

THE PRINCIPAL LEGAL AND POLITICAL PROBLEMS INVOLVED IN THE KASHMIR CASE

The legal and political issues involved in the Kashmir case between India and Pakistan are more than usually complicated. For various reasons experienced and careful observers have been led to fear that the problem may well drag on for several years before a definitive solution is reached. Obviously no final judgments are yet available on the various issues involved, but it may be useful to analyze the problem at this stage with a view to identifying the principal legal and political questions at stake and expressing tentative appreciation of some of the issues. At the same time it must be remembered that strong Indian tenacity in the matter is matched by even stronger and more emotional resentment in Pakistan, which feels that it has been defrauded of part of its very self in Kashmir.

The British Government, on the eve of withdrawing from India, made an effort to reserve for the Princes, whose States had enjoyed a special relationship with the Paramount Power, the privilege of acceding (or not) to one or the other of the two states into which India had somewhat unexpectedly, not to say unfortunately, been divided. Therein arises the first problem: Could such a stipulation enjoy any validity under British, Indian, or international law? Probably an affirmative answer must be given to this question, although some reservations thereon may have to be made, as will appear at once.

The Maharaja of Kashmir in fact acceded to India on October 27, 1947. This action was taken largely in order to obtain protection against invading forces which had begun to enter Kashmir from Pakistan, although made up at the beginning of elements not part of the forces of that state. This accession was accepted, but at the same time the Indian Government, through Prime Minister Nehru, declared that this accession would have to be confirmed, not to say tested, by a plebiscite. For this declaration nothing in the original stipulation (based on British and Indian agreement) or in international law could be cited, but it corresponded closely to Indian professions of self-determination. Once made, and noted by Pakistan and other countries likewise, it has come to be more or less binding.

India also took the matter to the United Nations in January, 1948, in order, as it was explained, to avoid the necessity of invading Pakistan, with a view to putting an end to the invasion of Kashmir, and thus avoid war between the two countries. Undoubtedly India was justified in taking such a step, in view of the failure of Pakistan to prevent the invasion, at least, although there may be some doubt as to just what she expected to obtain thereby, especially in view of the limited capacity of the United Nations to prevail upon Pakistan, or the forces invading Kashmir, to withdraw therefrom.

Thereupon the United Nations, acting well within its powers, sought to bring about a state of peace or an armistice or truce between the contending

parties which would permit a solution of the main problem—of sovereignty over Kashmir—on the merits; that is, presumably, the holding of the plebiscite. Inevitably this led to placing Pakistan and India, morally and legally, on a plane of equality, a curious result of any mediatory effort, to which the Indians very naturally object strenuously.

Through the efforts of the United Nations a cease-fire agreement was signed on January 1, 1949; this was a definite beginning and important as such. There followed protracted, complicated, and not entirely candid efforts to implement the agreement and provide for demilitarization of the territory looking toward the plebiscite. Drawing a line between the opposing forces, securing withdrawal of forces invading from Pakistan, disbanding "Azad" Kashmir forces, organized, in their later stages at least, in sympathy with Pakistan, reducing the strength of Indian forces, providing for control and policing of the extreme Northern districts in the wilds of the Himalayas—such were the tasks before the United Nations Commission, and it is no wonder that this body has not enjoyed complete success. For the failure so far encountered, mistakes of the Commission itself and somewhat unwise interventions by Great Britain and the United States (animated mainly by desires for a quick settlement but giving rise to suspicions of either anti-Indian or pro-Muslim feelings on one side or the other, not to mention any desires for air bases) are in part to blame, as well as some intransigence and procrastination on the part of both India and Pakistan.

From this point onward the way seems, for the immediate future, clear though difficult. The demilitarization agreement must be worked out, but the reduction of forces on either side will be very difficult to secure. The plebiscite also must probably be carried out—India adheres to this principle and of course Pakistan will insist upon it and a plebiscite on a State-wide basis; the only escape would be partition of Kashmir, or an independent State, and both the Kashmiri and the Indians would probably prefer the plebiscite. There would, however, be some Indian opposition to international conduct of the operation, although at one time Nehru suggested United Nations supervision; and there must also be noted the extreme difficulty and delay involved in reconstructing the Kashmir electorate of October, 1947. There would almost certainly be adamant Indian opposition to any arbitration of the central issue; and it should be noted that proposals for arbitration so far have related solely to issues arising under the cease-fire agreement. In case amicable execution of these steps proves impossible, the United Nations possesses few, if any, resources for securing results, and the ultimate solution must flow from agreement between the parties.

On the merits of the principal question—sovereignty over Kashmir—speculation from the outside is rather futile. Kashmir is strategically important to both countries in view of its boundary lines, but appears to be

geographically (topography, rivers, roads) and economically an appendage of Pakistan. It is predominantly Muslim, and the Indian answer that religion is not to be the basis of the new Indian state, which contains many millions of Muslims, is not entirely conclusive for various reasons. On the other hand, it does appear that the Kashmiri, under Sheikh Abdullah, may prefer to avoid the rather strict Muslim state of Pakistan, with its somewhat feudal economic pattern, and join the new India. How the plebiscite would go if held at the present moment—or in a year, or five—is very much of a guess. How, likewise, a military struggle between Pakistan and India—and such a struggle would probably flame into a general war in the sub-continent, if not elsewhere—would go if the peaceful procedures of the United Nations were to fail, is also conjectural, except that it would be both prolonged and fanatical, given the character of the terrain and the attitudes of zealous patriots in both countries, in spite of Indian predominance in men and resources. It is obviously devoutly to be hoped that the United Nations Members can lead and aid India and Pakistan to a solution of the problem and do this without further dangerous delay.

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THE AMERICAN COMMITTEE ON DEPENDENT TERRITORIES

The presence in the American Continent of colonies and possessions of non-American Powers first became acute at the Meeting of Foreign Ministers at Habana in July, 1940. What if Germany, as appeared more than likely, should win the war and take over by way of conquest the colonies and possessions of the defeated Powers, Great Britain, France and Holland? The danger which had been foreseen at the Meeting of Foreign Ministers at Panama in 1939 had now become more imminent. It had always been a corollary of the Monroe Doctrine that the United States would oppose the transfer of colonies and possessions in America from one European Power to another, particularly if the latter was a strong Power capable of constituting a future danger to the United States. Under the circumstances, then, it was clear that the United States would be inflexibly opposed to the transfer of the colonies and possessions to Germany. A threat to the peace was presented, and under the terms of the Convention of 1936,¹ consultation was in order.

The Meeting of Foreign Ministers at Habana acted promptly. In spite of the danger involved in challenging Germany, the American States were unanimous in reaffirming in even more explicit terms the principle of collective security foreshadowed in the Convention of 1936 and in the

¹ This JOURNAL, Supp., Vol. 31 (1937), p. 53.