

ARTICLE 35A OF INDIAN CONSTITUTION AND DAUGHTERS OF JAMMU AND KASHMIR

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ABSTRACT

At the outset, women constitute half of the world population. The role of women in leading developing nations towards change is indispensable, but they are the major excluded group in almost all aspects of life. Although Government of India has given a greater push to gender mainstreaming by promoting its flagship scheme - Beti Bachao, Beti Padhao. But the women in Jammu and Kashmir (hereafter J&K) have been suffering from boundless injustice since last six decades due to an article introduced insidiously into the Constitution in 1954. Since its inception they have been deprived of equal rights available to all other women and men in India and J&K respectively. Article 35A is a clear violation of the basic structure of our Constitution as it curbs certain basic rights enshrined in the very Preamble of the Constitution. This paper seeks to examine the effects of Article 35A on women of J&K and the how the state government has so far managed to get away with it. It will also study how this Article (Article 35A) violates the gender equality and the basic fundamental rights. Leaders of political parties and separatists groups across the spectra have announced their comic solidarities and warned that interfering with the autonomy of the state will lead to anarchy and violence. It is also important to understand why it is dangerous for the central government to tamper with Article 35A, despite its provisions being discriminatory against women. The special status of the state of J&K is additionally strengthened by stringent J&K state determined citizenship provisions, to which Article 35A gives legal and constitutional legitimacy. It was added to the Constitution as a testimony of the special consideration the Indian government accorded to the permanent residents of J&K.

Key Words: Article 35A, Article 370, Constitution, J&K, Kashmir, Women

I. INTRODUCTION

Before coming to the Article 35A, it is pertinent to mention about Kashmir's unique place within the Indian union. It is the only state that maintains its own state constitution, as a result of its unique position at the time of partition in 1947. In 1950 the Indian Constituent Assembly approved Article 370 of the Indian Constitution. This article gives special and different status to J&K, unlike any other state in India. This special constitutional

provision, enshrined as it was in the Indian constitution due to the unique circumstances of the state's accession to the Indian state. The special status of the state of J&K is furthermore strengthened by the stringent J&K state determined citizenship provisions, to which Article 35A of the Indian constitution gives legal and constitutional legitimacy. [1] Countries of continental dimensions respect diversity, like Quebec in Canada. Britain has conferred "special status" with substantial autonomy on Scotland and Wales, not to forget Northern Ireland. [2]

Article 35A is a provision incorporated in the Constitution empowers the J&K assembly/legislature to define states' permanent residents" and confer on them special rights and privileges in public sector jobs, scholarships, acquisition of property in the state and other public aid and welfare. It was added to the Constitution through a presidential order of 1954 with the then J&K government's concurrence.

The Presidential Order was issued under Article 370 (1) (d) of the Constitution. This provision allows the President to make certain "exceptions and modifications" to the Constitution for the benefit of 'State subjects' of J&K. 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. The controversial Constitution (Application to J&K) Order of 1954 followed the 1952 Delhi Agreement entered into between Nehru and the then Prime Minister of J&K Sheikh Abdullah, several provisions of the Constitution were extended to J&K via presidential order in 1954. Article 35A was one of them, inserted then, which extended Indian citizenship to the 'State subjects' of J&K. [3]

In other words we can say that this Article 35 (A) was added to the Indian Constitution as a testimony of the special consideration the Indian government accorded to the Permanent residents of J&K. As a consequence of this, no one except those defined as 'permanent residents' are entitled to property rights; participation in Panchayat elections, employment in state government; municipalities and legislative assembly elections; admission to government run technical education institutions; scholarships and other social benefits. [4]

II.TEXT OF ARTICLE 35A

Article 35A "Saving of laws with respect to permanent residents and their rights. - Notwithstanding anything contained in this Constitution, no existing law in force in the State of J&K, and no law hereafter enacted by the Legislature of the State, -

- (a) defining the classes of persons who are, or shall be permanent residents of the State of J&K; or
- (b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects-
 - (i) employment under the State Government;
 - (ii) acquisition of immovable property in the State;
 - (iii) settlement in the State; or
 - (iv) right to scholarships and such other forms of aid as the State Government may provide, shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this part." [5]

