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

Authored by: Arkadip Mukherjee* & Prattay Lodh**

* 2nd year BBA LLB student, CMR University School of Legal Studies, Bangalore

** 2nd year BBA LLB student, CMR University School of Legal Studies, Bangalore

ABSTRACT

The people of the valley are frustrated and angered, life in Jammu and Kashmir has come to a standstill, rallies and protest are organized every week now. The citizens of the State, both the state subjects and others, cannot come to a consensus. This article ventures to answer several orthodox and an unorthodox question as to what is that provision, its origin and how is it impacting the present dynamics of the country. As the sense of dread has seeped on amongst the citizens of the valley regarding Article 35A, it is imperative to understand that what does this famous State Order Constitute in the present age, what are its limits and boundaries, who are the stakeholders in this chaos and how does any change or “tinkering” in the law affect the people living in the State. What remains to be decided is not for subjects but for the supreme.

Keywords: Article 35 A; Constitution of India; Jammu & Kashmir
INTRODUCTION

Article 35A is instilled in the Constitution giving the State Legislature of Jammu and Kashmir 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 lex loci. It was incorporated in the Indian constitution through a constitutional amendment even much before the constitution of Jammu and Kashmir came into existence.

The Article 35 of the constitution gives special power to Jammu and Kashmir as a State. It implies that the state government has the right under this article to give or deter to give certain privileges to people who migrated there during independence.

Hence, this Article provides special rights and privileges to the permanent members of the State over the other members of the state, where it has imposed certain reasonable restrictions for the other members of the state. The grounds for restriction is as follows-

1. Employment under state government.
2. Acquisition of immovable property in the state.
3. Settlement in the state.
4. Rights to scholarship and other such forms of aid as the State government may provide.

If the state legislation of Jammu and Kashmir makes any laws on these four restrictions, this will not be termed as void on the grounds that it is inconsistent or takes away or abridges the present conferred rights on the other citizens of India by any provisions of this part, neither it will be held unconstitutional in any form as it is and it is due to this provision in the Constitution that it gains its validity from.

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1 Article 35A and the basic structure, Surith Parthasarathi available at https://www.thehindu.com/opinion/lead/article35a-and-the-basic-structure/article24786741.ece
2 Presidential order, 1976, between Jawaharlal Nehru and Sheik Abdullah
3 Article 35A (i)
HISTORY OF ARTICLE 35A

To understand the dynamics of the said Article and extrapolate upon the reasons for its origin, it is imperative to comprehend the history behind this current situation. As we are aware of the fact that the State of Jammu and Kashmir was acceded by the Indian Union in a state of utter chaos and amongst riots, there’s a lot to be known about what happened and how does this affect the present.

Much before independence, the State of Jammu and Kashmir was a princely State, where Maharaja Hari Singh was the ruler, and the citizens were known as the subjects of that State. In 1927, the Maharaja passed The Hereditary State Order[^5], which defined the State subject and their respective rights. He granted residents the right to public office and the right to land use and ownership. These rights were given solely to the State subjects and eliminated any availability to non-state subjects, where it also regulated migrants coming into the State. Even after the accession of Jammu and Kashmir into the Indian Union, the exclusivity of state subjects remained unchanged.[^6]

In the year 1949 Sheik Abdullah negotiated Jammu and Kashmir’s political relationship, which led to the inclusion of Article 370 in the Constitution. This Article guarantees special status to Jammu and Kashmir restricting Union’s legislative powers over three areas. Them being:

1. Defence
2. Foreign affairs
3. Communications

STATEMENT OF PROBLEM

This paper’s primary objective is to study the various provisions in the Constitution in reference to the validity of Article 35A. The researcher has further focused upon the various aspects of the functioning of the Jammu and Kashmir and how are these laws juxtaposed to the provisions so

[^4]: Instrument of accession, Sourced from National Archives of India available at https://thewire.in/history/public-first-time-jammu-kashmirs-instrument-accession-india
[^5]: State Subject Definition Notification dated the 20th April, 1927 Legal Document No 44.
provided in the Constitution. In the end, the author has provided his critical analysis of this provision, where the author has provided areas of both for and against.

