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Property Rights of Kashmiri Pandits: A Critical Evaluation of Legal and Policy Measures taken by the Indian Government

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Abstract

The revocation of special status of the state of Jammu and Kashmir (J&K) under Article 370 of the Constitution of India has put the spotlight back on return and rehabilitation of Kashmiri Pandits thus stirring up the debate, yet again, on their property needs. This paper attempts to critically analyse the legal and policy measures taken by the Indian state to safeguard the property rights of Kashmiri Pandits. The paper looks specifically at three core issues: 1) the categorization of Pandits as ‘migrants’ despite their forced movement from the valley; 2) implications of revocation of special status of the state of J&K under Article 370 of the Constitution and its impact on the property rights and return process of Pandits, and 3) substantive and procedural failings of property reclamation process in the context of its role within the broader peacebuilding process in the valley.

Keywords

Internal Displacement, Kashmiri Pandits, India, Property Rights, Durable Solutions

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1. Introduction

Targeted by rising militancy in the late 1980s, the Kashmiri Pandits left their home state of Jammu & Kashmir (J&K) and resettled in different parts of India. The violent conditions faced by the Pandits forced them to leave behind their homes and property in J&K or sell it for a pittance. In the acts of violence, many saw their houses burnt and looted. On 5 August, 2019, the Government of India abrogated the special status¹ conferred upon the state of J&K under Article 370 of the Constitution and return and rehabilitation of Kashmiri Pandits was brought back as a prime agenda. The inoperation of provisions of Article 370 has paved the way for land and property situated in the state to be possessed and owned by outsiders to restore a sense of ‘normalcy’ in the state. This perceptive shift, besides being aimed at integrating the state of J&K with the rest of the country, is also directed at encouraging the return and rehabilitation of Pandits in the valley.²

Treated more benevolently by the Indian state as compared to other displaced groups, the community of Kashmiri Pandits has been denied the legal and political recognition as internally displaced persons (IDPs). Instead, the Government of India and the National Human Rights Commission (NHRC) have consistently emphasized on recognizing them as ‘migrants’ — a category signifying movement, but not always the urgent need for protection of life and security which Pandits in this case faced.³

Seven years after the first exodus, the state of J&K enacted The Jammu and Kashmir Migrant Immovable Property (Preservation, Protection and Restraint on Distress Sales) Act, 1997 (hereafter, the 1997 Act) to ‘protect and restraint’ the ‘distress sales of the immovable property of the migrants’. Although aimed at preventing the distress legal sale of properties and illegal occupation of homes and other lands of the absentee Pandits, the legislative action was largely unsuccessful in not only achieving its goals but also in providing a satisfactory transition framework for the return of properties. Those who could, used judicial remedies to create almost life-long property rights on government accommodations which were being allotted to them as government servants. The progressive judiciary on some occasions did, however, protect and even bestowed property rights on petitioners in specific cases while issuing general directions to the

¹ The special status of J&K conferred on it the autonomy in relation to almost all legislative and governing matters except for defense, foreign affairs, and communication. The semi-autonomous state of J&K, as a result, had its own separate Constitution, and civil matters of the residents of the state were being governed by special territorial laws. Some of these laws prohibited ‘outsiders’ (or non-state residents) from purchasing and occupying land in the state.

² The Union Home Minister made the statement in the lower house of the Indian Parliament that the government was planning to resettle all the displaced Kashmiri Pandits in the state of J&K by 2022 as a part of discussion on the J&K (Reorganisation) Amendment Bill, 2021 enacted post-revocation of special status of J&K. Information available online at: <https://timesofindia.indiatimes.com/india/governments-2022-jk-plan-resettlement-of-kashmiri-pandits-25k-jobs-train-link/articleshow/80899281.cms> (Last accessed on 6th June, 2021).

