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International Dispute and Its Dichotomous Nature

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ABSTRACT

Until and unless establishment of peace justice cannot be done. The safeguarding of international peace and security has always been the foremost reason of the International Law. But these concepts are still missing in many parts of the world due to huge number of disputes among the states. We are well aware that an international dispute takes place between states whenever in their affairs to one another certain divergent claims, interests and rights have crystallized with respect to certain existing issues. In fact under some circumstances in international community dispute existence itself disputable one; there is no specific norm to understand the term dispute. Because, majority of inter-sate differences include political allegations and a potential legal solution. The paper is focused on a very important and sensitive matter- the one which concerns the disputes among states and its two completely opposing ideas. It also aims to finding out the definition of the international dispute in order to indicate the framework of the analysis and indicates the main characteristics of it with the help of various attempts made by the international institutions. This paper continues to analyze the legal and political nature of international dispute with the help of India-Pakistan, Kashmir issue; India-Bangladesh Enclaves issue.

I. INTRODUCTION

Since the Mesopotamian Bronze age (according to historians where rebellion activities were started) to Modern technological age (where war attacks emerged unimaginable), The causes of any war are extremely complicated, because the acts and events which have contributed in some measure to the final issue are so numerous, and many of them are so difficult to recover from the obscurity of the past. "This familiar distinction between the true but often obscure causes of a war and the superficial cause, which is generally only the occasion on which a war, which has been preparing over a long period of time, breaks out, has an important bearing on any scheme of legal machinery which we attempt to devise for the organisation of world peace."[2]

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[2] J.L.Brierly, The Essential Nature of International Disputes, Virginia Law Review, 1930, Vol.XVI, No.6,

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From all the times peace has a prominent significance than justice. It always takes a place on top in the range of absolute values. Because it is everybody agreed, every time sustained , everywhere accepted condition that without establishing the peace justice cannot be done. But the problem of protecting peace is truly depending on two issues, those are relinquishing the reasons for war and shielding the peace regardless. In spite having well awareness of these issues state still entice to depend on war. Contacts among states or men are inventible but where fiction arises they are distinct to conflict rather to survive, as rising the root causes of international conflict are endless. Every time a new technique is demanded to any organisation of peace to tackle both different tasks that is reducing the underline causes of war and ready to face the quick threat of war. Wars arise only when the disputing parties are against peaceful settlement but it can avoided by an international life, falling every dispute within its preview to be settled pacifically.[3]

The maintenance of international peace and security has always been the major purpose of the International Law. It was the basic objective behind the creation of the League of Nations in 1919 and the United Nations in 1945. The Charter of the United Nations made some steps towards the elimination of war as a means of settling international disputes. The extension of its principles to States which are not members of the United Nations is of revolutionary character. However, it is not adequate to prohibit States to have way out to war. The required outcome of such prevention ought to be the guarantee that each State can find justice by peaceful proceedings. Why because under some circumstances in international community dispute existence always disputable; there is no specific norm to understand the term dispute, but some attempts have been done those are explained in the later paras.

II. MEANING AND DEFINITION OF THE INTERNATIONAL DISPUTE

The definition of a dispute may appear superfluous at first sight. Everyone knows the meaning of a dispute and one may presume that one will recognize a dispute when one sees it. However, in actual practice the existence of a dispute may be in doubt and may in itself be disputed. At times, the existence of a dispute is denied in order to contest the jurisdiction of an international court or tribunal.[4]

The word dispute plain meaning is disagreement and controversy, conflicts are suitable synonymous for legal studies. Even in oxford dictionary also the dispute termed as a

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pp.538-545

[3] *Ibid*

[4] Christoph Schreuer, What is a Legal Dispute?, in: International Law between Universalism and Fragmentation, Festschrift in Honour of Gerhard Hafner (I. Buffard, J. Crawford, A. Pellet, S. Wittich eds.) 959 (2008).

