

THE DEBATE AROUND ARTICLE 35A OF THE INDIAN CONSTITUTION - WILL IT ERODE THE AUTONOMY OF JAMMU & KASHMIR?

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This paper seeks to prove the fact that providing complete autonomy to the state of Jammu and Kashmir (J & K) *vide* Article 35-A would only do greater harm than good, for it leads to the violation of constitutional provisions.

Jon Ronson, a Jewish-Welsh polymath, once opined, “*Misuse of privilege is seen as the worst sin.*” People, when granted special prerogatives, often tend to take that autonomy for granted and utilize it to covertly or overtly ridicule notions of equality under the garb of achieving a semblance of so-called “equity”. Article 35-A, is probably is the best example of such misuse.

Let me put forth this infamous article’s history in essence. The Instrument of Accession was executed by Maharaja Hari Singh, the then-ruler of J & K (which was a princely state) on the 26th of October, 1947, wherein he agreed upon the state’s accession to the Indian Dominion along with subjects like defence, external affairs etc. Clause 7 of the same mentioned, “Nothing...shall be deemed to be a commitment in any way as to acceptance of any future Constitution of India...”.¹ Subsequent to it was the introduction of Article 370 and several Presidential Orders, of which the one in 1954 introduced Article 35-A.

Article 35-A, titled “Saving of laws with respect to permanent citizens and their rights”, avers that no law enacted by J&K as regards permanent residency, employment rights and acquisition of immovable property, to name a few, shall be called into question on grounds of inconsistency with the Constitutional rights offered to other Indian citizens. Essentially, this would imply that a preferential treatment would be accorded to those who would fall within the definition of “Permanent Resident” of the State. And this definition would be fixed by the State itself.

¹ Instrument of Accession §7 (1947), (Oct. 5, 2018, 2:25 PM), http://jklaw.nic.in/instrument_of_accession_of_jammu_and_kashmir_state.pdf

Part III of the J&K Constitution enacted in 1956, describes the criteria for a “Permanent Resident”, some of which are: that one must be a State subject of Class I or II; that one must have been an ordinary resident of the State for atleast 10 years after having legally acquired “immovable” property.

The purpose of the Article may probably have been to portray a façade that the country would not think of interfering with the traditions and identities of the people of J&K. However, the other side of the coin that such an intention brings along with it, could have disastrous consequences, to say the least.

Article 35-A stands on shaky grounds and is contested by a concatenation of interconnected challenges. Primarily, it was introduced by means of a Presidential Order. However, Article 368(2) of the Indian Constitution clearly mentions that an amendment to the Constitution could be appended **only** if the bill was placed before both houses of the Parliament. The President can introduce an ordinance under Article 123, and that is the maximum extent of his legislative power. Then too, it has to be approved by the Parliament, lest it should cease to exist. Though the *Puranlal Lakhanpal vs. The President of India*² case held that the President has authority under Article 370(1)(d) to ‘modify’ the Constitution, it didn’t specifically mention that ‘modify’ included introducing an Article or a provision into it, and therefore the validity of 35-A still is a debatable issue.

Also, the Residuary Powers in J&K remain with the State, while actually, they should remain with the Centre under Article 248. Such provisions give excessive autonomy and power to a State than what is required under a federal setup in the first instance. Though introduced before the Constitution of India came into effect, it goes against the very principles on which our Constitution is based, as was argued by the NGO “We the Citizens” in 2014 before the Supreme Court.³ These additional provisions can be at best surmised as provided for a limited purpose of onboarding the J&K with rest of the Indian States at a particular point in time and when the relevance of such provisions are no more valid, tinkering with such provisions to align with

² AIR 1519.(SC:1961).

³ TIMESOFINDIA.COM, [SC to decide validity of Article 35A on J&K: All you need to know](https://timesofindia.indiatimes.com/india/validity-of-article-35a-pertaining-to-jk-to-be-heard-in-sc-today-all-you-need-to-know/articleshow/65616557.cms), The Times of India, Aug. 31, 2018. <<https://timesofindia.indiatimes.com/india/validity-of-article-35a-pertaining-to-jk-to-be-heard-in-sc-today-all-you-need-to-know/articleshow/65616557.cms>>

today's reality can't be considered as "jeopardising with the provisions of Constitution" of India.

