleagues were interrogated for over ten days and later deported back into the Indian administered Kashmir. Aftab is a legend in the journalism of Jammu and Kashmir and edits Daily Aftab since June 1957 from Srinagar.

It may well be argued whether or not the army of Pakistan has an authority to arrest, interrogate and push back a 'state subject'. And if it has a stipulated and a restrained role, what criminal liability would it incur for its offence against any citizen of Jammu and Kashmir. Similarly the arrest, detention and torture of Maqbool Ahmed Butt (Maqbool Butt shaheed), Abdul Khaliq Ansari, G M Mir, G M Lone, Mir Qayyum, Hashim Qureshi, Ashraf Qureshi, Mustafa Alvi and many others like Abdul Hamid Diwani, Ghulam Nabi Yatu, Ghulam Rasul Shahin, Muhammad Ahsan, Muhammad Rafique and Abdul Rashid in 1976 by authorities in Pakistan, prima facie raises similar questions of authority. And if these and many others have been wronged, what is the redress.

The arrest and imprisonment of Khawaja M Y Saraf, Chief Justice of High Court and a culture of many other similar arrests, is part of a policy to raze the confidence of refugees and hold them away from asserting their rights. (author was arrested and detained in Muzaffarabad forte and jail from 7 May 1973 – 11 February 1974).

There are over 22 listed options for the resolution of Kashmir dispute. Many Kashmiris have run riot and have put their name to one of these or other options. Kashmir Study Group of Farooq Kathwari is a serious group but it may not have directed its composite wisdom on the jurisprudence of the case. The seriousness of many other options can be illustrated from an example that in 1997 during one of our meetings with the Chairman of the UN Sub Commission on Human Rights in Geneva, he enquired if we had considered any options outside UN package as well.

To our surprise one of the participants Firdouse Asmie who manned APHC office in Delhi (now back in Government job in Srinagar) replied that he had submitted two options to 'Home Ministry' in Delhi. Syed Ghulam Nabi Fai of Kashmiri American Council also said that he too had submitted an option to the Government of India. The interesting point was that both individuals conducted themselves in reference to APHC but had submitted their options privately to the Government of India. As a principle even APHC did not have the authority to submit an option without a full and final reference of it to the people.

India and Pakistan have tried proxy politics and a proxy war in Kashmir. It has changed the mode and manner of life in the last 58 years in general and the last 15 years in particular. India and Pakistan are in de facto control of the three administrations on either side of LOC. These controls create a corresponding liability and obligation as well. They have accrued over the past 58 years and more particularly in the last 15 years a criminal liability for a loss of life and violation of human rights. There is an added criminal liability for non performance of specified 'trust' obligations.

Self Rule option of course is welcome and the move enhances the constituency of an expressed debate. It has to be put to a test in accordance with the jurisprudence of the 128 year old Rights Movement. However, it raises a scenario of a criminal liability for killing those National Conference people and many others who had advocated an 'internal autonomy' for the state.

It also raises a massive criminal liability for a politics under APHC constitution which cost Kashmir the death of a generation and caused unprecedented violation of human rights in the 128 year old history of Rights Movement. It also raises a scenario of a criminal liability for subscribing to a militant struggle for self serving and private benefit. It entails a criminal

liability for recruiting 'child soldiers' and for reaping financial and other rewards in the last 15 years.

Self Rule option and the dialogue raise the question of criminal liability for killing those militant leaders who proposed a cease-fire and those politicians who had proposed a dialogue to save life, honour and property. A question would be asked of Mirwaiz for abundantly using the mosque and religion to oppose autonomy or self rule up until his visit to Pakistan in June 2005.

More so he has to conduct politics in reference to an expressed and debated popular consensus. Otherwise, he should seek a final abode to be constructed by the side of Choudhry Ghulam Abbas Khan in Rawalpindi. As 'chief priest' he cannot afford a private blend of religion and politics and roller skate his self serving interests at the cost of the death of a generation.