³ Dutta, A., ‘To be a Refugee in One’s Own Country’, Oxford University Press (2nd December 2016) available online at: <https://blog.oup.com/2016/12/refugee-kashmiri-pandits-displaced/> (Last accessed on 6th June, 2021).

state government for allotting residential property to Pandits and putting a return and rehabilitation plan into action.⁴

In this paper, I critically analyze the legal and policy measures taken by the Indian state to safeguard the property rights of Kashmiri Pandits. I begin by highlighting the scale and circumstances of exodus of Pandits from the valley between 1989-1990 to establish the gravity of the problem and also the involuntary nature of their movement. In section III, I examine the status of Pandits as ‘migrants’ while academically exploring the possibility of treating them as ‘IDPs’ for all intents and purposes. This becomes crucial not only to apply the international framework on IDPs to the case of Kashmiri Pandits, but also to appreciate the full scale of implications posed by the incoherent policy responses and jurisprudentially deficit court judgments on property rights and needs of this community. Section IV delves into the direct and indirect consequences of the revocation of special status of the state of J&K under Article 370 on the restoration of property rights of Kashmiri Pandits and thus the impossible expectations it generates for realizing their return and repatriation to the valley. The last section V elaborates on the key role that could be played by property in ensuring successful implementation of durable solutions for displaced communities, and the possible socio-legal fallouts of neglecting the rights of ‘secondary occupiers’.

2. The Tragedy that was Kashmir

The circumstances and number of Kashmiri Pandits, a Hindu minority community, who moved out from the state of J&K since 1989 remain contested even after 30 years. An independent inquiry into the killings and exodus of Pandits was denied not just by the central and state governments but also by the Supreme Court of India on two different occasions in 2016⁵ and 2017.⁶

In one of the earlier accounts in 1993, Balraj Puri estimated that about 250,000 of total 300,000 Pandits left the state during 1989-90.⁷ According to Alexander Evans, some 160,000 Pandits have left the valley since 1990 which forms about 95% of their total original population in the state of J&K.⁸ The Internal Displacement Monitoring Centre in its 2010 report marked the total number at

⁴ See, For example, *J. L. Koul v. State of J&K* [Civil Appeal No. 3809 of 2005], *P. K. Handoo v. Estate Officer* [132 (2006) DLT 672] and *Union of India v. Vijay Mam* [LPA No.332 of 2011].

⁵ Writ Petition Civil no. (S). 534 of 2006. The Court did not reject the petition but transferred it to the High Court of Jammu and Kashmir where no decision on the concerned issue has been made till date.

⁶ Writ Petition(s) (Criminal) No. 105/2017. The Court rejected the petition twice, once in July 2017 and its review in October 2017.

⁷ Puri, B., *Kashmir Towards Insurgency*, Orient Longman (1993), New Delhi at p. 20.

⁸ Evans, A., ‘A Departure from History: Kashmiri Pandits, 1990-2001’, *Contemporary South Asia* (2002), 11:1, 19-37, at pp.19-20.

about 250,000 since 1990.⁹ As per the other information portals such as ReliefWeb¹⁰ and The Borgen Project,¹¹ the Kashmiri Pandits, till today, remain the largest displaced community in India.

On the reasons of exodus, there are two broad theories identified by Alexander Evans based on the existing scholarship. One of them treats the mass flight of Kashmiri Pandits as forced displacement due to rising ‘communal intimidation by Muslims’ against Hindu minorities of the state.¹² Another, promoted mostly by the separatist Muslim leaders, identifies the exodus as a part of a bigger strategy of the Indian government which would have allowed it to tackle the Muslim militants much more freely.¹³ However, Evans does not find any credible evidence for the latter theory and considers the flight of Kashmiri Pandits to be a forced displacement driven by desperate circumstances. He goes on to identify his own third theory, according to which, the exodus was the result of ‘legitimate fear’ induced amongst the community due to the actual killings — not mere intimidation or conspiracy — carried out by the militants between 1989 and 1990.¹⁴ The 2018 Report of the UN High Commissioner for Human Rights seems to support this theory by referring to attacks and threats by armed militant groups as the main reason responsible for the exodus.¹⁵ Either way, the scholarship on the issue seems to be in general agreement that the flight of Pandits from the valley was forced and not voluntary based on the existing and emerging corroborating evidence to support it.¹⁶ Besides the killings and violence targeting the Pandit community members, a number of crimes were also committed violating their property rights. The houses and businesses were either burned down to the ground or destroyed by the militants leaving no other option but to migrate for those who survived.¹⁷

3. ‘IDPs’ or ‘Migrants’?

