

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

Written by Devika Radha

Undergraduate Student, [BBA., LL.B (Hons)], Symbiosis Law School, Pune

INTRODUCTION

Article 35A¹ was inserted in the Constitution of India through the Presidential Order of 1954², issued by then President Rajendra Prasad (exercising his powers under A.370³ of the Indian Constitution) with the concurrence of the Government of J&K. The article provides that any legislation that defines ‘Permanent Residents of Jammu & Kashmir’ or confers any rights on these persons shall not be void on the ground that it is inconsistent with Part III (Fundamental Rights) of the Constitution of India. These rights are related to employment under the State Government, settlement and acquisition of immovable property in the State and right to scholarship or any other form of Government aid in the education sector.

The recent discussion on A.35A is related to the hearing of a petition filed by ‘We the citizens’, a Delhi-based NGO. The petition, questioning A.35A of the Constitution of India picked up the threads of debate on the validity of special provisions related to the State of Jammu & Kashmir (hereinafter referred to as ‘the State’ or ‘J&K’). In addition, a petition filed by Adv. Ashwini Upadhyay also relates to the said Article.

The arguments in the petitions are; firstly that the power to add or delete any provision in the Constitution is a function exclusive to the Parliament and A.370 does not grant the President any legislative power. Therefore, 35.A was inserted without following the due procedure under A.368⁴ as the Presidential Order was never presented before the Parliament. Secondly, the article protects all those laws enacted by the J&K State Legislature that violates Articles 14,

¹ The Constitution of India, Art 35A.

² The Constitution (Application to Jammu and Kashmir) Order, 1954.

³ The Constitution of India, Art 370, Cl. 1(d).

⁴ The Constitution of India, Art 368.

15, 16, 19 and 21 of non-permanent residents in the state. Special attention was drawn to the circumstances where a permanent resident woman marries a non resident man (their children lose right to property), conditions of Dalits and Valmikis (who were given the status of Permanent residents on the condition that they and their future generations would continue serving as safai karmacharis) and the status of West Pakistani Refugees.

Evidently, A.35A gives certain autonomy to the State legislature of J&K which is alien to other states of India. In a scenario where A.35.A is struck down, will it erode the autonomy of Jammu & Kashmir? For this question to be answered, the Constitutional Provisions that grant autonomy to J&K must be first examined.

ANALYSIS

AUTONOMY OF J&K

History of Jammu and Kashmir is peculiar. **Sold** to Raja Gulab Singh,⁵ the predecessor of Maharaja Hari Singh, the State was a Muslim majority ruled by a Hindu Maharaja at the time of Independence. At the wake of independence, on October 26th, 1947, when Kashmir was invaded by armed raiders, Maharaja Hari Singh decided to accede to the Dominion of India by executing a document known as the Instrument of Accession (IoA) under provisions of the Independence Act⁶. According to the provisions of the IoA, the Dominion would have control over the State only in respect of 16 topics under the heads of Defence, External Affairs and Communications, along with 4 Ancillary subjects.

In furtherance of providing clarity to the relation between the State and Union, the Constituent Assembly inserted A.370 in the Constitution of India. The article provides that only such provisions of the Constitution of India shall be applicable to the State, subject to such exceptions and modifications, as the President may by order specify.⁷ Secondly, the Parliament shall have legislative power over the three subjects (specified in the IoA) and subjects in the Union and Concurrent list, which the President has to declare with the **concurrence of the State government**.⁸ However, any such order is to be placed before the **Constituent Assembly**

⁵ V. P Menon, The Integration of Indian States 390 (1956).

⁶ The Indian Independence Act, 1947.

⁷ The Constitution of India, Art 370, Cl. 1(d).

⁸ The Constitution of India, Art 370, Cl. 1(b).

for final assent.⁹ Further, the abrogation of amendment to A.370 can be done by the President only under a recommendation of the Constituent Assembly of J&K. The Nehru-Abdullah Agreement of July 1952, known as the Delhi Agreement, provides further insight to intended application of Union laws to the State.