Self - rule, demilitarisation and peace process need to be debated and discussed in public. However these gifts should be accompanied by an accountability of those who acted otherwise until November 2005. With it should come a shared liability of India and Pakistan to rebuild Kashmir and to make appropriate reparations to victims in all the three administrations and abroad.

APHC leaders, others outside the fold and those who acted in reference to APHC, Jihad and militancy and amassed wealth and reaped benefits at the cost of human tragedy shall have to account for a miraculous swell in their wealth at a time when the civil society as a whole has buckled under deprivation and poverty.

As a result of the post 1990 leadership the people in Jammu and Kashmir live in 'ghettoes'. The various regions are polarised and maintain a distance in social and political understanding. Political establishment is domiciled at Srinagar. People are tagged as Indian agents, Pakistani agents, Renegades, Mukhbirs and it is for the first time in the 128 year old Rights Movement that no Kashmiri can escape the label of a RAW or ISI or IB agent. Mirwaiz or be it anyone else all have their labels.

I don't argue that Mirwaiz is singularly responsible for the curse of Albatross around our neck but his inexperience has killed the Kashmiri Albatross.

It is high time that our leadership takes a refresher course in the Jurisprudence of Kashmir case. It can never succeed unless it understands the distribution of the people under three administrations. It has to understand that the death of a foreign militant - in fact is the death of a Kashmiri State Subject, who has come from Azad Kashmir or Northern Areas (Gilgit and Baltistan). On the one hand we are seeking an honourable solution in

accordance with the aspirations of the people and on the other we continue to send them to grave - day in and day out.

It is only a living man and a woman who have accountable aspirations. Dead have no aspirations and their numericals have no jurisprudence. We need to seek a compensation from India and Pakistan as two parties to the dispute for failing to conserve life in Kashmir. A compensation claim has to be lodged against the leadership for failing to take due care, for failing to adhere to its Constitutional programme and for becoming instrumental in the death of not one but three generations.

Maharaja of course did not put the Instrument of Accession with India to vote. However seeking Indian support to protect 'life', 'property' and 'dignity' of the people of Jammu and Kashmir make him stand much ahead of his times. He used his 'brains' to secure the over all interests of the people and to defend the geographical oneness of Jammu and Kashmir.

The civil society in Kashmir did not bother to draw up the contours of 'secrecy' and 'transparency' necessary in the conduct of political wisdom and militant power. The neglect of not performing its 'Common Duty to Interfere' in political and militant affairs in the last 15 years made the politics and militancy a game with 'no holds barred'.

Politics became private, undemocratic, commercial and unaccountable. Militancy was not allowed to gel in Kashmiri culture and plural traditions. Today the civil society has lost both the 'politics' and the 'militancy'.

Politics in Kashmir has lost the argument and President Musharraf wants them to use their 'brains'. Pakistan nourished this brain with its 'moral', 'political' and 'diplomatic' elixir for the last 15 years and now has found out that Hurriet has no 'brains'. At least President Musharraf has come out courageous to settle a confusion for the people of Jammu and Kashmir.

Indians are in no hurry. They seem to revamp the old policy of wait and see. They remain content and wait for the bridge to appear and then decide whether or not to cross. Seemingly secular they may be but in Kashmir they are without a make up. Just like an 'onion' - you peel it, there is another layer and the layers go on and on. How many there are? You go on peeling.

The humbled and badly beaten Kashmiri has only dreams and in the subcutaneous he has hope, caution and trust. He must rue the August 15 1947 when he trusted Pakistan and entered into a Stand Still Agreement with it and woefully regret the 26 October 1947 when he proposed an Instrument Accession to India in return of defending his territory and protecting his 'life', 'honour' and 'property'.

When the third Duke of Isle of Man was induced in 1765 to surrender the regality and customs duties to the Crown for £70,000 and an annuity of £2,000. A verse well expresses the disgust of Manxmen at the bargain -

The babes unborn will rue the day
That the Isle of Man was sold away;
For there's ne'er an old wife that loves a dram
But what will lament for the Isle of Man

Iqbal draws a common with the misery of Isle of Man when he expresses his disgust on the sale of Kashmir in 1846 as follows:

Their fields, their crops, their streams,
Even the peasant in the vale;
They sold, they sold all, alas!
How cheap was the sale.