⁹ International Displacement Monitoring Centre, ‘India: National and State Authorities Failing to Protect IDPs’, Norwegian Refugee Council (2nd September, 2010) available online at: <https://www.internal-displacement.org/sites/default/files/publications/documents/201009-ap-india-overview-en.pdf> (Last accessed on 14th August, 2021).

¹⁰ Faret, T., ‘India: Conflicts have Displaced at Least 650,000 Persons’, Global IDP Project (ReliefWeb) (27th October, 2003) available online at: <https://reliefweb.int/report/india/india-conflicts-have-displaced-least-650000-persons> (Last accessed on 19th September, 2021).

¹¹ Brenner, C., ‘The Internal Displacement of Kashmiri Pandits’, The Borgen Project (03rd November, 2020) available online at: <https://borgenproject.org/internal-displacement-kashmiri-pandits/> (last accessed on 19th September, 2021).

¹² See, Evans, supra note 8, at p. 21.

¹³ *Ibid.*

¹⁴ *Id.*, at p. 22.

¹⁵ See, ¶ 137, Office of the United Nations High Commissioner for Human Rights, *Report on the Situation of Human Rights in Kashmir: Developments in the Indian State of Jammu and Kashmir from June 2016 to April 2018, and General Human Rights Concerns in Azad Jammu and Kashmir and Gilgit-Baltistan* (14th June, 2018) available online at: <https://www.ohchr.org/Documents/Countries/IN/DevelopmentsInKashmirJune2016ToApril2018.pdf> (Last accessed on 18th August, 2021).

¹⁶ See e.g., Datta, A., ‘Uncertain Journeys: Return Migration, Home, and Uncertainty for a Displaced Kashmiri Community’, *Modern Asian Studies* (July, 2017), 51:4, pp. 1099-1125 and Sarkaria, M.K., ‘Powerful Pawns of the Kashmir Conflict: Kashmiri Pandit Migrants’, *Asian and Pacific Migration Journal* (2009), 18:2, pp.197-230.

¹⁷ Hans, A., ‘Internally Displaced Women Internally Displaced Women from Kashmir: The Role of UNHCR’, *SARWATCH* (July, 2000), 2:1 at p. 22.

Three broad arguments could be laid down in favor of treating Pandits as IDPs and not as migrants. The first one relates to the very nature of internal displacement as it is understood in international law. The second argument draws on the emerging practice of recognition (and a call for it) of Pandits as IDPs by domestic institutions as well as by Indian judiciary. I lay down the third argument as more of a reserve argument which emphasizes the significance of the very fact of displacement itself and completely obliterates the need for recognition as IDPs by any institution, organisation, or even the state itself.

The term ‘migrant’ remains undefined under international law and as such has not acquired the status of a distinct legal category. According to the UNHCR, the term broadly signifies *voluntary movement* undertaken by a person for reasons such as, better economic opportunities or education, but not due to ‘direct threat of persecution or death’.¹⁸ The IOM, on the other hand, takes a somewhat mixed approach in defining a ‘migrant’ by including both voluntary and involuntary category of movements within it.¹⁹ The Guiding Principles on Internal Displacement (Guiding Principles) enacted by the United Nations, laying down basic rights and guarantees for IDPs, add more clarification in this regard. The Guiding Principles define an IDP as someone who has been ‘forced, or obliged to flee’ due to armed conflict, violence, human rights violations, or disasters.²⁰

The demand of Pandits to be recognized as ‘IDPs’ has been heeded to by ad hoc and independent government advisory bodies as well as by Indian judiciary. The Law Commission of J&K headed by a former High Court Judge M. K. Hanjura recently recommended that the term ‘migrant’ shall be replaced by ‘internally displaced persons’ under the 1997 Act.²¹ The judicial approach in case of status determination of migrants has been a mixed one. In a petition filed by *The All India Kashmiri Samaj*,²² the Supreme Court of India, without going into the merits of the case which sought a determination of the IDP status of Kashmiri Pandits amongst other issues, transferred it to the High Court of J&K. However, in the latter case of *Union of India v. Vijay Mam*,²³ the High Court of Delhi applied the provisions of the Guiding Principles to extend the right to shelter to

¹⁸ A., Edwards, ‘UNHCR Viewpoint: ‘Refugee’ or ‘Migrant’ — Which is Right?’, UNHCR (11th July, 2016) available online at: <https://www.unhcr.org/news/latest/2016/7/55df0e556/unhcr-viewpoint-refugee-migrant-right.html> (last accessed on 24th July, 2021).