III.POLITICAL PARTIES AND SECESSIONISTS POSITION

Supporters of special status for J&K argued that it is a defining characteristic of the state that has promised to its people and any tempering would threaten its demographics. As sale of land and property the state will be facilitated for outsiders. J&K mainstream and secessionists parties opposed to tampering with Article 35A. Fear that it would lead to further erosion of J&K's autonomy and trigger demographic change in Muslim majority valley. Political parties believed that Kashmir resolution lies in greater autonomy and self-rule; separatists fan paranoia against possibility of Hindus 'flooding' the valley. However, in the last 70 years, demography of Kashmir Valley has remained unchanged even as Hindu majority in Jammu and Buddhists in Ladakh have rights to buy property and settle in the Valley. [6] The issue has touched the sensitive cords of identity and religion in the state and the mainstream political parties across the spectrum including ruling PDP, opposition NC and even Joint Resistance Leadership comprising of Sayed Ali Geelani, Mirwaiz Umar Farooq and Yasin Malik have vowed to fight against its abrogation at any cost. They asked Kashmir diaspora all over the world to hold peaceful protest demonstration against the conspiracies to scrap the state subject law as the issue is a matter of life and death for people for people of J&K. [7]

In other words it is argued that the regional pro-India political parties see it as a danger to their existence as they have always projected themselves as buffer between the J&K state and New Delhi protecting the special identity of the state. In fact, J&K chief minister Mehbooba Mufti went on record saying that if the special status of J&K was tinkered with, there would be nobody to hold tricolor in the state. [8] Omar Abdullah has called it the death knell for pro-India politics in the Valley. [9] The state's two main regional political parties, NC and PDP, contended that there would be no J&K left if this provision is tampered with, and have promised to fight the battle together despite being the two main rivalry. Most people in valley believe this is the central governments design to change the demographic character of the Muslim majority state. [10] In other words we can say that there was an overall opposition to the efforts to revoke Article 35A of the Constitution. [11]

Dr. Farooq Abdullah's and his United Front has felt the need for going to the people of J&K to enlighten them with the importance of this article, he claimed "we have also decided to appeal the democratic voices and all credible sections of the society in the country to understand the dangers ahead and the serious implications of removing Article 35-A. This will be a dangerous move, dangerous for the state and as a country as a whole." [12] Dr. Farooq Abdullah, has been quoted as having said on this 7th August while talking to media in Srinagar: "It (Art 35A) is not just a Kashmir centric issue as they (BJP & RSS) are trying to project it. It was very important to discuss the issue of Article 35A and its implications on the State, and all its three regions-Jammu, Kashmir and Ladakh, so that people understand as to why we are against its abrogation, which gives us the basic right and scrapping it will take away that basic right from us. Big responsibility on shoulders of those who have always worked in direction of keeping the state away from regional frenzy politics. It was Maharaja Hari Singh who in 1927 had brought in the ownership laws of the state, for welfare of state subjects". [13]

The right wing BJP has traditionally argued against the special status and Article 370 for Kashmir but with regard to the recent legal challenge, it has not spoken in favour of Article 35A. The Centre has refused to take a

stand on the issue, as Attorney General K K Venugopal informing the court that it was “Very sensitive” and required a “larger debate”. [14] However in September 2017, Home Minister Rajnath Singh said the central government would not do anything “against the sentiments” of the people of J&K. The RSS has repeatedly labelled Article 35A as illegal and constitutional fraud – depriving citizens of India of their basic fundamental rights. [15] But the intelligentsia and informed citizens in Kashmir believe that it is purely the BJP’s machination of pursuing its Kashmir-centric agenda. [16]

Prof. Bhim Singh of Jammu and Kashmir National Panthers Party (JKNPP), said that there is no fundamental right guaranteed in J&K Constitution which keeps Indian Constitution out of its jurisdiction in J&K. He said that fundamental rights available to citizens of India are not available to the permanent residents of the state. *He contended that the President of India is fully authorized under Article 370 itself to integrate the State with the rest of the country by amending Article 370 through Presidential Order. This is the only way when the Fundamental Rights of the Indian Constitution shall be extended to the State of J&K and the people of J&K shall not fall victim to the blunders committed by the Central Govt. by adding Article 35A in the Constitution of India giving authoritative power to the Legislative Assembly of J&K when it was not even born in 1954.* [17]

The president of Panun Kashmir, a front organization of migrant Kashmiri Pandits, argued that the Article 35A has created a state within a state and provided justification to so called sub-nationalism. Vinod Pandit, a migrant Kashmiri Pandit leader and chairman of the All-Parties Migrant Coordination Committee, argued that “If Article 35A comes in the way of development of the state compared to other parts of the country, there will be no hesitation in repealing it.” Professor Hari Om, a historian and social activist, said, “It is an atrocious article that creates a high wall between people of J&K and the rest of India. It must be thrown out lock, stock and barrel.” [18]

IV. DISCRIMINATORY AGAINST WOMEN

“Almighty has bestowed woman with different virtues - A woman performs the role of a mother, a nurse... and a good friend when she shares the grief as well as joy of her husband,” narrated Hazrat Abubakar Sidiq (RA).

