

## PRESENT CONSTITUTIONAL STATUS OF AZAD JAMMU & KASHMIR

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### ABSTRACT

The basic question whether Azad Jammu and Kashmir territory comes within the definition of a State, if yes, then which class of State qualifying under International law and whether its so called Interim Constitution 1974 comes within the definition of a Constitution or not requires a detailed legal and constitutional debate cannot be tackled with herein. However, as per its present constitutional status under the Constitution of Pakistan, India and particularly under its own so called Constitution is in doldrums. This is the main theme of this article, as different courts have different views with regard to the Constitutional status of this disputed territory. There are land marks judgments on it but that too have been given under different circumstances in different way in order to resolve the issue for the time being on biased and personal interest basis, but on permanent basis it is yet to be decided that what is the constitutional status of Azad Jammu and Kashmir and how the people of this area are required to be treated nationally and internationally. For the above purposes, firstly the Azad Jammu and Kashmir's nature as a whole have been discussed under the first heading. Then the nature of the so called constitution of Azad Jammu and Kashmir have been discussed particularly comparing it with Gilgat Baltistan's territory and the status of its people under the land marks judgments of the Supreme Court of Pakistan. Then under different headings the constitutional status of Azad Jammu and Kashmir have been discussed under Indian Constitution and Pakistan Constitution comparatively. For this purpose, different land mark case laws of the superior courts have been taken into consideration.

**Keywords:** Constitutional Status, Azad Jammu and Kashmir

### 1. INTRODUCTION OF AZAD JAMMU AND KASHMIR

The State of Jammu and Kashmir having total area of 218780 square kilometers, in which Azad Jammu and Kashmir is 6439 Ladakh is 4294, Gilgat Baltistan is 73302, total 84035 square kilometers, Under Indian occupation Jammu is 25589 Kashmir is 17853, Ladakh is 63634 total 107076 square kilometers. Under China occupation Gilgat Baltistan is 4838 Sankiang (Ladakh) is 9795 total 14633 square kilometers, so whole the State has been divided in four regions i.e. Indian occupied Jammu and Kashmir, China occupied Jammu and Kashmir, Pakistan administered area Gilgat and Baltistan

and Azad Jammu and Kashmir, in which we are residing as a State subject.<sup>1</sup>

In 1947, when the flags of Pakistan and India were flying on the world map, the Hindu ruler of the Muslim State, Maharaja Hari Singh, allegedly acceded the State of Jammu and Kashmir to India in derogation of the Partition Plan. It was done against the wishes of the Kashmiri people, who were the majority in Jammu and Kashmir at the time. On October 24, 1947, the people of the area now known as Azad Jammu and Kashmir declared independence from the Dogra ruler and established an interim government with its headquarters in Pallandri. Initially, this government was established as a War Council to secure freedom for the entire State. Following the

<sup>1</sup> Shahzad, M. S., Akram, S. A., & Hashmi, S. B. H. (2016). AZAD JAMMU AND KASHMIR AND GILGIT BALTISTAN: HISTORICAL,

CONSTITUTIONAL & ADMINISTRATIVE DEVELOPMENT. Journal of Contemporary Studies, 5(1), 69-85.

United Nations resolutions to end hostilities and resolve the status of Kashmir through a popular vote, the War Council assumed executive power and has since evolved into the Azad Government of the State of Jammu and Kashmir, which is not yet recognized internationally as the legitimate government of the territory. The interim constitution of Azad Jammu and Kashmir is 1974.<sup>2</sup>

However, now days a very hot issue is under consideration in general and particularly between Government of Pakistan and Azad Kashmir Government that how the relationship of both as per Constitution, Administration and Financial factors be determined. Some are arguing that the Kashmir Council may be extinguished; some are saying that the Supreme Court of Azad Kashmir may be abolished, some are suggesting that Azad Kashmir may be treated and given share as equal to other provinces of Pakistan and some are saying that this may be given under the control of Federal Government of Pakistan etc. In view of this critical discussion, a legal and Constitutional analysis is needed so that the authorities could reach to a right decision.<sup>3</sup>

## **2. NATURE AND FUNCTION OF AZAD JAMMU AND KASHMIR CONSTITUTION**

While waiting for a plebiscite to be conducted under UN auspices to decide the status of Jammu and Kashmir, the Azad Jammu and Kashmir Interim Constitution, 1974 (VIII of 1974) was passed to improve the governance and administration of Azad Jammu and Kashmir. The Government of Pakistan assisted, drafted and agreed to the Azad Jammu and Kashmir Interim Constitution, which stipulated that two legislative bodies would function in Azad Jammu and Kashmir. The Azad Jammu and Kashmir Council have 14 members and is led by the Prime Minister of Pakistan, whose title also includes the Chief Executive of Pakistan. Different Subjects in the Legislative List is within the purview of this