**RESEARCH QUESTIONS**

1. What is Article 35 A?
2. How is the present law different from the State order imposed under Raja Hari Singh?
3. What are the differences between Indian and Jammu and Kashmir Constitution?
4. What are the measures to improve the status quo?

**RESEARCH METHODOLOGY**

The research undertaken is purely a research. However, in order to substantiate certain propositions, the researcher has undertaken the method of historical research as well. The researcher has also paid regular visits to various information centers (University library) to gather information about the said topic. Access to various online sources and other legal research database provided by the University websites has been very helpful to the researcher.

**MODE OF CITATION**

The citation design that has been uniformly followed in this paper is the 19th edition blue book format citation.
CHAPTER 1
DIFFERENCE IN THE GRUND NORM

JURISDICTION OF PARLIAMENT

Comparatively to other states, Parliament or the union has very limited jurisdiction for Jammu and Kashmir. Previously till 1963, parliament could legislate of subjects contained in the union list\(^7\) and had no jurisdiction in case of Concurrent List under 7\(^{th}\) Schedule of the Constitution. But now, the Parliament has power to legislate on subjects contained in the Union List and also on some of the subjects of Concurrent List\(^8\). Unlike other states, residuary powers, rest with Jammu and Kashmir. Only the State legislature has the power to legislate Preventive Detention laws\(^9\) for the state. The Parliament has no power in that matter.

AUTONOMY IN CERTAIN MATTERS

Any kind of action performed by the Union Legislature or Union Executive which results in alteration of the name or territories or an international treaty or agreement which is affecting the disposition of any part of the territory of the state requires the consent of the State Legislature or the State Executive to be effective. The union has no power to suspend the Constitution of Jammu and Kashmir.

STRUCTURE OF THE COURTS

There is certain restriction of powers for The High Court of Jammu & Kashmir when compared with the other High Courts located in India. It doesn’t have the authority to pronounce any law as unconstitutional. The High Court of Jammu & Kashmir cannot issue any writs under Article 226

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\(^7\) 7\(^{th}\) Schedule, Constitution of India.
\(^8\) Ibid.
\(^9\) Article 22 – Arrest and Detention in certain cases.
of the Constitution other than enforcement of Fundamental Rights unlike the other High Courts in India.\(^{10}\)

**OFFICIAL LANGUAGES**

Provisions of Part XVII of the Constitution apply to J&K only insofar as they relate to (i) the official language of the Union; (ii) the official language for communication between one state and another; or between a state and the Union; and (iii) language of the proceedings in the Supreme Court. Urdu is the official language of the state but use of English is permitted for official purposes unless the state legislature provides otherwise.\(^{11}\)

**PROCEDURE FOR AMENDMENT OF STATE CONSTITUTION**

The Legislative Assembly of the state can amend the Provisions of the State Constitution by an Act which is passed by the majority of not less than two-third of its members. If Governor or Election Commission is affected due to such amendment then it requires involvement of president’s consent. Any amendment in the Constitution of India will not extend to Jammu and Kashmir unless it is extended by an order of the President under Article 370(1).\(^{12}\)

**EMERGENCY PROVISION**

Under Article 360 of the Constitution, the Union does not have any power to impose emergency in relation to the financial matters in Jammu and Kashmir. The center can only declare emergency in the valley if there is a situation of war or any kind of external aggression.

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\(^{10}\) Article 226 in the Constitution of India 1949.

\(^{11}\) Part XVII (Article 343-351) of the Constitution of India.

\(^{12}\) Article 370(1) in the Constitution of India 1949.
This is in stark contrast to other states, where the nominal head of the executive has the power to impose emergency if there is any kind of financial emergency\(^{13}\) where there is a financial crisis in the country. This happens when the credit of any part of India is threatened or is in danger. The purpose of it being to support the government machinery in times of financial crunches in the economy.

Even for declaring the emergency, there are certain conditions, them being-

1. The emergency which is to be proclaimed has be made in concurrence with the government of the state.
2. And in a case, where the aforementioned provision is not followed, the emergency has to be subsequently applied by the President at the request or by taking concurrence along with the government of the state.