'disagreement or argument' in noun ,and dispute using as verb defined as 'argue about something'.[5] In Black's Law Dictionary the word dispute circumscribed as a 'conflict or controversy, esp. one that has given rise to a particular lawsuit.' [6]

Keep in sight of the basic meaning of the dispute one can easily understand that what is an international dispute, means a disagreement that takes place between states with reference to relations with one another and with other states. International judicial institution also expressed views on the issue of the existence of a dispute in several cases. Very first and judicially noticeable definition on international dispute by The Permanent Court of International Justice (PCIJ) in Mavromattes Palestine Concessions case is as "A dispute is a disagreement on a point of law or fact, a conflict of legal views or of interests between two persons."[7] In Interpretation of the Peace Treaties among Bulgaria, Hungary and Romania case the International Court of Justice defined the dispute as "a situation in which the two sides held clearly opposite views concerning the question of the performance or non-performance of certain treaty obligations."[8] An International Arbitral Tribunal also defined the dispute while deciding a decree which attempted to nationalize all of Texaco's (P) rights, interest and property in Libya was promulgated by Libya (D) in Texaco v. Libya. It referred the dispute as a 'divergence of interests and opposition of legal views'.[9]

Among states, different political, legal, economic, military and other misunderstandings and differences appear, but only some of them may turn into conflicts under specified conditions. An international dispute arises among states whenever in their relations to one another certain opposing claims, interests and rights have crystallized with respect to certain concrete issues.[10] Obviously above entails a common understanding of what is meant by legal disputes and in opposition what matters are to be integrated under the description of political disputes. Now the question is what is a legal dispute and what is a political dispute? how these two disputes distinguish?

III. LEGAL AND POLITICAL NATURE OF INTERNATIONAL DISPUTE

The expression legal nature of dispute is engaged in the conventions for the pacific settlement

[5] https://en.oxforddictionaries.com/definition/dispute
[6] Black's Law Dictionary 10th ed. (West Group, 2014), Bryan A. Garner, editor, ISBN 978-0-314-61300-4
[7] Mavrommatis Palestine Concessions, Judgment No. 2, 1924, P. C.I. J., Series A, No. 2, p. 11.
[8] Interpretation of the Peace Treaties with Bulgaria, Hungary and Romania (first phase), ICJ Reports 1950, pp. 65, 74.
[9] Texaco Overseas Petroleum Company and California Asiatic Oil Company v. Libyan Arab Republic, Preliminary Award, 27 November 1975, 53 ILR 389, 416.
[10] Wagner, Wienczyslaw J., "Is a compulsory Adjudication of International Legal Dispute Possible", Northwestern University Law Review (1952), Vol.47, pp.21-54

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of international disputes of 1899[11] and 1907[12], as well as in the statue of the permanent court of international justice, to refer to dispute measured particularly suitable for arbitration.

The settlement of disputes by peaceful method can be attained in two ways, by contract of parties to the dispute and binding decision of international organs. Both are legal methods but some authorities are of view that the determination of the disputes by an agreement of parties is a political issue as the parties consistently concern with their own rules in preference to the rules of existing law in determining the dispute. As there is no confined definition a usual definition of legal disputes is found in the famous treaties of Lorcane, according to which legal disputes are all those disputes in which the parties are in conflict as to their respective rights. This definition is of problematical value. It refers only to rights and not to obligations though obligations are always involved in every dispute.[13]

In treaty of the League of Nations Members agree that 'whenever any dispute shall arise between them which they recognise to be suitable for submission to arbitration or judicial settlement and which cannot be satisfactorily settled by diplomacy, they will submit the whole subject-matter to arbitration or judicial settlement. Disputes as to the interpretation of a treaty, as to any question of international law, as to the existence of any fact which if established would constitute a breach of any international obligation, or as to the extent and nature of the reparation to be made for any such breach, are declared to be among those which are generally suitable for submission to arbitration or judicial settlement'.[14]

The treaty described the distinction between legal and political disputes by splitting up the subject matter of disputes into justiciable and unjusticiable disputes. According to the mentioned provision a justiciable dispute being capable of settlement by the application of existing rules of international law, whereas a non-justiciable dispute, not capable of such solution, being left to the parties to settle their own mechanism. Dispute is clearly a legal or justiciable one if both states relying upon the issue and wanted to solve it according to their international declarations. If one of the state challenges some rule of law as unfair and unjust

[11] Article 16, Convention (I) for the Pacific Settlement of International Disputes (Hague I) (29 July 1899) states as 'In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Signatory Powers as the most effective, and at the same time the most equitable, means of settling disputes which diplomacy has failed to settle'.

[12] Article 38, Pacific Settlement of International Disputes (Hague I); October 18, 1907, states as 'In questions of a legal nature, and especially in the interpretation or application of International Conventions, arbitration is recognized by the Contracting Powers as the most effective, and, at the same time, the most equitable means of settling disputes which diplomacy has failed to settle. Consequently, it would be desirable that, in disputes about the above-mentioned questions, the Contracting Powers should, if the case arose, have recourse to arbitration, in so far as circumstances permit'.