council, and it may pass whatever laws it deems fit regarding them. The Chairman of the Azad Jammu and Kashmir Council has executive power, and other members of the council may perform executive duties on his or her behalf.<sup>4</sup> In contrast to Kashmir Council, the Legislative Assembly has no authority to carry out anything. The Azad Government of the State of Jammu and Kashmir has executive authority for matters that fall within the Assembly's purview of lawmaking. The Prime Minister and other members of the Cabinet will be responsible for running day-to-day operations in Azad Jammu and Kashmir. The Azad Jammu and Kashmir Interim Constitution do not presume that the executive Authority of the Azad Jammu and Kashmir Council would be exercised by functionaries or officers of the Government of Pakistan. However, it does allow for the delegation of executive authority from the Council and the Government to officers and authorities subordinate to them. The Prime Minister of Pakistan cannot delegate any Council duty to any officer or authority in the Government of Pakistan while acting as Chairman of the Council reason that Azad Jammu and Kashmir is not integral part of Pakistan, as the laws of Pakistan do not apply inside the newly freed region of Azad Jammu and Kashmir.<sup>5</sup>

## **3. STATUS OF NORTHERN AREAS**

The Constitutional status of Northern Areas is different from that of Azad Jammu and Kashmir as under Article 1(2) (d) of the Constitution of Pakistan, the Gilgit-Baltistan territories are, for all practical purposes, a part of Pakistan, and the decisions of the Supreme Court of Pakistan have more than just persuasive value in the region.<sup>6</sup> The people of the Northern Areas are the same as any other citizens of Pakistan, making them subject to the same laws and requiring them to pay the same taxes and other levies, as in the region the state subject Act and Rules have been

<sup>2</sup> (The Fundamental Law of Azad Jammu and Kashmir by Muhammad Ashraf Qureshi published by Mehmood Printing Press Gawalmandi, Rawalpindi page 23)

<sup>3</sup> Abbasi, M. K., & Khan, M. N. (2004). Introduction of white clover for herbage production and nitrogen fixation in the hilly areas of Azad Jammu and

Kashmir. Mountain Research and Development, 24(2), 134-140.

<sup>4</sup> Shafiq, S. (2015). 18th Amendment and the Constitutional Structure of Azad Kashmir. Pakistan Perspectives, 20(2), 115.

<sup>5</sup> [2001] PLC (C.S.) 114

<sup>6</sup> [2010] GBLR 160

put in abeyance.<sup>7</sup> The individuals above have the right to vote in local elections and to an impartial judicial system that upholds their rights to, among other things, a fair trial<sup>8</sup>. Competency of application for winding up of company had been objected to on the ground that the Company had its registered office at a place which was in Provincially Administered Tribal Areas to which Companies Ordinance, 1984 had not been extended. "The High Court of the location where the company's registered office is located has jurisdiction over any disputes arising under Section 7(1) of the Companies Ordinance, 1984. Whenever the High Court's authority is expanded, the Company Judge may use it. The High Court has jurisdiction over the firm because of Sections 2 and 3 of the Supreme Court and High Court (Extension of Jurisdiction to Certain Tribal Areas) Act, 1973, which provide for the extension of High Court and Supreme Court jurisdiction to Provincially Administered Tribal Areas." The company's dissolution application has been deemed legally sufficient, and the matter must now be heard based on its merits. Based on these respected Supreme Court rulings, the Northern Areas are an integral part of Pakistan, and its residents are Pakistani citizens, unlike in Azad Kashmir. Even now Supreme Court of Pakistan has confirmed this status recently under a bench headed by Saqib Nisar Chief Justice (then was)

#### **4. APPEALS FILED BY PERSONS SERVING IN NORTHERN AREAS**

In accordance with Article 212 of the Constitution of Pakistan, a Service Tribunal was established in 1973 to hear and decide disciplinary cases involving current or former Pakistani government employees. The "civil servants" specified in Section 2(a) of the Service Tribunal Act, 1973, and Section 2(1)(b) of the Civil Servants Act, were within the scope of the Service Tribunal's authority to hear their appeals.<sup>9</sup> After the appeals process, the Tribunal might either uphold, reverse, or alter the original ruling. No Northern Area but only government servants

were covered by the relevant provisions of the Constitution of Pakistan (1973) and the Service Tribunal Act. The Tribunal had the authority to hear and rule on the appeals of Pakistani government employees. Any attempt by a tribunal to use its authority in a way that goes against the Act or the Constitution of Pakistan would be null and of no consequence so in this case the position is different.<sup>10</sup>

#### **5. POSITION OF NORTHERN AREAS NOT DIFFERENT FROM AZAD JAMMU AND KASHMIR**

Writ jurisdiction of High Court does not extend to Northern Areas as it dismissed a writ petition incompetently filed to challenge appellate order of the Judicial Commissioner whereby he maintained conviction under section 302/149 and 148, Penal Code but altered to life imprisonment sentence of death awarded to petitioners by Sessions Judge for Northern Areas (Gilgat), under this case law another different view have been taken by the Supreme Court of Pakistan with regard to the Northern areas by holding that its status is like that of Azad Jammu and Kashmir.<sup>11</sup>

In view of this background interpretation of Azad Jammu and Kashmir Interim Constitution, 1974, the present status of Azad Kashmir as per present Constitutional set up of both Pakistan and Azad Kashmir as opposed to that of Northern Areas, is discussed as under even as per Indian Constitution as well."<sup>12</sup>

#### **6. CONSTITUTIONAL STATUS IN INDIA IN HISTORICAL PERSPECTIVE BRIEFLY**

A brief history of the various Constitutional changes that took place in the State of Jammu and Kashmir have been set out by the Supreme Court of India in case Muhammad Maqbool Damnoo Vs. State of Jammu and Kashmir, which is as follows:

i. "20.10.1947-H.H. the Maharaja of Jammu and Kashmir wrote to the Governor General of India offering to accede to the dominion of India."