In the year 1964, Article 356 and 357 from part XVIII of our constitution were extended to the Constitution of Jammu and Kashmir.

**FUNDAMENTAL DUTIES AND DIRECTIVE PRINCIPLES OF THE STATE POLICIES**

Another differentiation amongst the Constitution of the valley and Indian Constitution of the Jammu and Kashmir is that Part IV\(^{14}\) and Part V\(^{15}\) of Indian Constitution is not applicable to the State.

**MISCELLANEOUS**

The permanent residents of Jammu & Kashmir have been given special privileges in respect to employment, procurement of immobile property, settlement, and scholarship and various other aids in the state as provided by the state government.

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\(^{13}\) Article 360.
\(^{14}\) Part IV (Article 36-51) of the Constitution of India.
\(^{15}\) Part V (Article 148-151) of the Constitution.
Schedule 5 of the Constitution associated with administration and control of SC and ST and Schedule 6 of the Constitution related to administration of tribal areas doesn’t apply to state of Jammu & Kashmir.
CHAPTER 2
PRESENT SITUATION

Hence, it is quite clear that The Hereditary State Order passed by the Maharaja of Jammu and Kashmir still stands, but now there is an evolution of this order into a full-blown legislation for the society to adhere by now named as Article 35A. This Article has found its way to our Constitution in the year 1954. A presidential order was passed through the Delhi Agreement between Nehru and Sheik Abdullah which imposed Article 35A under Article 370\textsuperscript{16} of the Constitution.

As of now a permanent member of the state is defined as a person who was a state subject\textsuperscript{17} on 14th may 1954 or who has been lawfully residing in the State for a period of ten years and has lawfully acquired immovable property in the state or migrated from the State on march 1st 1947 and has gone within the Pakistani area and has come back with a resettlement format in the State.

In the case of \textit{State Bank of India vs Santosh Gupta and Ors.}\textsuperscript{18} The court held that the Securitization and Reconstruction of Financial Assets and Enforcement of Security Interest Act, 2002\textsuperscript{19} (SARFAESI Act, 2002) cannot be enforced in the State of Jammu and Kashmir. It is to say that in the

The power then used by these people was enshrined into their constitution decades ago and now has become the major point of distress amongst the citizens. Now the impugned Article deals with two basic things. On one hand it provides power to the State to have a right to define and come about with the definition of “permanent residents of state” and on the other, the state of Jammu and Kashmir can lawfully prevent the people from other state to buy property in their own state.

\textsuperscript{16} Article 370 of the Indian constitution is an article that gives autonomous status to the state of Jammu and Kashmir. The article is drafted in Part XXI of the Constitution: Temporary, Transitional and Special Provisions.

\textsuperscript{17} A citizen according to The Hereditary State Order.

\textsuperscript{18} State Bank of India vs Santosh Gupta and Ors, CIVIL APPEAL NOS. 12237-12238_OF 2016[ARISING OUT OF SLP (CIVIL) NOS.30884-30885 OF 2015]

\textsuperscript{19} Efficient or rapid recovery of non-performing assets (NPAs) of the banks and FIs. Allows banks and financial institutions to auction properties (say, commercial/residential) when borrower fail to repay their loans.
An NGO\textsuperscript{20} has challenged 35A in the Supreme Court in 2014 on grounds that it was not added to the Constitution through amendment under the regular system of Constitutional amendment which is provided in the provision of Article 368\textsuperscript{21}. They are contending this incorporation of Article 35A was never presented before the parliament and that it came into effect immediately.

Many contests that the root of the issues which the State is now facing is the incorporation of this provision through the system of presidential order. The provision was incorporated when the parliament was not in session. Hence, it was impossible for the parliament to amend this through a constitutional amendment which would have required a special majority to pass this bill into a full-blown Act.

Also, in 2017 two Kashmiri women argued that the state’s laws, flowing from 35A, had disenfranchised their children. In the sense that the state laws of Jammu and Kashmir does not allow the children of Kashmiri women to vote in the state assembly election of the State. 35A does not cover the voting rights of the State subjects. Hence, there was a need to review the Article 35A as to whether such provisions which is seen arbitrary to others be constitutional or unconstitutional.