MISUSE OF ARTICLE 370

A.370 was intended to guarantee Kashmir's autonomy as the State's own Constituent Assembly would decide the subjects on which the State Legislature may legislate. To quote Jawaharlal Nehru:

*"It will be for the Constituent Assembly of the State when convened, to determine in respect of which other subjects the State may decide. Article 370 embodies this basic principle which was reiterated throughout."*¹⁰

Thus, the process of presidential orders altering constitutional provisions culminates at the final decision of the Constituent Assembly when it meets. Constituent Assembly Debates on A.370 (CAD) affirms the above assertion and so did the Supreme Court when it ruled that 'the Constitution-makers were anxious that the relationship should be finally determined by the Constituent Assembly of the State itself'¹¹ (although the Court ruled the contrary in 1969¹², without even referring to the 1959 ruling). Therefore, the State Government would lose all authority to accord concurrence to the presidential orders once the Constituent Assembly was convened (5 November, 1951) and with the Assembly's dispersal (17 November, 1956), there is no authority left to cede more powers to the Union or to accept Union institutions other than ones specified in the IoA. (Noorani, 2006) Additionally, then president Rajendra Prasad himself questioned the competency of the President to repeatedly exercise his extraordinary powers under A.370 and concluded that any such provision authorizing the executive to make amendments in the Constitution was an incongruity.¹³ In effect, every Presidential order passed after the dissolution of the Constituent Assembly is constitutionally invalid. However, in

⁹ The Constitution of India, Art 370, Cl. 2.

¹⁰ Vol. xi, Selected works of Jawaharlal Nehru, Second Series, 12.

¹¹ Prem Nath Kaul v. State of J&K, AIR 1959 SC 749.

¹² Sampath Prakash v. State of J&K, AIR 1970 SC 1118.

¹³ Vol. 15, Valmiki Chaudhary, Dr. Rajendra Prasad, Correspondance and Select Documents, 105 (1991).

reality, a vast majority of presidential orders have been made since then (*Report of the State Autonomy Committee*¹⁴ lists all the forty orders under A.370 which had been adopted till then).

Further diluting the autonomy, the Head of the State or *Sadar-i-Riyasat*, [elected by the State Legislature as per Constitution of J&K before the amendment and a resolution passed by the Constituent Assembly of the State (Anand, 2003)], who accords **concurrence of the State Government**, was supplanted by the Governor of the State (nominated by the Union). This was enabled by an amendment¹⁵ to S.147¹⁶ of the Constitution of J&K, which renders itself immune to any amendments. Therefore, A.370 was used freely to amend the Constitution of the State; something not envisaged by the Constituent Assembly or under A.370. By replacing the Head of the State with Governor, A.370 has lost its meaning as the State no longer has any say in decisions taken by the Union through presidential orders. This reflects in adoption of the Presidential order of 1986¹⁷ that extended application of A.249 (Parliament's power to legislate on matters in the State list with passing of a resolution in Rajya Sabha) to the State. The concurrence to this was accorded by Centre's own appointee, Governor Jagmohan G A Lone. By virtue of this order, the Union acquired power to legislate not only all matters in the State list but also residuary matters (as opposed to Delhi Agreement where it was agreed that Union's power to legislate over residuary matters will not apply to J&K).

Therefore, any question related to mitigation of the State's autonomy requires careful consideration as the autonomy that remains with the State is most minimal.

ARTICLE 35A

To analyze whether striking down of A.35A would lead to erosion of autonomy of the state of J&K, we assume that A.35A has been removed from the Constitution. In effect, any Indian citizen would be able to challenge any of the laws that grant special rights to the permanent residents of J&K to be in violation of his or her fundamental right of equality. Argument being, any such law is in violation of A.14 (right to equality) of the Indian Constitution. Any law in

¹⁴ Report of the State Autonomy Committee, Jammu, April 1999.