<sup>7</sup> Kreutzmann, H. (2008). Kashmir and the Northern Areas of Pakistan: boundary-making along contested frontiers. *Erdkunde*, 201-219.

<sup>8</sup> [1999] SCMR 1379

<sup>9</sup> Service Tribunal Act, 1973, S 2(a) (Pakistan)

<sup>10</sup> (2002 PLC (C.S) 498(b)

<sup>11</sup> NLA 1981 Cr.LJ 575

<sup>12</sup> Raman, B. (2009). The northern areas of Jammu and Kashmir. In *Himalayan Frontiers of India* (pp. 94-104). Routledge.

ii. “27.10.1947. The Governor General accepted the offer and made certain stipulations (The Supreme Court did not set out what these were)?”  
iii. “05.03.1948. The Maharaja issued a proclamation forming a responsible Government of a Council of Ministers headed by the Prime Minister which was to take steps to constitute a National Assembly based on adult franchise to form a separate Constitution for the State;”  
iv. “20.06.1949. The Maharaja entrusted his legislative, executive and judicial functions to his son-Yuvraj Karan Singh;”  
v. “25.11.1949 The Yuvraj issued a proclamation directing that the Constitution of India to be adopted by the Constituent Assembly of India (should also) be adopted by the Constituent Assembly in so far as it was applicable to Jammu and Kashmir. This was in order to govern the relationship of the State and the contemplated Union of India;”  
vi. “26.11.1949. The Constitution of India was adopted and certain provisions came into force on the day; the remaining provisions came into force on 26.01.1950;”  
vii. “26.01.1950. The Constitution (Application to Jammu and Kashmir) Order 1950 (C.O.10) was issued by the President;”  
viii. “20.02.1951. The Maharaja issued a proclamation convening the Constituent Assembly on 05.11.1951;”  
ix. “10.06.1952. The Basic Principles Committee of Jammu and Kashmir Constituent Assembly submitted its interim report and recommended: a) the form of the future Constitution of Jammu and Kashmir shall be wholly democratic; b) the institution of hereditary Rulership shall be terminated; and c) the office of the Head of the State shall be elective.”  
x. “12.11.1952. The Constituent Assembly of Jammu and Kashmir adopted these recommendations and passed suitable resolutions;”  
xi. “15.11.1952. The President made Order No. C.O. 44 amending the explanation with a modification whereby instead of Maharaja of

Jammu and Kashmir, it would be Sadar-e-Riyasat of Jammu and Kashmir;”<sup>13</sup>

xii. “14.05.1954. The President with the concurrence of the Government of Jammu and Kashmir, made the Constitution (Application to Jammu and Kashmir) Order, 1954. This superseded the order made in 1950;”<sup>14</sup>

xiii. “17.11.1956. The Jammu and Kashmir Constitution was adopted with some section coming into force on that day and the remaining portion on 26.01.1957.”<sup>15</sup>

According to Article 1 of the Indian Constitution, the territory of the Union of India shall comprise the territories of the States; the Union territories specified in the First Schedule; and such other territories as may be acquired, as explained by the Supreme Court of India and the current Constitution of India. Consequently, the land that was formerly part of the Indian State of Jammu and Kashmir is now part of the Indian Union as a result of the straightforward interpretation of First Schedule, Item No. 15. Parliament may by legislation admit new States into the Union or form new States on such terms and circumstances as it sees proper, as outlined in Article 2. No provision in the Constitution gives a state-created or admitted to the Union after the Commencement of the Constitution or a state formed after the Commencement of the Constitution under Article 3 of the Indian Constitution the right to claim complete equality of status with a state existing at the Commencement of the Constitution. Creating new states and changing existing states' regions, borders, or names are all possible under Article 3 of the Indian Constitution. Parliament may enact laws in this area. No Bill providing for expanding or contracting the area of the State of Jammu and Kashmir or changing the name or boundary of the State shall be introduced in Parliament without the consent of the Legislature of this State was added to this Article in 1956 to make it applicable to the State of Jammu and Kashmir.”<sup>16</sup>

However, Article 370 clearly shows that Jammu and Kashmir are accorded unique status. “In

<sup>13</sup> Muhammad Maqbool Damnoo v. State of Jammu and Kashmir, (1972), 2 SCC 864