Woman possessing all these qualities but still continues to be dominated by the man in this society. [19] According to Prof. Trilok, “Kashmiri woman is hard working, beautiful, stout, and active. She has proved her worth in different fields, one finds her in crop fields helping her husband in transplanting paddy and at times she proves to be a helping hand in reaping the crop. A women in Kashmir can be found selling flowers in Dal Lake and paddling Shikaras or one can spot her selling pottery items. She is very active in the fish market of Srinagar. In the last decade of 20th century one finds them collecting dry wood for domestic use...her great treasure is her character and simplicity. But when arises she acts as a savior and can withstand a storm that sweeps away everything which crosses its way. From spinning wheels to weaving shawls or selling fish on the pavement of Srinagar city, she has rose to the highest position to rule Kashmir.” [20] But it is crystal clear that women in J&K have not found niches in the upper strata of decision making bodies whether it is political, religious or social. Apart from giving the special status to the state of J&K, Article 35A is also discriminatory in nature

towards several communities like West Pakistani refugees, [21] Valmiki community, [22] the Gorkhas [23] and the women of the State. [24]

The history of the state is witness to a long drawn struggle for gender equality by many like the Director of All Indian Radio, Leh, Tsering Angmo, former J&K Prime Minister Bakshi Ghulam Mohammad's grand-daughter; and former Punjab Governor Surinder Nath's daughter-in-law Rubina Malhotra; and Amarjeet Kaur of Baramulla. [25] The role of women in leading developing nations towards change is indispensable. Number of states in India are observing the emergence of a new crop of women leaders but J&K is yet to realize the need for a balanced representation for women in politics and in other important sectors. The permanent resident's law forbids non-permanent residents from "permanent settlement" in the J&K state, purchasing or acquiring immovable property, government services, scholarships and aid. It was also highly interpreted as discriminatory against J&K women. As this Article disqualified them from their state subject rights if they married nonpermanent residents.

Constitution of India guarantees gender equality across the country. Unfortunately, women of J&K do not enjoy the same rights as men. The Article 35A clearly violates the principle of gender equality. Women of J&K continue to be victims of severe gender discrimination from last six decades. In case daughters of J&K marry a non-resident, her husband and children get robbed of their residentship rights. But in case sons and brothers marry a non-resident his wife and children automatically acquire all rights. [26]

This gender discrimination in J&K can best be explained by quoting the example of one family alone the Abdullah family itself. Sheikh Mohammed Abdullah's son, Dr. Farooq Abdullah, married a Christian British citizen, Mollie, who became a naturalized citizen of J&K by marrying a male citizen of the state (Farooq Abdullah). She got all the rights of a 'permanent resident' though she was a British citizen. Her children also got all the rights in J&K. Farooq's son Omar Abdullah married a non-resident, Payal, a Hindu, and she became a naturalized 'permanent resident' by marrying a male citizen of the state (Omar). Payal and Omar's children enjoy all the rights of permanent resident status in J&K. But Farooq and Mollie's daughter Sara Abdullah, on the other hand, married a non-resident, Sachin Pilot, the then UPA minister. After marriage, Sara's rights in J&K got severely curtailed. Her husband Sachin and children are not eligible for Permanent Resident Certificate (PRC) and its related 'privileges'. Sara's children have no right over any property she might own in the state of J&K. [27] Even Sara was robbed of her own rights, until the J&K High 2002 judgment. [28]

A ray of hope came to the women in J&K in a landmark judgment in October 2002, J&K High Court, in the case of State of J&K versus Dr. Sawhney and Others, held that women married to non-permanent residents will not lose their status as a permanent resident of the state on her marriage with a person, who is not a permanent resident of the state of J&K. Before this judgment their Permanent Resident Certificate (PRC) was temporary in nature with an endorsement of "Valid Till Marriage". Although it was in mid-sixties when the then J&K Revenue Minister issued an executive order directing all deputy commissioners to issue certificate of "permanent resident" to women with the proviso "Valid Till Marriage". [29] But according to the 2002 Judgment the children of such women does not have succession rights. Those children's cannot desire to get

employment in J&K as it is prohibited by Article 127 of the J&K Constitution, which restricts right to employment only to permanent residents.