¹⁹ A student or a worker moving either within the country or crossing an international border voluntarily for better educational and economic opportunities as well as an unwilling victim of human trafficking are treated as ‘migrant’. See, ‘Migrant’, *Glossary on Migration*, International Organisation for Migration available online at: https://publications.iom.int/system/files/pdf/iml_34_glossary.pdf (Last accessed on 26th November, 2021).

²⁰ ¶ 2, Introduction: Scope and Purpose, Guiding Principles on Internal Displacement <https://www.unhcr.org/protection/idps/43ce1cff2/guiding-principles-internal-displacement.html>

²¹ Pandit, M.S., ‘J&K Law Commission Recommends Ban on Sale of Migrants’ Properties in Kashmir’, Times of India (07th March, 2020) available online at: <https://timesofindia.indiatimes.com/india/jk-law-commission-recommends-ban-on-sale-of-migrants-properties-in-kashmir/articleshow/74532000.cms> (Last accessed on 14th August, 2021).

²² Writ Petition (Civil) No.(S). 534 Of 2006.

²³ LPA No.332 of 2011 decided on 01 June, 2012.

Kashmiri Pandits after recognizing the fact that they could not be expected to return back to their home state of J&K due to prevailing volatile conditions there.

The logical question then to ask at this stage is: whether non-recognition of Kashmiri Pandits as IDPs by the Indian government deprives them of their rights (including property rights) under international law?

Jamie Draper emphasizes on IDPs ‘distinctive normative status’ — as opposed to the legal status — which makes them eligible to claim certain rights.²⁴ Although, good in theory, in practice, the norms do not have the same compelling force under law. Normative status, on its own, cannot become the basis for conferring, exercising, and claiming legal rights. In this regard, an alternative approach is adopted by Brookings-Bern Project on Internal Displacement. A joint report by these two institutions argues that IDP is not a ‘legal status’ that depends on the recognition and registration by the state, and that IDPs shall be able to invoke all the relevant rights under international law in the absence of such recognition.²⁵

The Guiding Principles on Internal Displacement and the Pinheiro Principles lay down the basic framework under international law on the rights and guarantees for IDPs and practical guidance for states dealing with housing and property restitution of refugees as well as IDPs, respectively. Although, both are non-binding in nature, they lay down the overall policy guidance and principled approach which needs to be followed by states while dealing with IDPs. Taking into consideration the three arguments elaborated in this section, it would however be possible to presume that irrespective of the fact, whether Indian government formally recognizes Kashmiri Pandits as IDPs or not, they, by the very *fact and nature* of their displacement, form an internally displaced group who can invoke these rights under international law.

4. Restitution of Property and Article 370

Restitution of property is the only legal remedy which enables the freedom to choose amongst the three durable solutions of return, integration and resettlement for any displaced person.²⁶ Legal property ownership and factual possession thus constitute important conditions to be met for achieving a successful durable solution.²⁷ The understanding of the restitution of property rights

²⁴ Draper, J., ‘Justice and Internal Displacement’, *Political Studies* (2021), doi:[10.1177/00323217211007641](https://doi.org/10.1177/00323217211007641) at p. 2.

²⁵ Williams, R.C., *Protecting Internally Displaced Persons: A Manual for Law and Policymakers*, Report by Brookings and University of Bern (2008) at p. 13.

²⁶ Poulsen J., *Solving Property Issues of Refugees and Displaced*, Doc. 12106, Committee on Migration, Refugees, and Population; Council of Europe (08th January, 2010) at p. 6.

