

WILL ARTICLE 35A ERODE THE AUTONOMY OF JAMMU AND KASHMIR?

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The Constitution of Jammu and Kashmir is the legal document which establishes the framework of government at state level in Indian state of Jammu and Kashmir. The present constitution was adopted on 17 November 1956, and came into effect on 26 January 1957.¹ Under Part XXI of the Constitution of India, which deals with “Temporary Transitional and Special Provisions”, the State of Jammu and Kashmir has been accorded special status under Article 370.² Even though included in the 1st Schedule as 15th state, all the provisions of the Constitution which are applicable to other states are not applicable to J&K.³ J&K is the only state in India which has a Constitution of its own.

Article 35A is a provision incorporated in the Constitution giving the Jammu and Kashmir Legislature a carte blanche to decide who all are ‘permanent residents’ of the state and confer on them special rights and privileges in public sector jobs, acquisition of property in the state, scholarships and other public aid and welfare. The provision mandates that no act of the legislature coming under it can be challenged for violating the Constitution or any other law of the land. Permanent Resident is defined as a person who has a state subject on May 14, 1954, or who has been residing in the state for a period of 10 years, and has “lawfully acquired immovable property in the state”.

Article 35A was incorporated into the constitution in 1954 by an order of the then President Rajendra Prasad on the advice of the Jawaharlal Nehru Cabinet.⁴ The controversial Constitution (Application to Jammu and Kashmir) Order of 1954 followed the 1952 Delhi Agreement entered into between Nehru and the then Prime Minister of Jammu and Kashmir Sheikh

¹ Available at <https://m.timesofindia.com>

² Available at <https://www.rediff.com>

³ Available at <https://m.rediff.com>

⁴ Available at <https://www.clearias.com>

Abdullah, which extended Indian citizenship to the 'State Subject' of Jammu and Kashmir.⁵ So Article 35A was added to the constitution as a testimony of the special consideration the Indian government accorded to the 'permanent residents' of Jammu and Kashmir. The Article 35A has not been mentioned in the main text of the Constitution of India but has been mentioned only on Appendix-I to Constitution of India and only that (Appendix –I) Article 35A is mentioned.⁶

Through 1927 and 1932 notifications, Dogra ruler of the princely state of Jammu and Kashmir, Maharaja Hari Singh imposed a law that defined state subjects and their rights. The law also regulated migrants to the state.⁷ Jammu and Kashmir joined India through instrument of accession signed by its ruler Hari Singh in October 1947. After J&K accession, popular leader Sheikh Abdullah took over reins from Dogra ruler. In 1949, he negotiated J&K's political relationship with New Delhi, which led to the inclusion of Article 370 in the Constitution. Article 370 of the Indian Constitution guarantees special status to J&K, with Union's legislative powers over three areas: defence, foreign affairs and communications.⁸ However, under the 1952 Delhi Agreement between Abdullah and Nehru, several provisions of the Constitution were extended to J&K via presidential order in 1954. Article 35A was inserted. J&K's Constitution was framed in 1956.⁹ It retained Maharaja's definition of permanent residents: All people born or settled within the state before 1911 or after having immovable property resident in the state for not less than ten years prior to that date. All emigrants from Jammu and Kashmir, including those who are migrated to Pakistan, are considered state subject for two generations.¹⁰ Permanent resident's law prohibits non-permanent residents from permanent settlement in the state, acquiring immovable property, government jobs, scholarships and aid.¹¹ But it was also interpreted as discriminatory against J&K women. It disqualified them from their state subject rights if they married non- permanent resident.

I think we should study this Article 35A to understand it, as nowadays it has become the hot topic in the media and political sphere. There are many debates going on the constitutional validity of the Article. Being the citizen of India first then the Permanent Resident of the state

⁵ Available at www.thehindu.com

⁶ Available at www.thehindu.com

⁷ Available at <https://www.civildaily.com>

⁸ Available at www.thehindu.com

⁹ Available at www.drishtias.com

¹⁰ Available at <https://www.civildaily.com>

¹¹ Available at <https://www.civildaily.com>

of Jammu and Kashmir followed the growing situation in context with the Article 35A. There is a controversy regarding Article 35A that it should be held “unconstitutional “as the President could not have “amended the Constitution” by way of the 1954 order, and that it was only supposed to be a “temporary provision”. It’s a part of the Constitution applicable only to J&K. So there is no requirement of Parliament of India amending it. As Parliament have no such powers to add any article to the J&K Constitution without the approval of state legislature.¹² Every Article has been made applicable to J&K through Article 370, the President has been given powers to amend, alter or modify any article viz-a-viz J&K, with exception and modifications. A five-judge bench of the Supreme Court in its March 1961 judgement in *Puranlal Lakhanpal vs. the President of India*¹³ discusses the President’s powers under article 370 to ‘modify’ the Constitution. Though the court observes that the President may modify an existing provision in the Constitution under Article 370, but the judgement remain silent as to whether the President can, without the Parliament’s knowledge, introduce a new Article. This arise a question whether Article 35A is void, as the Nehru Govt. did not place it before Parliament for discussion. Thus this question remains open.