The judgment clarified that:

“Section 10 of the State Constitution lays down that permanent resident have all the rights guaranteed to them under the constitution of India, and if there is some discrimination inter-se between the citizens of India who are permanent residents of the state, then in the event of a case being made out for discrimination, that provision can be struck down as violative of equality clause. The immunity which has been provided is limited. The immunity is that law is not to be declared as ultra vires because different treatment is being given to citizens of India who are not the permanent residents and the citizens of India who are permanent residents of the state.”

[30]

Despite the High Court decision in favor of women, the bill was first introduced during the PDP-Congress coalition government, under the Chief Minister ship of Mufti Mohammad Sayeed, in the State Assembly but was rejected by the State Legislative Council.

V. DEFENSE OF ARTICLE 35A

It is argued that Article 35A is a violation of the basic structure of our Constitution as it curbs some basic rights enshrined in the very Preamble of the constitution. Addition or deletion of an Article amounts to an amendment to the Constitution. And the Constitution can be amended only by the Parliament as per procedure clearly laid out in Article 368. It is contended that the parliamentary route of lawmaking was bypassed when the President incorporated Article 35A into the Constitution, as it was never presented before the parliament of India. Article 368 (i) of the Constitution empowers only parliament to amend the Constitution. But according to the J&K Advocate General Jehangir Iqbal Ganai Article 35A is not a part of the Indian constitution. He further argues that “there is an argument projected that the President has no powers to amend the Constitution. The fact of the matter is Article 35 (A) is not part of the Constitution of India. It’s a part of the Constitution only applicable to J&K. There is a difference. So there was no requirement of Parliament amending it.” [31] And for this reason presidential order was issued after concurrence from the state constituent assembly. Even though J&K had no fundamental rights for first four years after 1947. But had extended fundamental rights of the Indian constitution to J&K, only because of article 35A otherwise we may not have done that, so this article does not violates fundamental rights of the citizens of the India.

Recently a writ petition filed by a little known New Delhi based NGO ‘WE the Citizens’, apparently backed by the right wing groups (RSS and BJP), challenged the very validity of Article 35A. The petition said Article 35 A is against the “very spirit of oneness of India” as it creates a “class within a class of Indian citizens”. Restricting citizens from other States from getting employment or buying property within J&K is a violation of fundamental rights under Articles 14, 19 and 21 of the Constitution. [32] Another petition was filed by J&K native Charu Wali Khanna has challenged Article 35A for protecting certain provisions of the J&K Constitution, which restrict the basic right to property if a permanent resident woman marries a non-resident man. “Her children are denied a PRC, thereby considering them illegitimate.” [33]

Article 35A had been challenged several times in the past but each time the central government had filed a counter-affidavit. This time central government had refrained from doing the same, even though the attorney general argued for a wider debate on this. [34] PDP led coalition government has been left to single-handedly defend Article 35A. But they have a strong support from opposition parties (NC and Congress) and separatist groups regarding the defense of it. One would expect to find the Article 35A between Article 35 and 36 of the Indian Constitution, but this article does not appear between 35 and 36 Article. In other ways we can say that it has not been mentioned in the main text of the Constitution of India. Interestingly, Article 35A appears in the Constitution as an appendix (Appendix I).

VI.IT'S SIGNIFICANCE TO J&K

Article 35A flows inexorably from Article 370 which is the part of the Constitution of India, as it was enacted on 26 November 1949. It is now 51 year old and only sanctifies the Maharaja's notification of 20th April 1927 which clearly defines State Subjects and their right to hold property. [35] Along with 1932 notification, Maharaja Hari Singh imposed a law that defined state subjects and their rights. The Maharaja's definition of permanent residents - all persons born or settled within the state before 1911 or after having legally acquired immovable property resident in the state for not less than ten years prior to that date. The law also regulated migrants to the state. All emigrants from J&K, including those who migrated to Pakistan, are considered state subjects. The descendants of emigrants are considered state subjects for two generations. [36] The Constitution of J&K under section 6 mentions that the citizens of India who on 14 May 1954 were 'state subjects' of Class I or Class II or has until that day lawfully acquired immovable property in the state as well as ordinary residence in it for not less than 10 years. In spite of this under section 8 of J&K Constitution, the state legislature has the power to extend or restrict the category of people regarded as 'permanent residents' or regulates or confers or modifies special rights requires the approval of two-thirds of the total membership of each house of the legislature. [37]

In its 1957 constitution, J&K state defines "who is a citizen of the state" and these citizens are called "Permanent Residents" of the state. J&K joined India through instrument of accession signed by its ruler Maharaja Hari Singh in October 1947. After the accession, popular leader Sheikh Mohammad Abdullah took over the 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. [38]

A G Noorani writes, "Kashmir would never have acceded to Indian, even in its hour of peril, if it knew that decade's later communal minded persons would want to wipe out that Notification which Art. 35A sanctifies." [39] Through the Permanent Resident requirements and several other legislative acts, J&K state has chosen, without ambiguity, to protect its citizens from other persons settling within its borders by preventing any settler from acquiring immovable property or laying claim to public employment.

