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Legal Aspects of the Kashmir Problem
H.S. Gururaja Rao

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An Exhaustive account of the changing political scenario of Kashmir

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The book under review is the second updated edition, the first having been published in 1967. As pointed out by Mr. M.N. Venkatachaliah, former Chief Justice, in his foreword to the book, "the scholarly contribution of Mr. Rao will serve to clear many legal misconceptions of the constitutional issues inherited and prevent persistence of dilemmas, either inherited or contrived".

The author has revised the book, keeping in view the development of these years from 1967 up to the date of publication of the present edition. Consequently, the chapters that have been added discuss Simla Agreement, Nuclear Explosions, Kargil Conflict, shift in US policy, Agra Summit and the prevalent situation in Kashmir.

As the author puts it, "an endeavour has been made in this volume to discuss the legal issues involved in 'Kashmir Problem', in its historic perspective. There are 71 annexures and include important documents, like Treaty of Amritsar (1846) Indian Independence Act 1947, Instrument of Accession (1947), Simla Agreement etc, various reports of UN Commissions, relevant extracts from UN Charter and some correspondence.

This shows the kind of research and hard work that has gone into the making of this book. The main objective has been to "demonstrate the necessity to refrain from making recommendations which will be found to be intellectually unacceptable, legally untenable, morally futile and politically dangerous". Undoubtedly, Mr. Rao has shown enough legal expertise and acumen in building up a case for India. The case has been made, so to say, brick by brick, on the basis of treaties and agreements, analyzing the ramifications of those treaties in international law and citing the available precedents from international documents, or covenants.

It would be worthwhile to give a brief summary of the arguments, put forward by Mr. Gururaja Rao. That Kashmir's accession to India was legally tenable, valid and had the sanction of international law, can be inferred from the following facts:

(i) The Indian Independence Act 1947, that partitioned the country, establishes that the Indian states could not have attained sovereign independent status, after the lapse of paramountcy. The

accession of a state to either of the dominions became obligatory from a practical point of view. Kashmir, though not a sovereign independent state, was not a *res nullias*— capable of occupation by other sovereign independent states.

(ii) Constitutionally, according to Government of India Act, 1935— which was the constitution at the time— "a state was deemed to have acceded to either of the two dominions, if its ruler executed an instrument of accession and the same was accepted by the Governor-General of the dominion concerned. Thus, Maharaja, the ruler of Kashmir was competent to sign the instrument of accession, and once he did it, the accession became a legal act.

(iii) The title which India acquired over Kashmir by virtue of the ruler signing the instrument of accession, was not an "inchoate" – (not fully developed or formed) title, but an absolute and indefeasible title, which cannot be altered.

(iv) The Indian government's 'wish' to refer the question of accession to the people of Kashmir, was sound, as it was inspired by its adherence to democratic principles. There was no legal obligation for GOI to fulfill this, at best, a moral obligation.

(v) Pakistan's claim that accession was "under duress and a fraud" has been very well rebutted by the writer on the basis of facts and relevant covenants or conventions from international law.

(vi) Mr. Rao has quite competently and skillfully proved that India was not obliged to fulfil the 'obligation of conducting a plebiscite, as per UN resolutions, because of the change of circumstances. According to the doctrine of— *rebus sic stantibus*— every treaty contains an implied term or clause which provides that the treaty is binding only so long as things stand as they are. With a vital change of circumstances the treaty is not binding.

According to the writer, there was a "vital change of circumstances", because (i) Pakistan created an unfavourable atmosphere, (ii) failed to vacate aggression, (iii) entered into an international agreement with China to demarcate the international boundary, "surrendering" to China, over 5180 Sq. Kms of Indian territory, (iv) entering into agreements like SEATO, Baghdad Pact, endangering the security of India and (v) finally, because of the ratification of the accession by Constituent Assembly of the state. Even UN Commission had admitted this change of circumstances and the reports of UN mediators, Dr. F. Graham and Gunnar Jarring, substantiate that.

The validity of the concept of doctrine or principle of 'right of self-determination' as far as Kashmir is concerned, has been very well challenged by the writer. Firstly, the principle cannot be invoked "on behalf of the people of a particular community of the state, other than the one which the majority of the people of that state belong, with a view to form a separate state of their own, or from the state constituted by people who claim to be members of their nation".

To assume that Kashmir is a homo-geneous state is a fallacy, which is neither justified by history nor by present structure. The Muslims of Kashmir are not homogeneously distributed in the entire state and do not form a major national group in all provinces (or regions) of the state.

Moreover, “the claim of a racial minority within a definitely constituted and duly recognized sovereign state is essentially (treaty or no treaty) a matter solely of domestic jurisdiction”.

Mr. G. Rao has dealt with the recent events like Simla Agreements, Agra Summit, Terrorism (or cross-border infiltration), nuclear explosions (by India and Pakistan), autonomy resolution and the current situation, quite comprehensively, with his comments. It would be enough to refer a few of these issues here.

Firstly, he comments on the Autonomy Resolution passed by the State Assembly. His attitude seems to be a little ambivalent. Commenting on the Resolution, he says, “being an integral part of India in terms of constitutional provisions and its ratification by Constituent Assembly of the state, that what is contemplated by the constitutional provisions binding on it – is a march forward, and not a march backward to reach a stage set up for it, at the time of execution of the instrument of accession.

He is referring here to the application of different constitutional provisions to Kashmir, beyond the subjects mentioned (Defence, External Affairs, Communication) in the instrument of Accession. His contention is that the greater integration of the State with the Union of India, was stipulated at the time of accession. Therefore, it was a step forward, not backward. But at the same time, he opines that rejection of the Autonomy Resolution by the central government smacked of arbitrariness. He advises the Centre to objectively consider the matter, discuss and debate it with the state government, so as to arrive at a satisfactory solution, to make accession a meaningful effort”.

The writer finds fault with the UN because “the UN did not make the chances of a settlement easier by the methods it adopted”. UN never seriously entertained the possibility of a compromise. He concludes his work by pleading for negotiations with Pakistan, but categorically rejects Pakistan’s demand for a discussion on Kashmir issue, because “its accession is a settled chapter and cannot be reopened now”.

On the whole, the book deserves to be read, especially by scholars and researchers, for whom it provides lot of references. It is a work of hard labour and dedicated research.