<sup>14</sup> Muhammad Maqbool Damnoo v. State of Jammu and Kashmir, (1972), 2 SCC 864

<sup>15</sup> *ibid.*

<sup>16</sup> The Constitution of India with Selective Comments by P.M. Bakshi published by Universal Law Publishing Company. Pvt. Limited Edition 1997 page 291



accordance with this Article, the President has the authority to apply the provisions of the Indian Constitution to this State with such exceptions and changes as the President may by order designate. Therefore, the President of India has the authority to issue an order excluding the State of Jammu and Kashmir from the applicability of certain parts of the Indian Constitution. The President also has the authority to interpret and implement the Constitution in a way that best serves the nation, including the ability to make exceptions to its requirements.” The term "modification" in Article 370(1) must be given its broadest possible interpretation, which may include significant changes.<sup>17</sup>

The petitioner argued that his incarceration was illegal since the J & K Preventive Detention (Amendment) Act, 1967, had not been approved by the State's Sadar-I-Riyasat, a requirement under Article 370. For this Article, the government of the State means the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadar-I-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office. This substitution was made by order of the President on November 16, 1952.<sup>18</sup> References to the Sadar-I-Riyasat of the State shall be construed as references to the Governor of the State as per the Constitution (Application to Jammu and Kashmir) Second Amendment Order 1965, which the President made under Article 370(1) with the approval of the Government of the State of Jammu and Kashmir. The petitioner's attorney argued that the State Assembly and the President lacked the authority to interfere with the Sadar-I-Riyasat's until Articles 368 and 370(3) of the Indian Constitution were altered, or a new Constituent Assembly was called to change the Explanation. The highest court in the land rejected that line of reasoning. The Court's Chief

Justice said that in [(1972) 1 SCC 536] on Article 370, and the petitioner argued that his detention under the J&K Preventive Detention (Amendment) Act, 1967, was unconstitutional since the Act had not been assented to by the Sadar-I-Riyasat of the State.

For purposes of this Article, "government of the State" means the person currently recognized by the President on the suggestion of the Legislative Assembly of the State as the Sadar-I-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State. On November 16, 1952, under executive authority, this swap was accomplished. In accordance with the Constitution (Application to Jammu and Kashmir) Second Amendment Order 1965, which the President made under Article 370(1) with the approval of the Government of the State of Jammu and Kashmir, references to the Sadar-I-Riyasat of the State shall be construed as references to the Governor of the State.<sup>19</sup> The petitioner's lawyer stated that unless article 368 and 370(3) of the Indian Constitution were amended or a new Constituent Assembly was formed to modify the explanation, neither the State Assembly nor the President had the right to interfere with the Sadar-I-Riyasat's operations.<sup>20</sup>

The nation's top court found a flaw in such a rationale. In a statement issued on behalf of the Court, Chief Justice Sikri said that Article 370(1)(b) and (d) need the consent or consultation of the State Government and that the State Government is to be defined at any given moment in light of the Constitution of Jammu and Kashmir. In clause (1) of Article 370's Explanations, the State's constitutional status is just recognized. The Chief Justice of Jammu and Kashmir quickly and easily determined that Article 370(1)(b) does not limit the state legislature's ability to create or alter the state constitution (d). It was pointed out that the constitutional position of the State has not altered

<sup>17</sup> Arvind P Datap Commentary on the Constitution of India Volume II publishers Wadhwa and Company Nagpur Law publishers Second Edition 2007) 10 [(1972) 1 SCC 536

<sup>18</sup> Ramaswamy, M. (1955). Constitutional Developments in India 1600-1955. *Stan. L. Rev.*, 8, 326.

<sup>19</sup> Deva, Z. (2020). Basic without structure?: the Presidential Order of 1954 and the Indo-Jammu & Kashmir constitutional relationship. *Indian Law Review*, 4(2), 163-198.

<sup>20</sup> G. Nair, B. (2019). Abrogation of Article 370: can the president act without the recommendation of the constituent assembly?. *Indian Law Review*, 3(3), 254-279.

considerably despite the change in nomenclature and mode of nomination and that the Governor is the legitimate successor to the Sadar-I-Riyasat. Even though the State of Jammu and Kashmir is a part of India and is included in the list of states in the first schedule of the Constitution, Jammu and Kashmir's position under this Article is unique from that of other states for the reasons set out below:

Jammu and Kashmir are not subject to the laws addressing the Union's other states' governmental apparatuses. The Union Parliament's legislative jurisdiction over this State is confined to those subjects in the Union and Concurrent List that have been determined suitable by the President in conjunction with the State's administration under the Instrument of Accession. 12 Since the State adopted its constitution on November 17, 1956, only those provisions of the Indian Constitution that the President may by order specify shall apply inside the State.