Iqbal's anguish finds a reference two years later in history when on 7 January 1848 Rt. Hon. Sir Henry Harding, the Secretary to the Government of India wrote to Maharaja Gulab Singh and reminded him - "of the principle by which the British Government is guided in its with Eastern Princes where cessation of territory is involved, that whilst it will scrupulously fulfil all its obligations for the protection of its ally, it never can consent to incur the reproach of becoming indirectly the instrument of the oppression of the people committed to the Prince's charge".

Unfortunately and undoubtedly British Government continues to 'incur the reproach of becoming the instrument of the oppression of the Kashmiri people. India and Pakistan became two other instruments of oppression after 1947. Politics and militancy since 1990 became two more instruments of oppression.

However, above all it is the common man and woman who have lost the will to etch a change in the affairs of their life not as a process of life but as a quality of life. There are still many good meaning British, Indians, Pakistanis and others around the world who wish the people of Jammu and Kashmir well and more so wish them a protection of their 'life', 'honour' and 'property'.

There is a difference between seeking rights in reference to Kashmiris Instrument of Accession with India and asserting rights in reference to Pakistan's control of Azad Kashmir under UNCIP resolutions and of Northern Areas under Karachi Agreement. Grant of a self-rule in a shared arrangement embeds in it a concept that India and Pakistan are occupiers of

the territories of Jammu and Kashmir. In law they are not occupiers but in practice they have converted their respective trust obligations into a repressive control – which remains near enough to occupation.

Self Rule carries a legal connotation far remote from a right to self determination. However, self rule may involve and satisfy a condition of 'internal self-determination'. An internal self determination may in some way accommodate the title of the Kashmiri people to self determination and respective claims of India and Pakistan as well.

However, self rule is not like a piece of furniture or a hand woven carpet that a business man can carry and spread in Islamabad, Delhi and Srinagar. We are faced with a final dispensation of a Rights Movement and every citizen of Jammu and Kashmir has a common duty to intervene, to secure a better tomorrow for our future generations.

On either side of LOC and in all the three administrations, we continue to remain a separate legal person under State Subject Law of 20 April 1927. We have the option of becoming Indians and Pakistanis. However, an Indian or a Pakistani cannot become a Kashmiri. The State Subject Law would not let them. They may trespass. It would all be unlawful.

December 2005

Statement by
Syed Nazir Gilani Secretary General JKCHR at the Symposium
on “Next step in Jammu and Kashmir: Give Peace a Chance.”
25th and 26th November 2000
at Bristol Hotel, Gurgaon - India

Mr. Chairman, distinguished delegates, ladies and gentlemen.

It is commendable that concerned citizens in India and Pakistan are making contributions towards new thinking about resolving conflicts and promoting co-operation between the two countries. It is re-assuring to note that the road map provided in their joint paper, by the International Centre for Peace Initiatives Mumbai, India and Institute of Regional Studies Islamabad, Pakistan, has been dedicated to the ‘good will and wisdom’ existing in India and Pakistan.

With a respectful exception may I, as son of the State of Jammu and Kashmir venture to add that there is ‘another side to this wisdom’ which begs our prime attention. That other side of this ‘wisdom and good will,’ of course is the due regard of and a full participation of the people of Kashmir.

On your way to the ‘princess of peace,’ you have to seek the practical assistance of the legendary lioness and her two cubs. If we nudge pass and fail to give a meaning to the tragedy of Kashmir, the ‘wisdom and good will,’ would falter and become less enduring. The key is to roller-skate the aggregate trust and faith of the people of Jammu and Kashmir.

Ladies and Gentlemen

“Kashmir is a story of the Spring being released from the bonds of Winter, the Sun being rescued from the darkness of the Night, the Dawn being brought back from the West, the Waters being set free from the prison of the Clouds.”
We have a colossal risk to identify s
Spring, Winter, Sun, Night, Dawn, West, Water, Cloud – and free them all.