Besides, it is on a collision course with Article 14 of the Constitution it is a part of, which says that all citizens of India are to be treated equally under the law, as it discriminates on two levels: between men and women, and between permanent and non-permanent residents.⁴ As to the former, it has been proclaimed that, if women married men who were non-permanent residents, they would forfeit their special state rights and so would their children, while the same rule didn't apply the other way round. Though it was argued that the case of *State of J & K vs Susheela Sawhney*⁵ had ruled against such discrimination, the Supreme Court judges felt that a matter of such gravitas must be presented before a Constitutional Bench.⁶ Therefore, this issue has not been finally decided upon. Similarly, Article 15(1) distinctly mentions that the State should never discriminate on certain grounds of which "**place of birth**" forms a part. Article 15(3) makes a provision to make affirmative action only in favour of women and children, **not** residents. Such contradictions make it a provision that, by reason of its inconsistency, falls under the provisions of Article 13 and should thus be abrogated.

Article 35-A empowers the State to provide permanent citizenship to a person even if he is not an Indian citizen,⁷ while simultaneously, several Indian citizens are struggling to gain citizenship here. This is an apparent anomaly and any course correction steps shall not amount to rebutting the constitutional provisions.

Autonomy a farce?

In the wake of the Supreme Court's decision that it would begin accepting appeals against the constitutional validity of Article 35-A,⁸ there were state-wide protests fearing that abolition of the article would lead to a considerable diminution in autonomy. This is true to an extent. It is

⁴ Siddharth Sunil, *Catch 22: The Treacherous Territory of the Article 35A/ Kashmir Quandary*, Law and Other Things, Aug. 23, 2018, <https://lawandotherthings.com/2018/08/catch-22-the-treacherous-territory-of-the-article-35a-kashmir-quandary/>

⁵ AIR 83 (J&K: 2003)

⁶ Deya Bhattacharya, *Article 35A Debate in Jammu and Kashmir: Plea against special law is about women's rights not political future of the valley*, Firstpost, Aug. 16, 2017, <https://www.firstpost.com/india/article-35a-debate-in-jammu-and-kashmir-plea-against-special-law-is-about-womens-rights-not-political-future-of-valley-3936559.html>

⁷ Mohan Krishen Teng, *Article 370*, (1990)

⁸ Ajay Kumar, *Abolishing 35A will dilute autonomy granted under Article 370 for Jammu and Kashmir, breach UN Resolution*, Firstpost, Aug. 28, 2018, <https://www.firstpost.com/india/abolishing-article-35a-will-violate-spirit-of-autonomy-granted-under-article-370-for-jammu-and-kashmir-breach-un-resolution-5060131.html>

argued that Article 35-A is an appendix to the Constitution and that it doesn't violate the basic structure that was laid down in the *Kesavananda Bharati* case.⁹ Abolishing it would reduce State control and thus denude its autonomy in preserving the culture and traditions that Kashmir is known for, it is argued.¹⁰ Besides, it is also contended that, if Article 35-A goes, states like Arunachal Pradesh would also lose their policy-making freedom to the government at Delhi.¹¹

However, a pragmatic study could lead to different conclusions.

Though the article provides 'special treatment' with respect to employment within the state,¹² there are high rates of unemployment in J&K. In fact, it has the highest unemployment rate in India at 12.13%.¹³ This leads to the ineluctable consequence – the perpetuation of poverty. Juxtaposing this with the fact that there are several liberation and terrorist fronts in the state like Hizbul Mujahideen and Lashkar-e-Taiba, these organizations could exploit the unemployed, by providing them money and other essentials, to join their ranks to exact revenge for the state's indifference to their concerns. This could lead to proliferation of violence in Kashmir, which would ultimately lead to the disruption in the culture and traditions that Article 35-A sought to protect.

Greater risk of terrorism and unemployment would mean, fewer investments and businesses being established, ending in the inevitable consequence – J&K's economy will suffer, thereby reducing its prospects of elevating the standard of life in the state. Also, given that tourism is one of the major sources of revenue in J&K, terrorism could therefore upset the bedrock of J&K's economy. In addition, greater provision of autonomy may stoke demands for complete autonomy from India, which is what fronts like the Jammu Kashmir Liberation Front are demanding, and countries like Pakistan would wish for.

⁹ *Kesavananda Bharati Sripadagalvaru v State of Kerala and Anr.*, 4 SCC 225 (SC: 1973)

¹⁰ Ajay Kumar, *supra* 8.

¹¹ Deya Bhattacharya, *supra* 6.