#### **PRESENT**

In view of the above position and circumstances, the Indian Parliament now in 2019, has repealed article 370 of the Constitution and has withdrawn the special status of the State of Jammu and Kashmir. Even article 35A too have been withdrawn now the State's legislative body consent for legislation in the State is not necessary and further the citizens of the State have been given equal status to that of all citizens of Union of India and all citizens of Union of India can enjoy the sources of the State equally. Now the status of the people of this area i.e. Azad Jammu and Kashmir can be termed as citizens of India in its present perspective under the Constitution of Union of India, which raises many many legal and constitutional questions that how and why this happened requires a detailed another article to be written.

#### **7. UNDER PAKISTAN CONSTITUTION**

The provinces of Baluchistan, North West Frontier, Punjab, and Sindh are listed as part of Pakistan's territory in Article 1 clause 2 of the Constitution of 1973.<sup>21</sup> The Federally Administered Tribal Areas and any other states or territories that are now or in the future part of Pakistan will be included in the Islamabad Capital Territory, where the federal government will have its seat of power.<sup>22</sup> Similar to the Indian Constitution, Parliament has the power to admit new states or territories into the Federation on such terms and conditions as it sees fit. Unlike in the Indian Constitution, "The State of Jammu and Kashmir" is not mentioned as an integral component of Pakistan territory.<sup>23</sup> I looked through the Constitution of Pakistan article wise and could not discover anything about Jammu and Kashmir's legal status. A formal acknowledgment is necessary before this territory may be considered a genuine part of Pakistan.

However only the Article 257 of the Constitution, that when the people of the State of Jammu and Kashmir elect to accede to Pakistan, their relationship with Pakistan would be resolved in line with their preferences? It is clear from this article that the people of Pakistan do not consider Jammu and Kashmir to be a part of India but rather a disputed State whose residents must ultimately decide whether or not to join Pakistan.<sup>24</sup>

#### **8. CITIZENSHIP OF PAKISTAN HOW?**

Conferring Pakistan citizenship on all Jammu and Kashmir nationals who migrated to Pakistan with intention to reside therein appellant, having migrated to Pakistan with intention to reside therein along with his father on 7.1.1971 seeking citizenship of Pakistan. Facts established on record were that appellant and his father had come to Pakistan in 1971 and did not return to occupied Kashmir since than appellant's father resided in Pakistan until he died in 1985, appellant had married a Pakistani lady and had a

<sup>21</sup> Chandio, J. (2013). UNDERSTANDING PAKISTAN.

<sup>22</sup> Mushtaq, M. (2016). Regional identities in quest of separate provinces: A new challenge for the Pakistani Federation. *J. Pol. Stud.*, 23, 289.

<sup>23</sup> The Constitution of Islamic Republic of Pakistan by M. Mahmood published by Pakistan Law Times Publications, Islamabad

<sup>24</sup> 1995 SCMR 1554 and PLJ 1995 SC 692

child and he was doing business in Pakistan.<sup>25</sup> Facts established on record clearly covered appellant's case under section 14-B, Pakistan Citizenship Act, 1951 and he had thus attained status of citizens of Pakistan.<sup>26</sup> Further a Notification has been issued by the Federal Government of Pakistan in 1972 that though the Azad Jammu and Kashmir is not the part of Pakistan but it shall be in future treated like the other provinces of Pakistan. Question is that what is the legal and constitutional status of this Notification requires another details deliberations. What is the legal status of ID cards issued by the Government of Pakistan to the people of Azad Jammu and Kashmir and how different departments of Pakistan are working in Azad Jammu and Kashmir and how different departments of Pakistan are refused to extend and work in are the questions of hypocrite nature. Allah bless us. Now read the recent illegal and unconstitutional development.

#### 9. COMPARISON AND FURTHER DEVELOPMENT TILL NOW AS PER CASE LAW

The comparison of the provisions of Indian and Pakistan Constitutions with regard to their territories shows that the use of words "admit into the Federation" used in clause 3 of Article 1 of Pakistan Constitution are significant and are calculated to carry special meaning and import as against the use of word "acquired" used in Indian Constitution, "where identical sub-clause (c) of clause 3 of Article 1, provides that the territory of India shall comprise such other territories as may be "acquired". The word "acquired" is related to word acquisition and it has been judicially interpreted in India that a territory can be said to have been acquired when the Indian Union acquires sovereignty over such territory as held.<sup>27</sup> As against this, the Constitution-makers in Pakistan have used the word 'admit' which implies as per request and not assertion as is implied in the word "acquire". Further the word "admit" connotes to allow, permit, to allow entry, to give permission to enter etc. The word

"acquire" on the other hand means to get as one's own to come into possession or control of, often by unspecified means. The distinction between the two words "admit" and "acquire" as used in the Constitution of Pakistan and India respectively is obvious and meaningful. While one denotes permissiveness and consent and the other implies assertion and aggression.<sup>28</sup> So it can be concluded that India have in aggressive way occupied the State and Pakistan's Constitution does not mention Jammu and Kashmir's accession to India, even though the Indian government has incorporated the territory of Jammu and Kashmir into the Union of India against the desire of the people living there. It is a contentious issue that deserves careful consideration, but for the sake of argument, let us takes a quick look at the current situation in Azad Jammu and Kashmir, a region that has been recently freed but which India also claims forcefully as her own."