²⁷ Paglione, G., ‘Individual Property Restitution: from Deng to Pinheiro – and the Challenges Ahead’, *International Journal of Refugee Law*, Volume 20, Issue 3, October 2008, pp. 391–412; Philpott, C.B., ‘From the Right to Return to Return of Rights: Completing Post-War Property Restitution in Bosnia Herzegovina’, *International Journal of Refugee Law* (2006), 18(1), 30-80; Das, H., ‘Restoring Property Rights in the Aftermath of War’, *International and*

for displaced communities, however, goes beyond simply addressing the need to find a mere dwelling place or a place to carry on an occupation or trade. It becomes more about restoring a sense of community, building broken linkages with the place, and most importantly, instilling a sense of ‘home’ within the returning community.²⁸

The revocation of special status of J&K under Article 370 has brought about a perceptive shift with the state being seen as more accessible for the outsiders and better prepared for ‘integration’ with the rest of the country. This could certainly change the demographic makeup of the state with the balance tilting in favor of Hindu minority of Kashmiri Pandits thus making the prospect of returning to the valley much more attractive to them. Tilting the demography of the state in favor of Hindus has been a long-standing demand of Rashtriya Swayamsevak Sangh and Vishwa Hindu Parishad, the ideological parent-bodies of the ruling Bhartiya Janata Party which formed the national government in 2014 and has been ruling the country since then.²⁹ Although, one must admit that the strategy of the government to resettle Pandits in the valley by integrating J&K with the rest of the country, or at least creating a perception of it, is highly speculative and contingent on factors such as, change in demography or development, both of which are gradual and uncertain processes.

It would be wrong to berate, however, the changes introduced by the abrogation of special status under Article 370 simply as ‘perceptive changes’ with no real (although remote) legal or policy outcomes. One of the consequences of revoking special status of J&K was the scrapping of Article 35A of the Constitution of India. Article 35A gave the legislature of J&K sole prerogative to define ‘permanent resident’, who could under law, hold exclusive property rights in the state. The definition, at the time of its abrogation, excluded those Kashmiri women from holding or getting a share in ancestral property where they had married the residents of other Indian states. Applicable to all communities across the board, the revocation of Article 35A shall be of special benefit to the Kashmiri Pandit women, who, in most circumstances, due to their families’ exile, had to get married to the residents of other states.³⁰ Ironically enough, the roots of exclusionary laws like Article 35A lie in the historical demand of Kashmiri Pandits themselves who requested the

Comparative Law Quarterly (2004), 53:2, 429-443, and Wak-Woya, B., ‘Property Restitution in Post-War Croatia: Problems and Perspectives, A Discussion Paper’, *Refugee Survey Quarterly* (2000), 19(3), 86-112.

²⁸ Smit, A., *The Property Rights of Refugees and Internally Displaced Persons*, Routledge (2012), New York, at p. 115.

²⁹ Bhat, I., ‘New Delhi’s Demographic Designs in Kashmir’, *Foreign Policy* (16th August, 2019) available online at: <https://foreignpolicy.com/2019/08/16/new-delhis-demographic-designs-in-kashmir/> (Last accessed on 15th September, 2021). For a detailed academic account of demographic intentions of the Indian government for the state of J&K, See, Nawaz, S., ‘Indian Efforts to Change the Demography of IOK’, *Strategic Studies* (Summer 2017), 37:2, pp. 40-57.

³⁰ Bansal, A. and Sharma, N., ‘Petitioners who Challenged Article 35A Happy Over Changes in Property Rights’, ET Bureau (08th August, 2019) available online at: https://m.economictimes.com/news/politics-and-nation/petitioners-who-challenged-article-35a-happy-over-changes-in-propertyrights/articleshow/70581443.cms?_oref=cook (Last accessed on 15th September, 2021).

