

PILdAT

Discussion Paper

**Proposed Constitutional Amendments in the
Constitution of Islamic Republic of Pakistan 1973, for
Empowerment of Azad Jammu & Kashmir and
Gilgit-Baltistan**

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Discussion Paper

Proposed Constitutional Amendments in the Constitution of Islamic Republic of Pakistan 1973, for Empowerment of Azad Jammu & Kashmir and Gilgit-Baltistan

Foreword

The Discussion Paper “**Proposed Constitutional Amendments in the constitution of Islamic Republic of Pakistan 1973 for empowerment of Azad Jammu & Kashmir and Gilgit-Baltistan**” authored by Justice (Retd.) Syed Manzoor Hussain Gillani, is an attempt to initiate a discourse on the question of a more appropriate interim constitutional arrangement for the State of Azad Jammu & Kashmir and Gilgit-Baltistan. The author of the paper has related this arrangement to an 'enhanced autonomy' for these regions.

The paper encompasses the constitutional status of the AJ&K and G-B region that remain invisible in the mainstream political and constitutional structure of the country for almost half century. In March 1949, the Ministry of Kashmir Affairs and Northern Areas (now known as Kashmir Affairs and Gilgit-Baltistan) was established, which has been liaising between the Azad Jammu & Kashmir and northern areas and Pakistan governments, although local Kashmir authorities have always been critical of its role. In a landmark decision, the Government of Pakistan had approved a Self-Governance Reforms Package for the Northern Areas on August 30, 2009, aimed at giving it full internal autonomy, but without the status of a province, and changed its name to Gilgit-Baltistan. However many so-called nationalist parties criticized the package as a 'gimmickry of words'. While the AJK Constitution of 1974 gives Islamabad a significant legal authority in the affairs of AJK through the Azad Jammu & Kashmir Council under the chairman ship of the Prime Minister of Pakistan. The AJK Constitution also restricts the AJK Assembly and the Kashmir Council from making any laws regarding the subjects of defence, trade, security and paper currency etc, which fall under the purview of the Federal Government of Pakistan.

Reflecting the aspect of inclusion of Azad Jammu and Kashmir and Gilgit-Baltistan in the National political and decision making set up, it is revealed that the regions do not have any seats in the Parliament of Pakistan or in the institutions established by the Constitution for consultation and coordination between the Federation and its component units, such as the Council of Common Interests (CCI), the National Economic Council (NEC) and the National Finance Commission (NFC). Similarly, Azad Jammu and Kashmir and Gilgit-Baltistan are also not represented on the Indus River System Authority (IRSA) and unlike the provinces, they get no share in the profits earned from the hydro-electric power stations located in their territory. This denial of rights has generated considerable resentment in both the areas.

Given the implication of complicated constitutional history of the AJ&K and G-B, the paper is aimed to initiate a dialogue on the proposed amendments in the Constitution of Pakistan so that the Azad Jammu and Kashmir and Gilgit-Baltistan enjoy equitable rights and facilities till the time a permanent settlement on the status of these regions is reached and the people of Azad Jammu and Kashmir get their right of self-determination as provided in the United Nations Security Council resolutions.

We hope that this paper helps in developing a consensus on the question of a new constitutional arrangement for the AJK and G-B.

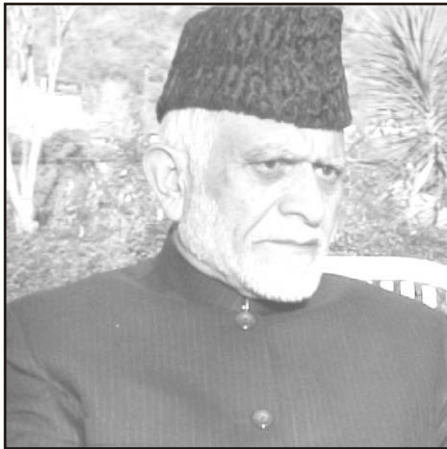
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ABOUT THE AUTHOR



Justice (Retd.) Syed Manzoor Hussain Gillani

Former acting Chief Justice of Azad Jammu and Kashmir,
Chairman, Association for the Rights of the People of Jammu and Kashmir

Justice (Retd.) Syed Manzoor Hussain Gillani graduated from Jammu and Kashmir University, Srinagar in 1968. He got the degree of L.L.B. from Aligarh Muslim University in 1970 in 1st Division and 2nd position in the University with distinction in Constitutional, Criminal, Mercantile and Family Laws. He joined Jammu and Kashmir High Court Srinagar as Pleader in 1970 and as an advocate in 1973. He got appointed as an Assistant Legal Remembrance in the Law Secretariat of Jammu and Kashmir Government in 1974 and rejoined the Bar in 1975 after resigning from the office.