"Azad Jammu and Kashmir" is defined as "the territories of the State of Jammu and Kashmir which have been liberated by the people of that State and are for the time being under the administration of Government of Pakistan and such other territories as may hereafter come under its administration" in the definitions clause of the Azad Jammu and Kashmir Interim Constitution, 1974. The highest courts of Azad Kashmir and Pakistan have reached contradictory conclusions on the legal status of this area, as shown below with accompanying questions.<sup>29</sup>

1. "As envisioned by the UN Resolutions, Azad Jammu and Kashmir have the status of a local administration. The people of Azad Jammu and Kashmir, the Commission makes clear, are the local authorities and would exercise absolute political and administrative power over the vacated areas." Local authority basically means that it is neither sovereign independent State as its sovereignty is controlled by Pakistan and not recognized by the International forum nor a province of Pakistan as in definition clause of Pakistan's Constitution are the words "The State of Jammu and Kashmir" not included in the

<sup>25</sup> Rouse, S. (1998). Sovereignty and citizenship in Pakistan Appropriating gender, 53-70

<sup>26</sup> Pakistan Citizenship Act, 1951, Section 14B (Pakistan)

<sup>27</sup> AIR 1958 Mad. 450

<sup>28</sup> AIR 1958 Mad. 450

<sup>29</sup> Jammu, A. (1968). Kashmir. The Northern Areas has a special status and is not.

territory of Pakistan as a province or otherwise. Here question is that what is the status of this territory for India and Pakistan?

2. And opposed to this, it was held in a case that no petition may be issued by the High Court to challenge the Peshawar operation.<sup>30</sup> (outside Azad Jammu and Kashmir), as in this case, all proceedings with regard to the elections of Legislative Assembly for the seat LA-XL Kashmir Valley-VI were taken in Peshawar. Here question arises for the determination of the status of this area.<sup>31</sup>

3. It was held in [PLD 1973 AJ&K 51], where the petitioner challenged the legality of his arrest in Azad Kashmir for an alleged offence committed in Pakistan on the plea that there existed no Extradition Treaty between the Azad Kashmir Government and the Pakistan Government and that he could, therefore, neither be arrested here nor compelled by any legal process to take the trial at Rawalpindi.<sup>32</sup> His plea was rejected by the Court and held that arrangements for extradition of offenders existing between Maharaja's Government of Jammu and Kashmir and areas of British India now Constituting West Pakistan are continue to remain in force, as the Azad Kashmir Government is the successor of Maharaja's Government and it was directed that under Extradition Rules adopted by Azad Kashmir Government, the petitioner be arrested and proceeded at Rawalpindi. Question arises under what status the treaty was made?

4. With regard to the status of Azad Kashmir territory, it was held in case of [PLD 1985 SC AJ&K 62], wherein a reference in order to avoid double tax, was made by the Income Tax Appellate Tribunal that whether on the facts and circumstances of the cases the Tribunal was justified in holding that it is the demand of assessed tax on an income accrued in Azad Kashmir and Pakistan that should be divided in the ratio of 50:50 between Azad Kashmir and Pakistan and not the assessed income?<sup>33</sup> In reply the Court held that for the forest lessees who operate business in Azad Kashmir as well as in Pakistan considering the above mentioned

documents 50% of profits or income will be regarded attributable to the operations in Pakistan and 50% to Azad Kashmir. Therefore, in this case, 50% of income and not the income tax shall be apportioned in equal shares between the two Governments, i.e. the Government of Pakistan and the Government of Azad Kashmir. It was also held that it is correct as held by Justice Hamoodur Rehman, J.<sup>34</sup>

*“That Azad Kashmir territory which does not constitute a part of the Republic of Pakistan as defined in the Constitution of Pakistan is a foreign territory. Nevertheless, for all particular purposes, it has all the constitutional features of a Government. It has got its own Constitution, its own High Court and Supreme Court, and therefore, it is a Government for all practical purposes; and it matters little as to whether this Government is recognized by the Government of Pakistan or not.” Question arises whether this area is a foreign territory for Pakistan?*<sup>35</sup>

5. “However, Azad Jammu and Kashmir still has all the characteristics of a full-fledged autonomous unit akin to a State through Pakistan as the defence, foreign affairs, currency, including foreign aid and trade are controlled by Pakistan through Kashmir Council the chamber of legislative body of the State, as visualized in Azad Jammu and Kashmir Interim Constitution 1974.” “The Government of Pakistan has vide notification D.O. No. 8/9/70 dated May 11, 1971 and No.6/7/88 dated June 6, 1988 given it the status equal to a province and that way, the Govt. of Pakistan is also amenable and answerable to the courts of AJ&K as held in several cases.” On the point, it is further clarified that under the legal scheme, Azad Kashmir is also a “territory otherwise included in Pakistan in view of Art 1 (2) (d) of the Constitution of Pakistan 1973 where it is provided that such states and territories as are may be included in Pakistan, whether by accession or otherwise. It is further held in a case (PLJ 1999 AJK-1) that practical and sustained relationship with Pakistan spread over five decades has made Azad Jammu and Kashmir a defecto unit of Pakistan at par with other de jure

