

# The Kashmir question

Territorially, Kashmir's reorganisation isn't unprecedented in post-colonies. Asian states need to, however, think people-centrally.

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Since 1947, India has exchanged, ceded, divided and assimilated territories. India used force to assimilate the princely kingdoms of Hyderabad and Junagarh. In 1951, India gave up territory from Assam to Bhutan even as it divided and exchanged with Pakistan a Berubari enclave. India used force in Goa, but France returned Pondicherry by an agreement. Sikkim joined India by an international agreement.

Upon India's complaint, the United Nations Security Council in April 1948 set up a commission for "mediation at the disposal of the Governments of India and Pakistan" on Kashmir. The UNSC suggested that Pakistan should withdraw "tribesmen and Pakistani nationals" who have "entered the state for the purposes of fighting". To India, the UNSC suggested withdrawing "forces" and "reducing them progressively to the minimum strength required for the support of the civil power in the maintenance of law and order."

The king of Jammu and Kashmir signed an "Instrument of Accession governing the accession of the State to the Dominion of India." Article 370 in the Indian Constitution, titled "temporary provisions with respect to the State of Jammu and Kashmir," became operative from November 1952 on the recommendation of the provincial Constituent Assembly.

Pakistan's civil war resulted in the birth of Bangladesh in 1971. Subsequently, the Simla Agreement, 1972, between Delhi and Islamabad called for "a final settlement of Jammu and Kashmir" issue.

Jammu and Kashmir, with Ladakh bordering China, has oscillated between UN multilateralism, Simla bilateralism and Indian constitutionalism. Militancy burgeoned in Kashmir since 1972 even as the Ladakh boundary with China simmered. India increased its forces in Kashmir.

In August 2019, India reorganized the state of Jammu and Kashmir by dividing it into two Union Territories – Jammu & Kashmir and Ladakh – ending Kashmir's partial autonomy under Article 370. China objected to Ladakh's reorganization as the undermining of "China's territorial sovereignty by unilaterally changing its (India's)

domestic law." Is Kashmir similar or not to India's other territorial experiences?

## International law

India under Nehru championed internationalism. In June 1962, the International Court of Justice had ruled in favour of Cambodia in the Temple of Preah Vihear case. Cambodia had won on the basis of French colonial stationery, maps and communiqué. Wellington Koo, a Taiwanese judge, penned a dissent, as it were, imagining China disputing at the ICJ with ex-colonial states. Beijing, however, replaced Taiwan at the UN in 1971, essaying a firm bilateral approach to boundaries.

Contrarily, in July-August 1962, India's legal adviser, given that parties to the Cambodia-Thailand dispute were Asian, suggested that the Temple case become a binding precedent for the India-China



boundary dispute. In Cambodia's win based on French colonial stationery, Beijing saw a script for India's victory using British colonial treaties. China responded to India's suggestion, in October 1962, with the Sino-Indian war. India now became sceptical of international adjudication.

In 1974, in conformity with the ICJ Statute, India accepted the Hague court's "compulsory jurisdiction" over international disputes but with eleven exceptions. First, India withdrew disputes with Commonwealth nations from the ICJ's compulsory jurisdiction. Under the declaration's paragraph 10(a), the ICJ was to have no jurisdiction concerning the "status" of India's "territory or the modification or delimitation" of India's "frontiers" and "boundaries". Next, India excluded disputes "essentially within" India's "domestic jurisdiction". Thus, India had, by virtue of Articles 370 and 35A, made Kashmir a constitutional issue.

## Perfecting *uti possidetis*

India tactically declared its exclusion of the ICJ jurisdiction, in 1974, right before the third UN Law of the Sea confer-

ence started. Why? Might paragraph 10(c) of India's declaration answer this? The declaration excluded from the ICJ disputes about "the condition and status of its islands, bays and gulfs and that of the bays and gulfs that for historical reasons belong to it."

Indian possessions in the 'Bay' of Bengal were, after all, perfected by British colonialism as well as Japanese occupation. The Japanese had supported—like Tokyo's support for Pu Yi in Manchuria—Subhas Chandra Bose's declaration of the Indian government in the Bay of Bengal.

Uncannily, China's December 2014 position paper after it submitted a 9-dash line map to the UN spoke of "historic bays or titles" and "historic rights" to "waters".

## Exchanging Territories

Justice Gajendragadkar's Berubari opinion said the Constitution espouses no "expansionist political philosophy" and from a "human point of view, great hardship" is inevitable in territory exchange.

In 1962, after the ICJ decision in Right of Passage over Indian Territory (Portugal vs India), India annexed Goa, a Portuguese 'bluewater' province, using force. India found support in the UN General Assembly only because Goa, Daman and Diu were Portuguese 'bluewater' provinces. International law, tellingly, prescribes self-determination from 'bluewater' colonialism.

In 1975, Sikkim, originally a Himalayan princely sovereign, joined the Indian Union under Article 2 of the Indian Constitution. Article 2 refers to the "admission" of new sovereigns into the Indian Union. Contrarily, Article 3, under which India assimilated Kashmir, deals with the "formation of new States and alteration of areas, boundaries or names of existing States"—"states" in the Indian Constitution referring to provinces—under the Parliament's constituent power of Article 368.

The "admission of Sikkim", India argued in the Paudiyal case, constituted an "acquisition of territory by cession in international law" with "terms and conditions" that are "political in nature". Nevertheless, Rosalyn Higgins, a British ICJ judge, had characterized Sikkim as "overrun by force" and incompatible with "self-determination," effectively confusing Sikkim with Goa.

Asian states are today fighting over land and sea that in international law are governed by, respectively, the UN Charter and the UN Law of the Sea. Territorially, Kashmir's reorganisation isn't unprecedented in post-colonies. Asian states need to, however, think people-centrally.

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