In 1976 he, along with his family, migrated to Azad Kashmir. He enrolled himself as Advocate in AJ&K High Court in 1977 and as Advocate of Supreme Court in 1979. He served as Legal Adviser to Custodian and Rehabilitation Departments from 1979 to 1986 and as Adviser to Muslim Commercial Bank from 1980 to 1986. He was elected as a Chairman Zakat Committee in 1979; Member of the Muzaffarabad Municipal Corporation in 1983 and Chairman of the Legal Committee of the Corporation in 1983. He remained the Advocate-General for Azad Jammu and Kashmir from March 1986 and resigned from the office in March, 1990. He became the permanent Judge in the AJ&K High Court on May 05, 1991 while appointed as an Acting Chief Justice of the High Court on May 03, 2001 and permanent Chief Justice on Jun 06, 2001. He acted as Ad-hoc Judge of the Supreme Court first time from January 10-16, 1996, second time from March 29-22, 1997 and third time from March 10.-21, 2000. He also appointed as a permanent Judge of the Supreme Court of Azad Jammu and Kashmir in 2003. He remained the Vice-Chancellor of the AJ&K University from December 21-1996 to April 25, 1997. He held the position as Chief Election Commissioner of Azad Jammu and Kashmir. He retired as an Acting Chief justice of AJK Supreme Court on May 12, 2010. Currently he is working as a Chairman of the Association for the rights of the people of Jammu and Kashmir, (ARJK).

He is an author of three Books titled “*Constitutional Development in Azad Jammu and Kashmir*”, “*Administration of Justice in Azad Jammu and Kashmir.*” and “*Te Constitution of Azad Jammu and Kashmir in the historical backdrop with corresponding Pakistan, India & Occupied Jammu and Kashmir Constitutions.*”

Background & Introduction

Because of India's refusal to implement the United Nations resolutions on Jammu and Kashmir, more than 10 million people in the occupied part of the State still remain under the Indian yoke. The struggle of the Kashmiri people to exercise their right of self-determination is now in its 64th year and the long-simmering Kashmir dispute, which has been the cause of two wars between Pakistan and India, remains a threat to the peace and stability of South Asia.

In addition to this external dimension of the Kashmir dispute, internally the failure to resolve the question of the final status of the State has retarded the constitutional development of the liberated territories of the State, i.e., Azad Jammu and Kashmir and Gilgit-Baltistan. The administration of these territories was entrusted to the Pakistan High Command under United Nations Security Council resolutions. They have since been treated in many respects as administrative units of Pakistan and are subject to most of the liabilities and obligations of a Province under the Pakistan constitution. But they do not have any of the constitutional rights and powers enjoyed by the provinces.

One of the main consequences of this situation is that Azad Jammu and Kashmir and Gilgit-Baltistan do not have any seats in the Pakistan Parliament or in the institutions established by the Constitution for consultation and coordination between the Federation and its component units, such as the Council of Common Interests (CCI), the National Economic Council (NEC) and the National Finance Commission (NFC). This means that although Azad Jammu and Kashmir and Gilgit-Baltistan are stake-holders in all matters falling within the ambit of these bodies and are affected by their decisions and policies, they have no say in their decisions. Similarly, Azad Jammu and Kashmir and Gilgit-Baltistan are also not represented on the Indus River System Authority (IRSA) and unlike the provinces, they get no share in the profits earned from the hydro-electric power stations located in their territory. This denial of rights has generated considerable resentment in both the areas.

Constitutional amendments for empowerment

This paper is intended to aid the consultation on the proposed amendments to the Constitution of Pakistan that would, pending the achievement of the right of self-determination by the State as a whole as provided in the United Nations resolutions on Jammu and Kashmir:

- a) place Azad Jammu and Kashmir and Gilgit-Baltistan at par with the provinces of Pakistan in respect of their autonomy and other powers and privileges, including representation in the Parliament of Pakistan; and
- b) reinforce Pakistan's commitment to the settlement of Kashmir in accordance with the resolutions of the UN Security Council and the United Nations Commission for India and Pakistan (UNCIP).

This constitutional amendment would be of a purely interim nature and would be reviewed in accordance with Article 257 of the Constitution of Pakistan, which states that *"when the people of the State of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and that State shall be determined in accordance with the wishes of the people of that State."*

Although the liberated territories of the State are not expressly named in Article 1 of the Constitution of Pakistan which defines the country's territories, they form part of Pakistan under clause (d) of Article 1(2) of the Constitution of Pakistan which states that Pakistan's territories include *"such States and territories as are or may be included in Pakistan, whether by accession or otherwise."* Both Azad Jammu and Kashmir and Gilgit-Baltistan are territories *"otherwise included"* in Pakistan under the UNCIP Resolutions. This position was implicitly accepted by India through the Cease-Fire Agreement of 1949, the Tashkent Agreement of 1966 and the Simla Agreement of 1972.