[13] Article.3, The Treaties of Lorcane, Treaty of mutual guarantee between Germany, Belgium, France, Great Britain and Italy, 16th October, 1925

[14] Article.13, The League of Nations, 1920

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and look for to protect its claim which find negative support in the positive legal system, in that circumstances the dispute has an entire political nature. Therefore, in majority of the cases nature of a dispute will determined by the requirement of the states claim. In many of the situations it will be hard to differentiate the dispute as political or legal. The most complicated disputes are political and cannot be settled by mere application of the rules of international law. Due to the fact that the lack of appropriate legislative power to disposal within the international community still political disputes are huge in number.[15]

The Act for the Pacific Settlement of International Disputes, adopted by the League of Nations based on the principle of severance of disputes in justiciable and non-justiciable ones. This treaty open to parties of the dispute for submission of their legal disputes to arbitration and other stipulated disputes were to be settled through conciliation. If conciliation failed, the dispute was to be referred to a other adjudication process which would apply principles of natural justice and equity if the prevailing norms of international law were found inapplicable. Barring some formal amendments, the Act remains in force.

The Charter of the United Nations also draws a line, between legal and political disputes, by providing that if the decision of the International Court of Justice is not accepted, the Security Council may recommend other means. Thus, there is nothing to prevent such recommendations from being contrary to the legal decision of the International Court of Justice. Each member of the United Nations undertakes to comply with the decision of the International Court of Justice in any case to which it is a party. If any party to a case fails to perform the obligations incumbent upon it under a judgement rendered by the Court, the other party may have recourse to the Security Council, which may, if it deems necessary, make recommendations or decide upon measures to be taken to give effect to the judgement.[16]

Therefore in making a recommendation, the Security Council is not barred from setting aside the judgement of the International Court of Justice with which the party concerned does not fulfil. That would mean decision by using their veto power of the permanent members of the security council always final in all international disputes. Such a provision creates without hesitation that politics takes over the rule of law. It is extremely inconsistent to find the Charter on the one hand speak as "The Organization is based on the principle of sovereign equality of all its Members,"[17] and on the other side remain a pawn of the permanent

[15] Zulfikar Ali Bhutto, The Distinction Between Political and Legal Disputes 'Vision', Karachi, October, 1954
[16] Article 94, The Charter of the Unite Nations, 1945
[17] Article 2 paragraph 1, The Charter of the Unite Nations, 1945

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members who completely on the sufferance of their political benefits.[18]

Even though the Charter's clear bias towards political interests the rules of logic and reason can not be subsidiary by the force of political concern. According to a scientific study of positive international law, there is entirely no difference between political and legal disputes. The difference occurs for the reason that certain elements regard as it beneficial to their narrow political interests. It is completely outside from an objective end. The fact that one of the state parties may not consent to settle a dispute by the use of international law does not make the dispute a political one. Which can be clearly understandable from the given instances, where India is one of the party.

IV. KASHMIR DISPUTE-WHERE LEGAL ISSUE ENTICED AS POLITICAL

The territorial dispute between India and Pakistan over the region of Kashmir has the main blockage for relations between the two states and to regional security in South Asia. The basis of the dispute over Kashmir stretch out in the end of the British Rule. In colonial ruling the Kashmir area was the princely state of Jammu and Kashmir with a amalgamation of five regions those are Muslim-majority population regions ruled by a Hindu maharajah. During 1947 the British government moved control and divided its earlier colonies in British India into the new states of India and Pakistan. All of the princely states during the partition was incorporated into either India or Pakistan except Kashmir.[19] Soon after the separation Pakistani tribesmen crossed the northern border of Kashmir with cooperation from Pakistani Muslims in the northern part of Kashmir and occupied one-third of the region. In reaction to an attack of his state, Hari Singh appealed to neighboring India for military support. But, India would not cross the border into Kashmir unless he signed the Instrument of Accession. Accordingly he signed the instrument consequently changing Kashmir's legal status. Instead taking the military action over the Pakistani invaders India approached the U.N. Security Council to lodge a complaint, pursuant to Article 35 under the U.N. Charter, invoking the Security Council's dispute resolution capacity.[20]

The argument of the Indian Government was that the Maharaja Harisingh of Jammu and Kashmir had legally acceded into the Union of India. India strengthening their argument with the support of the Instrument of Accession which was legally executed between the Maharajah and the Indian Union. According to that instrument Indian Government was

[18] Zulfikar Ali Bhutto, Supra

[19] Ijaz Hussain, Kashmir Dispute: An International Law perspective, Quaid-e-Azam University Press Islamabad, 2000.