Maharaja of Kashmir to enact laws to safeguard their land ownership and usage rights from the ‘outsiders’, especially the colonial Britishers.³¹

Similarly, several other policy measures were taken by the J&K government to return the properties of Kashmiri Pandits securely and efficiently in a time-bound manner. The J&K administration in August 2021 issued an order to the officials of the state to implement the provisions of the Act of 1997 through an online portal which made it easier for the Kashmiri Pandits, residing outside the J&K state (the so-called ‘migrants’), to register their complaints on illegal encroachment of their property.³² During the trial run of the portal itself, a record 854 complaints were filed by such ‘migrants’ to recover their properties.³³ Additionally, through the order of 31st March, 2020, the Union Ministry of Home Affairs did away with the requirement of a written complaint being by a ‘migrant’ for initiating a survey or measurement of an occupied property by the relevant authorities thus making it easier to implement the provisions of the 1997 Act.³⁴

The revocation of special status of the state of J&K under Article 370 has put the issue of migration of Kashmiri Pandits back on the agenda for both, the central as well as the state government of J&K. However, the property issues of IDPs have been tackled through quick-fix policy solutions rather than a comprehensive action plan directed towards achieving durable solutions. None of these measures addresses the issue of trust deficit between the alienated Muslim majority and minority Hindu community in the state which shall form the very foundation of the repatriation process.

5. Mending Trust while Safeguarding Property Rights

Rather than impeding the repatriation process, the recognition of property restitution rights shall only facilitate a smoother return of IDPs. Property restitution and related measures present a chance to build broken linkages and trust deficit between different communities. It is, however, to be noted that the ‘right to restitution of property’ survives independently of the ‘right to return’ for

³¹ Chari, S., ‘Modi Government’s J&K Land Laws Finally Bring the Emotional Connect Missing since Article 370’, The Print (30th October, 2020) available online at: <https://theprint.in/opinion/modi-govts-jk-land-laws-finally-brings-the-emotional-connect-missing-since-article-370/533737/> (Last accessed on 15th September, 2021).

³² Bhat, S., ‘J&K Government Issues Order to Protect Properties of Kashmiri Pandits’, India Today (20th August, 2021) available online at: <https://www.indiatoday.in/india/jammu-and-kashmir/story/jk-govt-order-protect-properties-kashmiri-pandits-1842970-2021-08-20> (Last accessed on 24th August, 2021).

³³ Kandhari, M., ‘Grievance Redressal Portal for Kashmiri Migrants Launched’, The Pioneer (08th September, 2021) available online at: <https://www.dailypioneer.com/2021/india/grievance-redressal-portal-for-kashmiri-migrants-launched.html> (Last accessed on 15th September, 2021).

³⁴ Ministry of Home affairs S.O. 1229E dated 31st March, 2020 available online at: <https://pib.gov.in/PressReleasePage.aspx?PRID=1610907> (Last accessed on 16th September, 2021).

the displaced communities.³⁵ An IDP shall thus have a right to have her property restituted even in cases where she voluntarily decides not to return to her original home.³⁶

In this section, I deal with two sub-issues which not only take forward the critical analysis of legal and policy measures taken by the Indian government to address the property needs of Kashmiri Pandits, but also examine the role played by these measures in rebuilding the broken community linkages and trust for returning IDPs. The first one focuses on understanding the importance of transitional mechanisms and rights of ‘secondary occupiers’ while cursorily exploring the idea of supporting property rights for Pandits in their host communities. The second sub-issue examines the consequences of an absent legal framework for determining and disbursing compensation, on the property rights of Pandits.

5.1 Transitional Mechanisms and Rights of ‘Secondary Occupants’³⁷

Restitution of property is seen as an integral part of the broader restorative justice³⁸ and post-conflict peace building activity.³⁹ However, in the case of Kashmiri Pandits, the restitution is not connected to the bigger process of peacebuilding but with the political process of integration of the state of J&K with the rest of India, with return of Pandits acting only as a political tool in the hands of the Indian state.

Within the policies and laws of the government, there is a conspicuous gap when it comes to inclusion of humane transitional mechanisms to pass over the possession of property to the real owners. Transitional mechanisms not only facilitate smooth implementation, but also generate the necessary will amongst the local authorities and administration to execute the challenging provisions of the law which entail taking actions against ‘secondary occupiers’ with whom they share close ethnic, religious, and community ties. It is not surprising then that the Law Commission of J&K criticized the 1997 Act for not being followed in letter and spirit for the past two decades particularly because of the lackadaisical attitude of the authorities.⁴⁰ Prioritization of rights and needs of one community (Pandits, in this case) over the other can also be counter-productive to the process of rebuilding of social harmony and reconciliation.