Governance Framework for AJK and GB

The total area of the State of Jammu and Kashmir is 84,471 square miles. Out of this, 33,958 square miles or about two-fifths have been under the control of Pakistan since 1947, comprising 29,814 square miles of Gilgit-Baltistan and 4,144 square miles of Azad Jammu and Kashmir. The population of Gilgit-Baltistan is 1.4 million and the population of Azad Jammu and Kashmir is 3.5 million. Besides, the people of Gilgit-Baltistan and Azad Jammu and Kashmir residing outside these areas in the rest of the country and overseas number 1.6 million and 1.5 million respectively.

Azad Jammu and Kashmir is being governed under the Interim Constitution Act, 1974, which was passed by the

Legislative Assembly of Azad Jammu and Kashmir and approved by the Government of Pakistan.

Gilgit-Baltistan is governed by the Gilgit-Baltistan (Empowerment and Self-Governance) Order 2009 which was issued by the President of Pakistan after a process of informal consultation with local leaders. The Gilgit-Baltistan Self-Governance Order is very similar to the AJK Interim Constitution Act. One exception is that the offices of President and the Prime Minister under the Azad Jammu and Kashmir Interim Constitution Act 1974 are designated as Governor and Chief Minister respectively under the Gilgit-Baltistan (Empowerment and Self-Governance) Order. The Interim Constitution Act of AJK can be amended by a majority of the total membership of the AJK Council and the Legislative Assembly in a joint sitting but two sections which guarantee certain powers to the Pakistan Government can only be amended with its prior consent. As regards the Gilgit-Baltistan (Empowerment and Self-Governance) Order, the sole power of amendment vests in the Pakistan Government.

Tiers of Constitutional Structure

These two instruments establish a three-tier constitutional structure. The first tier is the Government of Pakistan which is vested with all executive and legislative authority in matters of defence, foreign affairs (including foreign trade and foreign aid), currency, and the implementation of UNCIP Resolutions. The Azad Jammu and Kashmir Council and the Gilgit-Baltistan Council, respectively, form the second tier. They have exclusive legislative and executive authority over matters included in the "Council Legislative List" which comprises largely subjects that under the Constitution of Pakistan belong to the Federation. The Council for both the territories is in effect the Federal Legislature as well as the Federal Government. The third tier consists of the Legislative Assemblies and Governments of Azad Jammu and Kashmir and Gilgit-Baltistan, respectively. The AJK Legislative Assembly has exclusive power to make laws on the remaining matters not listed in the Council Legislative List, while the Gilgit-Baltistan Assembly has legislative power over the "Assembly Legislative List," all residuary powers belonging to the Pakistan Government.

The legislative and executive authority over the "Council Legislative List" vests formally in the Council. But both the AJK Interim Constitution Act and the Gilgit-Baltistan (Empowerment and Self-Governance) Order specifically

state that the executive power of the Council is exercised in its name by its Chairman, i.e., the Prime Minister of Pakistan. The Prime Minister of Pakistan appoints five members of the 14-member AJK Council and six members of the 15-member Gilgit-Baltistan Council from amongst Federal Ministers and members of the Pakistan Parliament. None of them, including the Prime Minister, takes oath under the Constitution of Azad Jammu and Kashmir or the Gilgit-Baltistan (Empowerment and Self-Governance) Order. They are, therefore, not answerable before the Council, Legislative Assemblies or the Parliament of Pakistan. Moreover, besides the powers vested in the Government of Pakistan directly, and indirectly through the Council, the Interim Constitution of Azad Jammu and Kashmir and the Gilgit-Baltistan (Empowerment and Self-Governance) Order also stipulate that the Governments of the two territories will exercise their authority in such a way as to secure compliance with the laws made by the Council and with Pakistani laws.

Bureaucratic Control

The six members elected to the Council by the Azad Jammu and Kashmir Legislative Assembly and the Gilgit-Baltistan Legislative Assembly have practically no role to play in policy or decision-making in respect of any matter on the Council Legislative List. The Council operates from Islamabad and is manned by the bureaucracy of the Federal Government. The powers given to the Council are in fact exercised in its name by the Ministry of Kashmir Affairs and Gilgit-Baltistan under rule 19 (4), Schedule 2 of the Rules of Business of 1973 of the Government of Pakistan. This Ministry regulates and controls the administration of these territories directly but the brunt of any maladministration is borne by the local authorities.