There is an overemphasis on the 'QUESTION' and the 'CONFLICT of Kashmir', and the regard for 'People' of Jammu and Kashmir is barely respectful and encouraging. Under these 10 principles the people of Kashmir seem to have been 'frozen,' in time as lifeless creatures.

We need to differentiate between the cause of the people on the one hand and a conflict between India and Pakistan on the other. We have to put the people's tragedy first. Conflict need not override the value of life in Kashmir.

The 10 principles fail to address Kashmir as – the question of a people, with deep foundations of a 'heroic victim hood.' On the opposite these principles apportion the people of Kashmir a minimal mechanical role of 'nuts and bolts' to negotiate a quid pro quo settlement for peaceful coexistence between India and Pakistan.

It is not a 'question,' a 'conflict' or a dispute of a hill, a hamlet or a rivulet but in essence a principal question of a people, sandwiched, divided against their will, mistreated and misunderstood in India and Pakistan. Over and above, the history of these two dominions of the treatment of the question and the people of Kashmir too has remained incongruous and at times has manifested a double standard.

Part I of phase 1 of the process identified in the joint paper does not ascribe any role for the people of Kashmir. It is structured as an exclusive of India and Pakistan. However, a reference under part II to Kashmiri political prisoners, All Parties Hurriet Conference (APHC) and other Kashmiri groups though encouraging, still falls low below the principle of due regard for a 'popular reflex' or 'vox populi.'

We commend the efforts of the architects of this road map. However we would like to share the wisdom which prompts them to opine that the Kashmiri leadership should have a limited role restricted to (1) discuss the process and not the substance of resolving the Kashmir conflict.

It is also not clear whether this restraint, is in respect of the leadership or whether it is 'people specific' as well. As a core principle I submit that the wisdom and free will of the people of Kashmir cannot be subjected to a restraint.

JKCHR would argue that the leadership and the peace process have to be commended to the consent and approval of the people of Kashmir. The think tanks and concerned citizens shall have to identify the process to make the people of Kashmir more visible and their reference binding on peace, politics and militancy.

Exclusion of the people of Kashmir from the substantive discussion can't be sustained. The jurisprudence of the relationship of people of Jammu and Kashmir, living on the two sides of LOC, with India and with Pakistan envisions a full participation in any discussion and on any road map for the resolution of the dispute.

Kashmiris have continued to make mistakes in the understanding of their case and in taking a position. They have to re-position themselves vis a vis India and Pakistan, in accordance with the two de facto positions and the jurisprudence of the case.

We respectfully argue that the people of Jammu and Kashmir have a substantive role in the process of seeking a just resolution of the conflict. It is time that the people of Kashmir start to reflect upon a Kashmir gifted with tranquillity and peace. They have a title to the principal gift of all gifts – the gift of life.

The people of Jammu and Kashmir have an Instrument of Accession with India, and Pakistan has caused for itself a foothold in Azad Kashmir under the UNCIP resolutions. These resolutions also create jurisprudence in the interests of India, Pakistan and the people of Jammu and Kashmir.

On the one side of LOC Kashmiris have 1952 and 1975 agreements with India and on the other side of LOC Pakistan has the control of Northern Areas under 1949 Karachi Agreement and has a hand in the affairs of Azad Kashmir under interim Constitution Act 1974.

The two think tanks on the one hand have recognized the principle of bilateralism between India and Pakistan and on the other avoid to endorse the benefit of the principle of bilateralism applicable in the relationship between India and the people of Kashmir and the relationship between Pakistan and the people of Kashmir.

I submit that the jurisprudence of grievance of the people of Jammu and Kashmir with India is different to the jurisprudence of grievance with Pakistan. It has bilateral primacy in relation to India and Pakistan.

If we have to move forward, we need to admit that the people of Jammu and Kashmir are a victim of involuntary compliance and coercion of the security forces, politics and militancy. The constitutional disciplines of the political and militant leadership continue to remain remote to a reference to people's power. They have lost relevance and directness, because they continue to remain averse to the consent of the people.