¹⁵ The Constitution of Jammu and Kashmir (Sixth Amendment) Act, 1965.

¹⁶ The Constitution of Jammu and Kashmir, 1957, S. 147.

¹⁷ The Constitution (Application to Jammu and Kashmir) Order, 1986.

violation of A.14, if affects any matter relating to public employment, is also in violation of A.16.¹⁸ Right to equality requires that State action must be based on valid relevant principles applicable alike to all similarly situated and it must not be guided by any extraneous or irrelevant considerations because that would be denial of equality.¹⁹

Therefore, the petitioner will have to establish that Indian citizens and Residents of J&K are on an equal footing before the law and that the classification made is unreasonable and has no nexus with the object sought to be achieved (protection of interests of the natives). It is imperative to note that challenging of any such law would be strengthened if the petition is initiated by or on behalf of Non permanent residents of J&K. Once violation of fundamental rights is established, every law granting special rights to permanent residents would be invalid.

However, it is to be noted that any such action would be contrary to the Delhi Agreement, where it was agreed that ‘the State would be empowered to define and regulate the rights and privileges of the ‘state subjects’ who would now be referred to as ‘permanent residents’²⁰.

We shall now consider a scenario where all laws which grant special rights and privileges of Permanent Residents are repealed. The result being, any Indian citizen would be able to purchase land and settle in J&K, recruitment to government jobs would be completely merit based and no restrictions to study in colleges of the State. That is, J&K would be tantamount to any other state in India; the process of integration of J&K to the rest of India would kick start. Impliedly, the State Government will have no control over ownership of property or recruitment to Government jobs.

As pointed out before, the erosion of the State’s autonomy should be carefully examined in light of the minimal amount of autonomy the State now has. However, taking down of laws that grant special rights to permanent residents of J&K would lead to erosion of any autonomy the State is left with.

CONCLUSION

¹⁸ E.P. Royappa v. State of Tamil Nadu, (1974) 4 SCC 3.

¹⁹ id.

²⁰ Part II, Volume III, Parliamentary Debates, House of the People Official Report, Statement on Kashmir in the House of the People, New Delhi, 24 July 1952, No.16, 219.

In the Delhi agreement of 1952, the Kashmir Delegation made it clear that the State Subjects should be entitled to certain rights and privileges in relation to acquisition and ownership of land, appointment of services, etc. These rights and privileges can be traced back to 'Kashmir for Kashmiri' movement led by the Pandit Community in pursuant to which the Maharaja of Jammu and Kashmir enacted various laws, including the Hereditary State Subject Order, 1927²¹. (Jyoti Bhusan Das, 2012.) These rights were therefore, granted to protect the native's interests and to prevent exploitation from outsiders. At that time, J&K was an independent state. However, now that the State of Jammu and Kashmir is an integral part of India and the permanent residents are Indian citizens, the idea of them enjoying special rights seems unfair. It is against the concept of unity and integrity of the country as envisaged in the Constitution.

On the other hand, there isn't much change in the existing circumstances of the State since the time of independence. Militancy and separatist movement within the State is everyday news. Although progressive integration of the State is desirable, the State's readiness for the same plays a significant socio political role.

In relation to the petition filed challenging A.35A, the Supreme Court has held that the President may modify an existing provision of the Constitution using A.370.²² Any such modification can be deemed to be amendment and hence, it logically flows that the President need not follow the procedure laid down under A.368. However, the judgment is silent on whether the President can insert a new Article. Secondly, any argument related to violation of fundamental rights of nonresidents of the State should be read in light of the Fundamental Rights as applicable to the State of J&K.

To conclude, abrogation of A.35A or any other law that protects the rights of permanent residents will not only undermine the constitutionally granted but consistently denied autonomy of the State, it will also be morally wrong as it goes against the promise made to the State in the Delhi Agreement.

²¹ Notification No. I-L/84 of 1927.

²² Puranlal Lakhanpal v. President of India, AIR 1961 SC 1519.