<sup>30</sup> PLD 1975 AJ&K 104

<sup>31</sup> PLD 1973 AJ&K 51

<sup>32</sup> PLD 1973 AJ&K 51

<sup>33</sup> PLD 1985 SC AJ&K 62

<sup>34</sup> PLD 1966 SC 88

<sup>35</sup> PLD 1966 SC 88



and constitutional parts of Pakistan.<sup>36</sup> Azad Kashmir is integrated with Pakistan in administrative, social, cultural and economic affairs without prejudice to its recognized position under UN Security Council Resolutions, so that it does not lack behind in the Justice system. It is further explained that Azad Kashmir does not have nation State identity under International law and Pakistan and Azad Kashmir are so interlinked and integrated that the High Court and Supreme Court of Azad Kashmir exercise jurisdiction over actions of functionaries of Government of Pakistan hence, Azad Kashmir or Pakistan, as the case may be, cannot be said to be foreign territory for each other. Here question arises that whether this territory is quasi autonomous body, province of Pakistan or part of any province of Pakistan or defecto or de jure unit of Pakistan?

6. In another Division Bench case<sup>37</sup> the High Court of Azad Jammu and Kashmir held that Indian occupied Kashmir and the present Azad Kashmir are not foreign territory to each other, therefore, holding of passport of either India or Pakistan does not deprive a State Subject of his status of being a State Subject of the State of Jammu and Kashmir. Resident of that part of State is as good State Subject as one residing in Azad Kashmir. Similar view was taken in another case<sup>38</sup> by Justice Abdul Majeed Malick Chief Justice of the time. Here question arises for the determination of status of both the territories of the State i.e. Azad and Occupied Jammu and Kashmir?

7. “The Supreme Court of Azad Jammu and Kashmir ruled in another instance in 1995.<sup>39</sup> However, the High Court of Azad Jammu and Kashmir is exempted from this rule since the words "in Azad Jammu and Kashmir" were removed from section 44 of the Interim Constitution Act, 1974 by the Interim Constitution (1st Amendment) Act of 1975.” “This change allows the High Court of Azad Jammu and Kashmir to issue writs against officials like the Azad Jammu and Kashmir Council and the Chief Election Commissioner of

Azad Jammu and Kashmir who carry out their duties from outside the territory. As outlined in the Interim Constitution Act of 1974, the Government of Pakistan has authority over Azad Jammu and Kashmir.” Therefore, an action taken while using such authorities may be subject to judicial scrutiny under section 44 of the Interim Constitution. Therefore, even though the government of Pakistan's administrative offices is located outside of Azad Jammu and Kashmir's territorial jurisdiction, an appropriate order may be made in the exercise of writ jurisdiction if the exercise of such powers by the government of Pakistan is shown to violate the law. Question arises whether or not this area is part of the Punjab province?

8. It was held that the State Subjects have the right to form political parties, join a political party of his own choice.<sup>40</sup> There is no law in force in AJ&K that a political party in AJK cannot be affiliated with a political party in Pakistan or a political party of Pakistan cannot set up a branch in AJ&K. Only such political party which is foreign aided or is operating in a manner prejudicial to Islamic Ideology or Ideology of States accession etc. is not allowed to function in AJ&K.<sup>41</sup> Here question arises whether there is one Government in Pakistan and Azad Kashmir?

9. “Territory of Azad Jammu and Kashmir has not formally been annexed with Pakistan, as its future status is to be determined in accordance with the wishes of the people of State of Jammu and Kashmir through democratic method of free and fair plebiscite as envisaged by United Nations Resolutions adopted from time. Till the plebiscite it is held, the territory known as Azad Jammu and Kashmir liberated by Pakistan shall be under the governance and control of Government of Pakistan as envisaged in the United Nations Resolutions and more clearly explained in the Azad Jammu and Kashmir Constitution, 1974.<sup>42</sup> Question is how and under what authority?”

10. Legal status of Azad Jammu and Kashmir to be viewed in the background of Freedom

<sup>36</sup> PLJ 1999 AJK-1

<sup>37</sup> PLD 1993 AJK 153

<sup>38</sup> PLD 1995 AJK-1

<sup>39</sup> 1995 SCR 43 AJK

<sup>40</sup> 1999 SCR AJ&K 396

<sup>41</sup> 1999 SCR AJ&K 396

<sup>42</sup> 2001 PTD 2079

movement, partition of India, emergence of two dominions of India and Pakistan.<sup>43</sup>

**11.** It is further held in another view that Legislative powers under section 31 of Azad Jammu and Kashmir Interim Constituion, 1974 are divided into three parts-- One part is to be performed by the Govt. of Pakistan-- Neither the Council, nor the Assembly has power to make any law concerning the matters enumerated in section 31(3) apart from the matters enumerated in sub-section (3), both; the Council and the Assembly have powers to make laws--under section 31(2) the Council shall have exclusive powers to make laws with respect to any matter incorporated in the Council Legislative List, set out in the third Schedule and in respect of residuary matters the Assembly have the powers to make laws. Section 31(4) confers powers both in the Council and Assembly for levying the tax for the territories of AJ&K. Similar provisions are found under Article 142 of Constitution of Pakistan.