¹² Raghav Pandey, [What is Article 35A: Law on Jammu and Kashmir autonomy was enacted for political appeasement through a blatantly illegal process](https://www.firstpost.com/india/kashmir-article-35a-was-enacted-for-political-appeasement-through-a-blatantly-illegal-process-3921719.html), Firstpost, Aug. 6, 2018, <https://www.firstpost.com/india/kashmir-article-35a-was-enacted-for-political-appeasement-through-a-blatantly-illegal-process-3921719.html>

¹³ Mukeet Akmal, [J&K has the highest unemployment rate at 12.13% in India: Report](https://www.greaterkashmir.com/news/kashmir/j-k-has-highest-unemployment-rate-at-12-13-in-india-report/269805.html), Greater Kashmir, Oct. 23, 2017, <https://www.greaterkashmir.com/news/kashmir/j-k-has-highest-unemployment-rate-at-12-13-in-india-report/269805.html>

Healthcare is also affected by such a provision. The World Health Organization lays down the optimal doctor-patient ratio to be 1:500, but in J&K, the ratio is an abysmal 1:2000.¹⁴ This shortage in the number of doctors would significantly impact the specialised treatment the people could've received had employment and citizenship been open to all. State-sponsored scholarship schemes are also not provided to the non-permanent residents,¹⁵ meaning that meritorious students in need of financial assistance are denied the necessary succour.

Also, Article 35-A which supposedly provides autonomy to protect the Kashmiri culture, is a two-edged sword. The mass exodus of Kashmiri Pandits best exemplifies this. After the hegira, which took place in the 90s as a result of demands for complete liberation, many of the Pandits, whose properties were forcibly annexed from them, and who wanted to return, could not do so, just because they owned no property now, and thus now exist as refugees¹⁶ in their home state.. This shows how perilous the effects of 35-A could turn out to be.

If complete autonomy is provided, it would mean that the validity of Article 35-A and the 1954 Agreement that introduced it, would be upheld. This would imply that Central jurisdiction would extend only to matters like Defence and External Affairs, to name a few. As per the Delhi Agreement announced in 1954, the Supreme Court would have only appellate jurisdiction¹⁷ as regards issues pertaining to J&K, thereby significantly reducing the authority vested in the Supreme Court. Agencies like the Central Bureau of Investigation would also have no authority to investigate occurrences in J&K. The state could then wield excessive power as it did in *Sampat Prakash v State of Jammu & Kashmir and Anr.*,¹⁸ wherein the State paid only half the dearness allowance paid by the Central Government, to the employees. While proclamation of General Emergency would also need a concurrence with the State which would only mean further procedural complexities and delays, proclaiming financial exigencies is removed out of the equation completely.

¹⁴ Team JV, [Everything you need to know about the shortage of Doctors in Jammu and Kashmir](http://www.jammuvirasat.com/2018/06/05/1-doctor-for-more-than-2000-patients-in-jk-and-much-more/), JammuVirasat, Jun. 5, 2018, <http://www.jammuvirasat.com/2018/06/05/1-doctor-for-more-than-2000-patients-in-jk-and-much-more/>

¹⁵ HT Correspondent, [What is Article 35A and why the controversy](https://www.hindustantimes.com/india-news/what-is-article-35a-and-why-the-controversy/story-w6HaKhNRGIO6RtLcXOIVZK.html), Hindustan Times, Aug 05, 2018, <https://www.hindustantimes.com/india-news/what-is-article-35a-and-why-the-controversy/story-w6HaKhNRGIO6RtLcXOIVZK.html>

¹⁶ Zubair Ahmed, [Kashmiri Hindus: Driven Out and Insignificant](https://www.bbc.com/news/world-asia-india-35923237), BBC News, Apr. 6, 2016, <https://www.bbc.com/news/world-asia-india-35923237>

¹⁷ Deepak Kumar, [The Constitutional Status of Article 35A](https://www.livelaw.in/constitutional-status-article-35a/), LiveLaw, Sep 8, 2017, <https://www.livelaw.in/constitutional-status-article-35a/>.

¹⁸ 2 SCR 365 (SC: 1969).

Is this the kind of autonomy envisaged by the Indian Constitution? Isn't this antithetical to the notion of 'unity in diversity' that India is known for? If autonomy is extended, other states could have a *locus standi* to raise demands for complete autonomy in order to 'preserve their monoculture' leading to a psychological fragmentation of India. While those protesting against its rescission argue vehemently that Article 35-A is a "historical pact" between India and Kashmir, one must recognize that it only trammels progress. Autonomy at the expense of national integration would not do any holistic good. A partial or total withdrawal of provisions under Article 35-A will only remove the lavish autonomy bestowed upon J&K, and will bring it on an equal footing vis a vis other States.

Thus, I contend that the originalist interpretation of Article 35-A would not stand the test of constitutional probity, and must be discarded to make way for a more dynamic interpretation – maybe the Supreme Court should bite the bullet and reach a middle ground, by ensuring that equality is not sacrificed at the altar of autonomy. This can be done by abrogating the special privileges available only to the "permanent" residents of J&K, while at the same time ensuring that the already strained relations between India and the violence-wrecked state do not cross the Rubicon.