Even with respect to matters which fall within the responsibility of the Government of Azad Jammu and Kashmir or Gilgit-Baltistan, effective authority is exercised to a large extent by senior members of the civil service appointed directly by the Government of Pakistan, such as the Chief Secretary, Additional Chief Secretary (Development), Inspector General of Police, Finance Secretary, Health Secretary, Auditor General and Accountant General.

At Par with Provinces

There are also other constitutional, legal and administrative measures and practices which place Azad Jammu and

Kashmir at par with the provinces. Some of them are given below:

- i. The Cabinet Division of the Government of Pakistan has issued two notifications, dated May 11, 1971 and June 6, 1988, directing that *“every Ministry in the field of its special responsibility should look upon and deal with Azad Jammu and Kashmir as if it were another administrative unit of Pakistan.... The Central Ministries should exercise the same powers and play the same role in regard to the affairs of Azad Jammu and Kashmir as they were doing in their respective fields in relation to other administrative units of Pakistan and it should for all practical purposes be treated like any other province of Pakistan.”*
- ii. Under section 4 (7) (2) of the AJ&K Interim Constitution Act, no person or political party in Azad Jammu and Kashmir is permitted to take part in activities prejudicial or detrimental to the ideology of the State's accession to Pakistan.
- iii. The President, Prime Minister, Speaker, Ministers and other constitutional office-holders of Azad Jammu and Kashmir are under the oath to *“remain loyal to the country and the cause of the accession of the State of Jammu and Kashmir to Pakistan.”*
- iv. The people of Azad Jammu and Kashmir and Gilgit-Baltistan hold Computerised National Identity Cards (CNICs) and passports issued by the Government of Pakistan which describe them as citizens of Pakistan.
- v. Quota in the federal civil services of Pakistan is reserved for both the units as in the case of provinces of Pakistan.
- vi. State subjects of Azad Jammu and Kashmir and Gilgit-Baltistan settled in different provinces of Pakistan are registered as voters for the respective Provincial Assembly and for the Parliament of Pakistan. They can also get elected in the Provincial Assemblies as well as the Parliament of Pakistan, without losing the right to be elected to the Legislative Assembly or the Council of their own administrative units.
- vii. Most of the major political parties of Pakistan have established their local branches in Azad Jammu and Kashmir and Gilgit-Baltistan.

Conclusion

To conclude, Azad Jammu and Kashmir and Gilgit-Baltistan have less autonomy in practical terms than the provinces of Pakistan. Moreover, unlike the provinces, the liberated territories have no representation in the Federal Government or the Parliament. They have no opportunity to participate in policy-making at the national level and are kept out of the national mainstream.

Over the past several months, the Association for the Rights of the People of Jammu and Kashmir, of which the author is the Chairman, has organised several meetings with different segments of the civil society, especially from Azad Jammu and Kashmir and Gilgit-Baltistan, to discuss these issues and devise appropriate measures to guarantee to the people of these territories greater autonomy and a full opportunity to participate in national decision-making. The following broad views have emerged from these discussions:

- i. Until a final settlement of Jammu and Kashmir in accordance with the UN resolutions, the status of Azad Jammu and Kashmir and Gilgit-Baltistan as separate entities within the State of Jammu and Kashmir, as well as the international status of the State as disputed territory whose final status is yet to be determined, should remain unchanged and the two territories should not be made provinces of Pakistan.
- ii. Pending the implementation of the UN resolutions and the exercise by the people of Jammu and Kashmir of their right to self-determination through a plebiscite under UN auspices, Azad Jammu and Kashmir and Gilgit-Baltistan should provisionally be given at least the same quantum of autonomy as given to the provinces of Pakistan, as well as other constitutional powers and privileges enjoyed by the provinces, including representation in the Parliament, due representation in the CCI, NEC and NFC, and rights over water and hydro-electric power.
- iii. Pakistan's commitment to respect and implement UN Security Council Resolutions – including Security Council Resolutions of 30 March 1951 and 24 January 1957 which declared that “*the final disposition of the State of*

Jammu and Kashmir will be made in accordance with the will of the people expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations” – should be enshrined in the Constitution of Pakistan.