It is not just the rights of ‘secondary occupiers’ which have gone unrecognized under the law, but also the rights of the third parties who might have come to occupy the property or any stake in it due to the misrepresentation by squatters. Similarly, the rights of original occupants who were de

³⁵ Principles 2.2 and 10.3 of Pinheiro Principles.

³⁶ See, Smit, *supra* note 28, at p. 99.

³⁷ The rights of secondary occupants have been recognized under Principle 17 (17.1 to 17.4) of the Pinheiro Principles.

³⁸ See, Poulsen, *supra* note 26, at p. 5.

³⁹ Proukaki, E.K., ‘The Right of Displaced Persons to Property and to Return Home after Demopoulos’, *Human Rights Law Review*, 2014, 14, 701–732 at p. 720.

⁴⁰ *Supra* note 21.

facto owners of property and did not have legal documents to prove their ownership also remain unrecognized under the law.⁴¹

The 1997 Act also does not establish a separate and independent institutional machinery to process the property claims of displaced owners.⁴² Under the Act, it is the District Magistrate who has been designated as a ‘competent authority’ entrusted with the task of processing the claims either *suo moto* or based on the complaint filed by the original owner of the property. The lack of judicial process and an independent claims processing body means that there is no scope for a secondary occupier to present their claims in an adversarial setting at the very first stance itself.⁴³

The violation of property rights of Kashmiri Pandits, in fact, has been systemic and systematic with the state government of J&K itself being found complicit in illegally occupying the lands of IDPs to construct public buildings, despite the instructions of the High Court of J&K to abstain.⁴⁴ In a petition brought before the Supreme Court of India, the petitioner, *The All India Kashmiri Samaj*, urged that relevant directions be issued to the state government of J&K to not occupy any property owned by Kashmiri Pandits without the prior concurrence of the Ministry of Home Affairs at the Centre.⁴⁵ In response, the Supreme Court simply transferred the petition to the High Court of J&K based on the reasoning that since the apex body to handle the issues relating to relief and rehabilitation of Kashmiri Pandits is based in J&K itself, the High Court of the state was a better judicial authority to tackle their property issues. This was despite the fact that the High Court of Delhi, in the past, had already passed several progressive judgments on the issues relating to property rights of Kashmiri Pandits. This judicial unresponsiveness by the supreme judicial institution of the country inadvertently plays into the hands of the Indian government which has already maneuvered the issue of return and rehabilitation of Pandits to reap political dividends.

Lastly, there has been little emphasis on providing shelter to Kashmiri Pandits within their host communities. The government rehabilitation packages have provided funds and housing, but these have mostly been temporary provisions⁴⁶ either made on humanitarian grounds or as a part of repatriation plan, and not as permanent solution to locally integrate or resettle IDPs.

5.2 Looking Beyond Restitution

⁴¹ One of the recommendations by the Council of Europe in similar circumstances. *See*, Poulsen, *supra* note 26.

⁴² The Law Commission of J&K in its 2020 report recommended the state government of J&K to establish an independent body to replace the District Magistrate and process the property claims of displaced persons. *See*, *supra* note 21.

⁴³ *See*, Smit, *supra* note 28, at p. 62.

⁴⁴ Hakhoo, S., ‘Government Encroaching upon Pandit Properties’, *The Tribune* (12th October, 2017) available online at: <https://www.tribuneindia.com/news/archive/j-k/govt-encroaching-upon-pandit-properties-480783> (Last accessed on 24th August, 2021).

⁴⁵ *All India Kashmiri Samaj v. Union of India*, Writ Petition (Civil) No.(S). 534 Of 2006.

⁴⁶ Under the 2015 scheme, about 6,000 transit accommodations were planned to be constructed in the Kashmir valley to accommodate Kashmiri Migrants.

The number of successful restitution claims is no guarantee that Pandits would return back to the valley. The legal scheme and policy measures do not recognize the fact that the idea of ‘home’ itself could have shifted for many Pandits during the protracted exile period.⁴⁷ Some of them might have adjusted well within their host communities and might not be willing to return to their home state. This could especially be true for the next generation of IDPs who might not even have a living memory of their original home.