In 2014, a NGO approached the Supreme Court challenging Article 35A on the grounds that it was illegally added to the constitution as it was never floated before Parliament. A writ petition filed by NGO ‘We the Citizens’ challenge the validity of both Article 35A and Article 370.¹⁴ It argues that four representatives from Kashmir were part of Constituent Assembly involved in the drafting of the Constitution and the State of Jammu and Kashmir was never accorded any special status in the Constitution. Article 370 was only a ‘temporary provision’ to help bring normality in J&K and strengthen democracy in that State, it contends. The petition said that Article 35A is against the very spirit of oneness of India as it creates a “class within a class of Indian citizens”. It is also restricting citizens from other States from getting employment or buying property within Jammu and Kashmir and it is a violation of fundamental rights under Articles 14, 19 and 21 of the Constitution. In July 2017, Supreme Court lawyer Charu Wali Khanna¹⁵ also challenged Article 35A on the grounds that it was discriminatory towards women. A petition filed by Jammu and Kashmir native Charu Wali Khanna has challenged Article 35A for protecting certain provisions of the Jammu and Kashmir Constitution, which

¹²Available at www.drishtias.com

¹³ Available at <https://indiankanoon.org>

¹⁴ Available at www.financialexpress.com

¹⁵ Available at www.freepressjournal.in

restrict the basic right to property if a native woman marries a man not holding a permanent resident certificate. The petition said that her children are denied a permanent resident certificate, thereby considering them illegitimate. At this juncture, it may be important to recall a landmark judgement delivered on October 2002, by the Jammu and Kashmir High Court, which held that women married to non-permanent residents, will not lose their rights, though children of such women will not enjoy succession rights.¹⁶

Article 35A is acting as a hindrance in complete development of J&K, affecting every sector of State's administration. Present situation is that there is no faculty in Engineering colleges, Medical colleges. No professor wants to go and teach in Jammu and Kashmir from outside the State because he cannot purchase house for him there, his children cannot get admission in professional colleges, no government service to his children. Another instance can be taken of refugees, who migrated in the state of Jammu and Kashmir in 1947 from West Pakistan and residing in the state for nearly 68 years, but still they are treated as a second class citizen of the state. They are considered to be an Indian citizen but not the citizens of the State. Not only this, they are denied many basic amenities and civil rights, which other Indian citizens have in other parts of the country, such as, the right to acquire any immovable property in the State, the right to employment under the State, right to start an industry, purchase a motor vehicle.

The procedure of revocation and removal of article 35A is there, but the execution of same is practically impossible. Article 35A is an offshoot of article 370 of the Constitution of India. Any question on article 35A has to be viewed through the prism of article 370. Article 370 is unique in the sense that it contains in itself the procedure to abrogate it. It can be done by President of India through a notification but only after concurrence of the State Constituent Assembly. But the practical problem is that the constituent assembly of J&K. Even if the president wants to do away with either article 370 or 35A, he has to consult the Constituent Assembly of J&K, which doesn't exist.

Article 370 has a different connotation. The J&K High Court in October 2015 has ruled that article 370 is 'permanent, beyond amendment, repeal or abrogation'. In a subsequent appeal, the Supreme Court stated that it is not permanent and Parliament can take a call on scrapping it. Hence, the battle has now shifted to Article 35A, which could be a precursor to Article 370. Over the years, Kashmiris have been made to believe that scrapping of Article 35A would

¹⁶ Available at <https://timesofindia.indiatimes.com>

change the demography of the region. The threat of abrogation of Article 35A is leading to unprecedented political developments in the valley. For instance, it is the first time in recent past that all major political parties in Kashmir, including the ruling People's Democratic Party and the opposition National Conference, independent MLA's and even Hurriyat have come together on an issue.

The demand for abrogation of the special status of J&K is completely justified. It is indeed root cause of all the problems of J&K and encourages secessionist activities within J&K. In the latest controversy relating to "Land Transfer" to Shri Amarnathji Shrine Board, it was alleged by separatists that it was a violation of Article 370 as the land was being transferred to India. Whereas, it was not so, as the land was being "diverted" and not "transferred", as alleged. It has, indeed created "psychological barriers" in minds of people of J&K and people of other parts of the country for each other. The very removal of article 35A will render the article 370 toothless. The state will retain its separate constitution, but, it will not be able to stop application of the fundamental rights guaranteed in the Indian Constitution, in the state of J&K. Thus the very premises, that separate and discriminate against the citizens of India, will go away. J&K will not be able to restrict its permanent citizenship, nor would it be able to stop the citizens of India from procuring property, entering the service of the J&K state, nor disallow scholarships or admission to professional colleges, to the citizens of the country. Hence the state of J&K, without these restrictions, will be just like any other state. The state government will not be able to hide its partisan, communal and nefarious acts behind the fig leaf of article 370. The very sinister purposes, that the article 370 is being used, will be gone. Hence, there will not be much opposition, if the article 370 is repealed at some later day. The only purpose, for which the Kashmiris were so possessive of article 370 of Indian Constitution, is that there are restrictions on the citizens of India imposed via article 35A. Whatever the vested interests have developed in the state of J&K, will be gone with this article. The essence will be gone. The Kashmiri people should come to terms with the change. However the special status of J&K is governed by article 370, not by article 35A. So the removal of the article 35A will only put end to the 'permanent resident' status of the people of J&K – not the special status of J&K itself.