Appendix

Proposals for Amendments to the Constitution of Pakistan relating to Azad Jammu and Kashmir and Gilgit-Baltistan

Part II

Fundamental Rights and Principles of Policy

CHAPTER 2- PRINCIPLES OF POLICY

(1) Insertion of new Article 40A

The following new Article shall be inserted after Article 40:

“Plebiscite to make final disposition of Jammu and Kashmir

40A. The State shall make all necessary endeavours at the international level for a free and impartial plebiscite conducted under the auspices of the United Nations to make a final disposition of the State of Jammu and Kashmir in accordance with the relevant resolutions of the United Nations Security Council and the United Nations Commission for India and Pakistan.”

Part III

The Federation of Pakistan

CHAPTER 1.- THE PRESIDENT

(2) Amendment to Article 41 (The President)

In Article 41, clause (3), the word “and” at the end of paragraph (a) shall be deleted and added at the end of paragraph (b) and the following new paragraph shall be inserted:

“(c) pending the final disposition of the State of Jammu and Kashmir in accordance with clause (1) of Article 257, the members of the Legislative Assemblies of Azad Jammu and Kashmir and Gilgit-Baltistan, respectively, from such date as the President may by order specify under clause (4) (3) of that Article 257A.”

CHAPTER 2.- THE MAJLIS-E-SHOORA

(3) Amendment to Article 51 (National Assembly)

In Article 51, the following proviso shall be added at the end of Clause (1):

“Provided that pending the final disposition of the State of

Jammu and Kashmir in accordance with clause (1) of Article 257, there shall in addition be eight seats for Azad Jammu and Kashmir and three seats for Gilgit-Baltistan, to be filled from such date, and in such manner, as the President may by order specify under clause (4) (3) of Article 257A.”

(4) Amendment to Article 59 (The Senate)

In Article 59, the following further proviso shall be added at the end of clause (1):

“Provided further that pending the final disposition of the State of Jammu and Kashmir in accordance with clause (1) of Article 257, there shall in addition be four seats each for Azad Jammu and Kashmir and Gilgit-Baltistan, respectively, to be filled from such date, and in such manner, as the President may by order specify under clause (4) (3) of Article 257A.”

Part XII

Miscellaneous

CHAPTER IV.-GENERAL

(5) Replacement of Article 257

Article 257 shall be substituted by the following:

“Provision regarding the State of Jammu and Kashmir

257. (1) The final disposition of the State of Jammu and Kashmir shall be made in accordance with the will of the people of the State expressed through the democratic method of a free and impartial plebiscite conducted under the auspices of the United Nations in accordance with the relevant resolutions of the United Nations Security Council and the United Nations Commission for India and Pakistan.

(2) When the people of the State of Jammu and Kashmir decide to accede to Pakistan, the relationship between Pakistan and that State shall be determined in accordance with the wishes of the people of that State.

(3) Pending the final disposition of the State of Jammu and Kashmir in accordance with clause (1) of this Article 257 and notwithstanding anything in this Constitution, such provisions of this Constitution shall apply in relation to the liberated territories of Azad Jammu and Kashmir and Gilgit-Baltistan, respectively, subject to such exceptions and modifications, if any, as the President

may by order specify;

Provided that no such order shall be issued except with the concurrence of the Governments of the liberated territories.

(4) Azad Jammu and Kashmir and Gilgit-Baltistan, respectively, shall be deemed to be provinces for the purpose of those provisions of the Constitution which apply to the liberated territories.

(5) In its application to Azad Jammu and Kashmir, the words "Province", "Provincial Assembly", "Provincial Government", "the Governor", "the Chief Minister", "Provincial Minister", "citizen of Pakistan", wherever used, shall respectively be read as "Azad Jammu and Kashmir", "Azad Jammu and Kashmir Legislative Assembly", "Government of Azad Jammu and Kashmir", "President of Azad Jammu and Kashmir", "Prime Minister of Azad Jammu and Kashmir", "Minister of the Government of Azad Jammu and Kashmir", and "State subject of Jammu and Kashmir".

(6) In its application to Gilgit-Baltistan, the words "Province", "Provincial Government", "Provincial Minister" and "Provincial Assembly" wherever used, shall respectively be read as "Gilgit-Baltistan", "Government of Gilgit-Baltistan", "Minister of the Government of Gilgit-Baltistan", and "Gilgit-Baltistan Legislative Assembly."

(6) Amendment to ~~Third~~ Second Schedule (Election of President)

In paragraph 18 (1) of the ~~Third~~ Second Schedule, Election of President, the following proviso shall be added at the end of clause (b):

"Provided that the number of votes cast in the Azad Jammu and Kashmir Legislative Assembly and the Gilgit-Baltistan Legislative Assembly, respectively, in favour of each candidate shall be multiplied by the total number of seats in the Provincial Assembly for the time being having the smallest number of seats and divided by four times the total number of seats in the Legislative Assembly in which the votes have been cast;"



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