[20] Sumit Ganguly, The Origins of war in South Asia 9–10 (1994) and Alastair Lamb, Kashmir: A Disputed Legacy: 1846 – 1990, Oxford University Press Karachi, 1992

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legally obliged to provide support to the Kashmir State. It was further argued that on the basis of the accession the State of Kashmir became an integral part of India. That dispute was submitted to an international agency, and as admitted by India, made the Kashmir dispute strictly a legal one. Pakistan filed a response with a counterclaim and framed the situation in a fundamentally different way. Pakistan argued that any arrangement between India and Hari Singh was illegitimate. Any decision about Kashmir's legal status should thus be made in reference to the Kashmiri people's will through a plebiscite.[21]

When concerned with Pakistan State on Kashmir issue it is purely within political interest. Why because with regard to Kashmir issue the Pakistan government sustains on the appreciation of people. The Security Council attempted to use its mediatory influence at the early stages of the conflict but could not bring about a permanent resolution. One reason for its failure is that the Security Council dealt with the dispute over Kashmir's legal status primarily as a political dispute. The Security Council weakened its recommendations by not making explicit the core legal issue of the dispute, which was the Instrument of Accession. Reference to the legal framework of accession might have made the obligations that India and Pakistan owed more explicit and more difficult to avoid.[22]

V. ENCLAVES DISPUTE-WHERE POLITICAL ISSUE ENDED WITH LEGAL CONCLUSION

Both India and neighbouring Bangladesh are suffering much from enclave problem. There are a total number of 162 territories within Bangladesh and India, which are commonly known as 'Chitmahal' which means the land disconnected from the mainland. There are 102 Indian exclaves inside Bangladesh and 71 Bangladeshi ones inside India, with a combined population between 50,000 to 100,000. These enclaves are the consequence of the historical partition of Indian subcontinent awarded by Sir Redcliff in 1947. The imminent territory within these two countries created an inhuman situation for the people of these enclaves. In the Mujib-Indira treaty 1974 of boundary identification between Bangladesh and India, it was mentioned that the people of these enclaves and exclaves might live in any of these two countries.[23]

However, the treaty was not finally executed or no effective steps were taken in last 40 years and the enclave people are passing their days in an inhuman situation of statelessness.

[21] Sumathi Subbiah, Security Council Mediation and the Kashmir Dispute: Reflections on its failures and possibilities for renewal, Boston College International & Comparative Law Review, 2004, Vol.27, No.1, pp.173-185

[22] Anthony Wanis St. John, The Mediating Role in the Kashmir Dispute Between India and Pakistan, 21 SPG Fletcher F. World Aff. 173, 176 (1997)

[23] Whyte, B. R. (2002). 'The Cooch Behar Enclaves of India and Bangladesh: An Historical Overview and Determination of Their Number, area and Population'. Oriental Geographer. vol. 46, No. 2. Dhaka.

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Enclave problem is a political issue between the two countries. There is no alternative of resolving this political dispute through arriving a legal conclusion considering the human rights and long-term relationship of both neighbouring countries. Given the vital need for developing the eastern part of the country, the Indian government has made non-reciprocal concession on the Land Boundary Agreement (LBA) 2015.[24]

In fact, India is taking the lead in settling all existing irritants and disputes. The LBA will certainly minimise the security concerns of India and facilitate in tightening the security mechanisms along the border. It will also help to curb illegal movement of humans, drugs, funds and small arms.[25] Though, the execution of the LBA may not be easier said than done and may be Numerous challenges will have to be faced when the question of implementation of the LBA will arise. But, it will address the broader security issues of India and defuse the bilateral irritants between the two countries.[26]

As of above consideration we can come to a conclusion that legal disputes are the disputes where opposing legal claims arise among states, dealing with interpretation of a treaty, a matter of international law, the existence or not of an alleged violation of an international obligation, as well as with the establishment of the nature or extent of the damages due in case of violation of international obligations political disputes are the disputes where the parties' conflicting claims cannot be legally formulated. But, "A question may be legal in one country, and political in another one. There are even purely legal matters which become political at the time of a dispute. The politics is the realm of international law. Do we desire to distinguish legal questions from technical and economic question? This would also be impossible. The result is that the word legal states everything and states nothing, and in matters of interpretation the result is just the same. It has been asked: who is to decide in case of some dispute, whether a question is or whether it is not legal? So far we have had no answer".[27] By observing the both Kashmir and enclave issues, that India facing problem with Pakistan and Bangladesh clearly shows the fact that the nature of the dispute is legal or political one it always depend upon the fair understanding of the disputed states. If the dispute is legal one it is unable to settle even intervention of the adjudicating bodies through amicable methods under international law like Kashmir issue. At the same time political