In his Statement to the Lok Sabha on the accord, Nehru said:

“The question of citizenship arose obviously. Full citizenship applies there. But our friends from Kashmir were very apprehensive about one or two matters. For a long time past, in the Maharaja’s time, there had been laws there preventing any outsider, that is, any person from outside Kashmir, from acquiring or holding land in Kashmir. If I mention it, in the old days the Maharaja was very much afraid of a large number of Englishmen coming and settling down there, because the climate is delectable, and acquiring property. So although most of their rights were taken away from the Maharaja under the British rule, the Maharaja stuck to this that nobody from outside should acquire land there. And that continues. And in the state subject’s notification by the Maharaja, they defined four grades of subjects, Class number one, Class two, Class three and Class four. And unless you come in one of these classes, you just cannot acquire land there, or any immovable property. So the present Government of Kashmir is very anxious to preserve that right because they are afraid, and I think rightly afraid, that Kashmir would be overrun by people whose sole qualification might be the possession of too much money and nothing else, who might buy up, and get the delectable places. Now they want to vary the old Maharaja’s laws to liberalize it, but nevertheless to have checks on the acquisition of lands by persons from outside. So far as we are concerned, I agree that under Article 19, clause (5), of our Constitution, we think it is clearly permissible both in regard to the existing law and any subsequent legislation. However, we agree that this should be cleared up. The old state’s subject’s definition gave certain privileges regarding this acquisition of land, the services, and other minor things, I think, State scholarships and the rest. So, we agreed and noted this down: ‘The State legislature shall have power to define and regulate the rights and privileges of the permanent residents of the State, more especially in regard to the acquisition of immovable property, appointments to services and like matters. Till then the existing State law should apply.’ ” [40]

In other words we can argue that these citizenship necessities have their roots in Kashmir’s nationalist history. As Maharaja Hari Singh, promulgated citizenship rules in response to a popular agitation by the Muslim population of the state against outsiders [41] for their protection against exploitation and marginalization by richer people of neighboring areas, above all the Punjab. [42] In response to growing pressure, the Maharaja granted certain privileges and rights to his state subjects. [43] Article 370, guarantees special status to the J&K, restricting Central government’s legislative powers over three areas only namely, Foreign Affairs, Defence and Communication, allowed the state government to legislate on residuary powers. The special provisions regarding permanent residents have remained untouched despite the incremental abrogation of the Article 370 and the states special status. Article 370 and the states specific citizenship rules regarding property and employment have become symbolically and emotionally intertwined with the states special status and distinct identity. [44]

VII.CONCLUSION

J&K is an integral part of India. The state occupies a special status in the political realm of the country due to its unique historical and geographical factors. The Article 370 of the Indian constitution accords legitimate support to this understanding and act like a bridge between the two constitutions. Article 35A has not only a constitutional or legal issue, it has larger socioeconomic and political issue. Attempts to abrogate the Article 35 (A) have been seen as an attack on the special status of J&K. So it is important to not let only one voice,

supporting abrogation of Article, flow from the Jammu region. Rational thoughts must prevail and complete and majority state views must be considered, which are strongly against its abrogation. The government needs to take all stakeholders along for protecting the rights of all people of the state. As the State Government has already constituted a committee in February 2017 under the chairmanship of Advocate General to scrutinize the issues of gender discrimination against Kashmiri daughters after marriage with non-resident men, but justice still eludes the women folk. In order to maintain the requirements of the modern concept of gender equality, one cannot extend the discriminatory provision towards men who marry outside women, but there is a strong need to amend Article 35A but not to abrogate. If the central government is going to abrogate Article 35(A), the people of the state are no longer bound by the instrument of accession. It would simply mean invalidation of all the 41 subsequent presidential orders related to the 1954 presidential order. Common masses of the Valley believe that 'there would be a mass uprising and unrest in which people will die. Then, slowly and steadily, Kashmir will become Palestine, where we will be left fighting for a single bucket of water. Life will become an everyday fight for survival.' The central government must understand that it has both politically and militarily failed to control Kashmir. It has undoubtedly not won any hearts and minds among Kashmiris. So there is a strong need to amend Article 35 (A) regarding discrimination towards daughters of the state, than to abrogate it.

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