This forum has a duty to remind the three parties that they have a dual responsibility of taking decisions for the present generation and a higher burden of responsibility, of taking decisions, which would affect the coming generation. We should not lose sight of the fact that Tomorrow of our future generation would be, what we leave of it today.

We understand that India and Pakistan as member nations of UN, as parties to the dispute under the Resolutions, under Tashkent Declaration, Shimla Agreement and Lahore Declaration have agreed upon the principle of non-interference and a peaceful resolution of disputes.

We also understand that Kashmiri leadership, in particular the constitutional discipline of APHC binds it to a peaceful resolution under the UN Resolutions and to an alternative negotiated settlement of the Kashmir dispute.

The constitutional disciplines of a peaceful and a negotiated settlement, rule out the juridical basis of a militant struggle. APHC has to re-consider its duality of approach in this regard.

It may have breached its constitutional discipline on the one hand and accrued a culpability on the loss of life on the other. The loss of life is a direct result of the command and control of a political and militant struggle. It is not only security forces that have accrued culpability on the loss of life but militants have also engaged themselves in the killing of the civilians.

This forum and likes of it as a collective, have a very important role to play. They have to encourage Governments of India and Pakistan to stop invoking the enemy images of each other. They have to support the People of Jammu and Kashmir – and reclaim them from the jaws of death and destruction.

We all have to preach that it is never too late to make a war. But it is too late if peace is not made betimes. The effects of war are immediate but those of peace, far beyond and far reaching.

We have to assist the civil society in Jammu and Kashmir, to be able to exercise the freedom of that single day- which enables it to choose its politicians and elect its representative in the Government. It has to find the courage of that single day to be able to affect a change and pursue a composite of all other rights.

Kashmiri leadership has to invoke the support of Indian civil society and force the Indian government to face the acid test of the ‘aspirations of the people.’ India would not be persuaded unless the leadership too submits itself to the ‘free will’ of the people. It should be seen making an instant and equitable demand of Pakistan, in relation to Azad Kashmir and Northern Areas as well.

Civil society institutions in India and Pakistan have continued to express their interest in ameliorating the suffering of the people of Kashmir. These are overwhelming influences and the governments of India and Pakistan cannot afford to by pass them.

Politician and the militant in Kashmir, too cannot afford to by pas the will of civil society. They have to survive in the civil society. The civil society has the inherent power to refuse them a space.

The People of Jammu and Kashmir, should understand that India and Pakistan have endured a cease–fire since 1949. Tashkent Declaration and Shimla Agreement at best desire a peaceful settlement and at worse affirm a status quo.

It is for the people of Jammu and Kashmir to decide whether they would want to come out of the pigeon hole of the last 52 years. If so they shall have to re-position themselves, vis a vis India and Pakistan in equity and in good faith in the essential interest of their welfare and collective peace in the region.

The habitat of Jammu and Kashmir has to be cured of violence and embalmed with the gifts of tranquillity and peace. The people have to be empowered. It is only then, that the people of Jammu and Kashmir would be able to hold on to the composite gifts of other freedoms. Let us all resolve to respect the principal gift of all gifts – the gift of life and stand firm to ensure that life precedes any other ‘human right.’

May I respectfully conclude that – “Tomorrow of our children would be, what we leave of it today. And if we don’t act now, tomorrow may be too late.” It is time to enlarge and enhance the ‘constituency of peace.’

Thank you for your patience.

**Syed Nazir Gilani
Secretary General JKCHR
On UN register as an Expert in Peace Keeping/Humanitarian Operations
and Election Monitoring Missions.**

**P.O Box 241 London
SW17 9LJ
Ph. 0208 640 8630 Fax. 0208 640 8546 Email. dr-nazirgilani@jkchr.com**



**JKCHR Relief November 2005
at JKCHR Community Centre
Naranthal (Jalsharee), Baramulla
Kashmir**

**JKCHR
FREEPOST
LONDON SW17 9LJ
Tel: 0208 640 8630
Fax: 0208 640 8546
Email: info@jkchr.org**