[24] Willem van Schendel (2002). 'Stateless in South Asia: The Making of the India-Bangladesh Enclaves'. The Journal of Asian Studies, 61, No. 1.Feb. 2002.
[25] Sanjay Bhardwaj, India-Bangladesh Land Boundary Agreement: Ramifications for India's Security, Centre for Land Warfare Studies, Journals,Winter-2015,PP.93-110
[26] Sreeradha Datta, India-Bangladesh Land Boundary Agreement: Follow-up Concerns Need a Fair Approach, Institute of South Asian Studies National University of Singapore, ISAS Working Paper No. 219, 2016
[27] Baron Marschall von Bieberstein, Proceedings of the Hague Peace Conference 1907, Carnegie Endowment for International Peace, Vol.II, P.50.

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dispute among the states also come to legal conclusion like enclave issues when disputed states having Liberal foreign policy towards to settling the disputes and a strong political will to secure peace among peoples of states may resolve the problem. It is important to mention here the opinion of the Lauterpacht on this regard as " While it is not difficult to establish the proposition that all disputes between states are of a political nature, inasmuch as they involve more or less important interests of States, it is equally easy to show that all international disputes are, irrespective of their gravity, disputes of a legal character in the sense that, so long as the rule of law is recognised, they re capable of an answer by the application of legal rule".[28]

It also pertinent to notice that every dispute may not be adjudicated by judicial means. Some disputes not capable to settled by a mere application of legal provisions. They have a political nature and they have to be dealt with by a political body and should be settled by political rather than judicial bodies. The dispute having the nature of legal are only appropriate for a judicial pronouncement. Either it is in municipal or particularly in international law it is very hard distinguish these two political and legal disputes. Most cases entail both political and legal elements.

Probably the finest and perfect approach to distinguishing legal disputes from political dispute is by declaring that legal disputes are the ones disputes which are capable to settled by the application of existing legal norms. In other hand political disputes are the ones that are left to the disputants themselves to decide according to their own norms. It could in no way be overemphasized that the nature of a dispute is not always established upon the issue matter but exclusively upon the kind of norm used to settle the dispute. In other view differentiating the legal dispute from political disputes is contended that there are disputes to which international law cannot practice for the reason that it is uncertain. As a consequence of its deficiency, the states are forced to use their own norms. For a dispute to be settled by rules of law there ought to be pre-exisiting norms able to application for the specific dispute. if there is no such norm it is impossible position for international law in operation.[29]

There is an inherent erroneous opinion in this argument, which fails to notice the truth that when a international dispute submit to an international adjudicating bodies by the state parties, it is always given the option to ask for the tribunal to adjudicate the dispute either in application of existing law or by the application of principles of natural justice and equity. In

[28] Lauterpacht, The Function of Law in the International Community, pp.157-158.
[29] Zulfikar Ali Bhutto, Supra

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whichever happening, the decision of the adjudicated body is a legal one.[30]

While adjudication of dispute by international judicial organs applies the principles of natural justice and equity, the result is a legal determination of the dispute. Even though the decisions of the adjudicating bodies based on principles of equity and natural justice those decisions become legal precedents for later disputes under in international law. In every occasion the related principles are distorted into state legal norms. Hence a dispute is submitted to an international adjudicating bodies to resolve thereof turns into a matter of law irrespective of the nature of norms applied.

VI. CONCLUSION

The prevention and settlement of disputes are one of the main purpose of the law. As mentioned earlier, through peace only one can establish justice. It is also no doubt say that peace is heart of the purpose and principles of the United Nations Charter. Peak of peace is based on settling disputes, rather misleading to conflict disrupting international peace of not only parties but also other neighbouring countries. All means of peaceful machinery shall be improved regularly from remain unsettled disputes necessarily dangerous to peace. The on going difficulty in deciding the international dispute as legal or political arises from the misappropriation among states to accept an instrument of national policy which will watch over those national policies likely to conflict. Reconciliation by the acceptance of international arrangements on this complicated issue appropriately make easy and natural for state to impede war. Whatever it would be, until seen respect upon international laws, agreements by and oneness among all states any dispute can be resolved peaceful machinery regardless of how far it is political or legal aspects, by which universal peace can be achieved. If it is not real in the same sense, it strengthen the ideology of positivists as international law is a weak law.

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[30] Philip Marshall Brown, The Classification of International Disputes, University of Pennsylvania Law Review, 1924-25, Vol. 73, pp.269-279

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