\textsuperscript{20} A Rashtriya Sayamsevak Sangh (RSS) linked NGO.

\textsuperscript{21} An amendment of this Constitution may be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in Article 54, Article 55, Article 73, Article 162 or Article 241, or

a. Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or  
b. any of the Lists in the Seventh Schedule, or  
c. the representation of States in Parliament, or  
d. the provisions of this article, the amendment shall also require to be ratified by the Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent.
CHAPTER 3
ONE FOR THE SUPREME

After all this, the Supreme Court of India is reviewing the impugned Article, where the various aspects have come forward, several questions to be considered by the Supreme Court are as follows-

i. When a woman, who is a State subject of Jammu and Kashmir marries an outsider, she loses her right to ownership of property. But a court case in 2002\(^2\)\(^2\), which transferred citizenship rights to own property by a woman who is married outside, but did not allow the women to extend this right of ownership to her children. But that does not apply to the husband of a woman in Jammu and Kashmir.

Here, the question of Article 14 which provides the right to equality comes into play as there is discrimination between residents and non-residents on the basis of sex.

II. There has been violation of human rights relate to the manner in which the State subject act treats other community namely the lower caste communities, one of them being the Valmiki’s, they were brought in 1957 from Punjab to clean the filth of Jammu and they were given conditional state subject rights. The condition attached was while they own property, they cannot work for in any other work except safai-karamcharis, so the children, grandchildren of Valmiki’s are obligated to just be that. This is a gross human rights violation which has been condemned by both national and international institutions. The question is about the role that 35A plays in this regard.

III. Court will deliberate on the matter of people who came from West Pakistan in 1947, these people have Indian citizenship but are not provided state subject recognition. The question which arise that what should be done about these citizens, what is the adequate amount of justice for these citizens who are craving for citizenship rights in their own country.

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\(^2\) State Of Jammu & Kashmir, Dr vs Dr. Susheela Sawhney AIR 2003 J K 83, 2003 (1) JKJ 35
IV. The Court would look upon the matter of people living in Jammu and Kashmir, who do not have a permanent residence certificate, where they can vote in the Lok Sabha elections but can't vote in local body and assembly election.
CHAPTER IV
ANALYSIS AND POSSIBLE SOLUTIONS

It is absolutely safe to say that now the ball is in Supreme Court. Whatever the decision, it is bound to create a stir in the country, more specifically for the people of the valley. It has been stated by many in support of this Article that such a provision does not in itself confer any such rights to the citizens, rather this provision is a clarification provision that all the laws in the state which were so deemed to be unconstitutional by the constitution will now be constitutional. Also, they contest that any action to scrap the article should include scrutiny of all other presidential orders passed in 1954.

Also, the demographic composition of the state consists of a Muslim majority, it is feared that even the slightest change to such article would lead to influx of people of different religion into the state, which in turn can destroy the autonomy of the state as a Muslim majority state.

Also, the said provision is discriminatory in nature. This is the violation of the Constitution at a very basic level. The discrimination is between the permanent member and the non-permanent members of the state. Here a pertinent question to be raised is that why a person cannot buy and acquire property in the valley where he can do so for the rest of the states in the entire country.

Also, various injustices faced by various communities in the name of this provision are seen to be arbitrary by people across the country and world community. A positive judgement by the Court in this regard may provide the adequate relief to these communities, but considering the practicality of the situation, it is going to take a long time for the state subjects to consider these people as one of their own.
CONCLUSION

The said article is not only a key element in deciding the various policies but also affects the daily activities of people involuntarily. Here, we can conclude that actual muddle is not based on religion but the layer of politics which surrounds it. So far, with the development of this case, it has been difficult Kashmiri’s to take a sigh of relief. No matter what the ruling on this, if favored the petitioners would lead to catastrophic effects which will be felt most intensely in the valley. With the people of the valley coming up and against various difficulties already, this in turn will be quite a challenge for them. As for the petitioners, patience is the name of the game. Since they have challenged provision on valid and quite serious charges, they might as well get the cake and eat it too. But, it is now that the judiciary has decided to provide justice to those who are aggrieved.