Under Section 19 executive authority of the Azad Govt, it shall exercise its executive authority to the matters with respect to which the Assembly has power to make laws and shall not impede or prejudice the responsibilities of Govt. of Pakistan in relation to the matters specified in section 31 (3)- The Azad Govt. may with the consent of the Council, entrust, to the Council or its officers, the functions in relation to any matter to which the executive authority of the Govt.extends.

Under Section 21 executive authority of the Council shall extend to all the matters with respect to which the Council has power to make laws.

So appointment of Auditor General--- under section 50- A (3). the terms and conditions of service including the terms of office of Auditor General shall be determined by the Act of the Council. The matter of Legislation. in respect of terms and condition of Auditor General is not entered in the Council Legislative List ---**Held:** mere absence of a specific matter in the council legislative list does not debar the council from legislation in the matter, if otherwise the matter falls within the legislative Competence of

Council according to scheme of constitution-**Further held:**. For determining the legislative competence in the matters not enumerated in the list, the pith and stance of the matter has to be considered.

In the like manner, appointment of Chief Election Commissioner,The Judges and Chief Justice of the Supreme Court and High Court are made by the President on the advice of the Council. Held mere power to issue advice cannot confer legislative Authority in the Council--The advice cannot be issued on its own or in vacuum--The advice can be issued whenever the appointing authority seeks the advice.<sup>44</sup>

**12.** It is further held recently that Finance Department of Pakistan memorandum of responsibility in affairs of AJ&K not assigned any role under AJ&K Interim Constitution Act, 1974 private petitioners have no locus standi to represent Finance Department of Pakistan. So far the objection of Finance Department of Pakistan according to the referred memorandum is concerned, as per the provision of Act, 1974, neither the Finance Department of Pakistan has been assigned any responsibility or duty relating to the affairs of Azad Jammu Kashmir, nor the petitioners have any locus standi to represent it. These are just administrative matters between the Government of Azad Jammu and Kashmir and Finance Division of Pakistan.<sup>45</sup>

**13.** In 2019, without applying the literal, mischief and golden rules of interpretation, by overruling the previous judgements, another biased and personal interest based judgement has declared the Azad Jammu and Kashmir as a foreign territory by holding that sections 5, 46, 13, 44 A & 47-Family Courts Act (XXXV of 1964), 5.5, Sched-Suit for recovery of maintenance allowance- Execution of decrees passed by the Family Court of Pakistan in Azad Jammu and Kashmir Requirements-Decree passed by the Family Court of Pakistan was sent for execution in Azad Jammu and Kashmir-District Judge sent the decree to the Family Judge for its execution who passed order that the detree passed by the foreign Court was not executable in Azad Jammu and Kashmir-High Court directed

<sup>43</sup> 1991 CLC 2026

<sup>44</sup> 2015 SCR 1249 Presidential Reference No.1of 2015.

<sup>45</sup> 2016 SCR 853

14. the Family Court to continue proceedings for execution of a decree passed by the Family Court of Pakistan on merit but restrained to execute an ex-parte decree of foreign Court- Validity-Decree passed by the Court of Pakistan could only be executed in the territory of Azad Jammu and Kashmir while complying with the statutory provisions of 5 44-A, CPC-Supreme Court observed that governments of Pakistan and Azad Jammu and Kashmir should make reciprocal arrangements for execution of decrees by notification to be published in the official gazette- Decrees passed by the Courts of Pakistan could be executed through reciprocal arrangements between the governments of Pakistan and Arad Jammu and Kashmir-Executing Court had power to attend the objection raised by the judgment-debtor and determine the same High Court had misconceived the statutory provisions of law- Order passed by the High Court was not sustainable in circumstances-Impugned judgments passed by the High Court were recalled-Appeal was allowed in circumstances. [Genuine Rights Commission v. Federal Government and others PLD 2006 HC(AJ&K).<sup>46</sup>

#### **CONCLUSION**

By considering the above discussion, we can easily reach to the conclusion that unfortunately the people of Azad Jammu and Kashmir has no constitutional status at all. We are not the province of Pakistan, independent State, local authority, defector or dejure unit of Pakistan, autonomous body or foreign territory etc. Our position is in doldrums, therefore, it is suggested that in the preamble of the Interim Constitution, 1974 as well as in Pakistan Constitution, the status of this liberated area be determined till the independence of entire area, so that the conflicting views of the superior courts of Pakistan and Azad Kashmir be resolved as well as the legislative powers be determined. Illegal and unconstitutional thirteen amendment in so called Interim Constitution 1974 has no place being without the codified and compromised will of the people of the area.

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<sup>46</sup> PLD 2019 SC(AJ & K) 9