Charu Sawhney argues that resettlement of Pandits in other parts of India after displacement was directly dependent on their ability to access social and cultural capital.⁴⁸ After the displacement, the urban Kashmiri Pandits were able to find alternative social and cultural capital easily in their host communities while the rural Pandits, in the absence of agricultural land, struggled to build that capital again.⁴⁹ It would be important to note that this social and cultural capital also has a role to play in their repatriation back to their homeland and thus the Pandits who have been able to rebuild this capital in their host communities might not be willing to go back to the valley where they will have to start again from scratch.

The Pinheiro Principles recognize compensation as an effective remedy not only in cases where the remedy of restitution is ‘factually impossible’, but also in cases where the ‘injured party knowingly and voluntarily accepts compensation in lieu of restitution’.⁵⁰ The choice to have compensation in lieu of property thus makes the right to return a voluntary right in the truest sense of the term. The compensation can also play a crucial role in structuring other durable solutions like, resettlement and integration for the displaced communities.

The legislative measures remain fixated on the idea of restitution of property to the original owner without providing an alternative remedy of compensation to those who choose not to return home. Compensation is payable under the 1997 Act in certain limited circumstances only. Under the Act, it must be paid *only* for the time-period during which the land was illegally occupied by the unauthorized occupier or by any person who has received any right over the property.⁵¹ There is no right to compensation (either in cash or in kind) payable by the state or by the secondary occupier in-lieu of property.

The compensatory mechanisms could also be helpful in reimbursing the rural migrants who lost their agricultural land and thus their livelihood base due to displacement. The law or any policy of the government, however, does not provide for a damage assessment mechanism or criteria. A few

⁴⁷ See, Smit, *supra* note 28, at p. 99.

⁴⁸ Sawhney, C., ‘Internally Displaced Kashmiri Pandits: Negotiation and Access to Cultural Capital’, *South Asia: Journal of South Asian Studies* (2019), Vol. 42, No. 6, pp. 1062–1077 at p. 1062.

⁴⁹ *Id.*, at p. 1069.

⁵⁰ Principle 21.1.

⁵¹ Section 13.

schemes of the state of J&K and the central government although provide compensation for lost and/or damaged properties, the sum paid is uniform and conditional in the absence of any independent damage assessment mechanism.⁵²

6. Conclusion

The political nature of Kashmir's territorial dispute with the neighboring country of Pakistan has kept the issue of migration of Kashmiri Pandits alive and perhaps even unresolved. The Pandits have not been recognized as IDPs by the Indian state but simply as 'migrants', which suggests a blatant denial of the coerced and involuntary nature of their displacement. In the absence of this valid categorization as IDPs, the community loses out on the necessary state protection and assistance.

The abrogation of Article 370 has put the issue of return and rehabilitation of Pandits, as well as issues related to their property rights, back into the spotlight. Post-revocation of special status of J&K, the approach of the Indian state has been to resolve the displacement crisis through development and integration of the J&K state into the rest of the country. Allowing outsiders to purchase land and property in the state and incentivizing private development initiatives have laid down the necessary foundation to restore normalcy in the valley after three decades of militancy. These measures, however, have fallen-short of suggesting any major shift towards achieving durable solution for Pandits that would restore a sense of 'home' for the returning community by paying suitable attention to their property needs.

The law on property reclamation still does not recognize the rights of 'secondary occupiers', a crucial element for re-building the trust between alienated communities in the valley. The emphasis of the government has been on repatriation and restitution of property while ignoring other durable solutions like, local integration and resettlement. The absent compensation measures in-lieu of restitution would have given Pandits a right to choose freely between different durable solutions.

⁵² The assistance of fixed sum is provided under Prime Minister's Rehabilitation Schemes in 2008 and 2015 to those migrants whose houses were damaged (Rs. 7.5 lakhs), left unused (Rs. 2 lakhs) or even to build new ones (Rs. 7.5 lakhs) for those who sold their properties between 1989 and 1997, the time-period between beginning of migration and enactment of 1997 Act.

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