

# Article 35A

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## ABSTRACT:

A large number of political and defense analysis attribute instability in Jammu and Kashmir to India's inability to fully integrate the state into the union. The challenges towards such integration have historical roots dating to the circumstances under which the state led by Maharaja Hari Singh acceded to India following Pakistan attempt to annex the state through the force. Historically Pakistan has consistently be provided support to terrorist and separatist movement in J&K and has also extended such support to promote terror in other parts of the country, in furtherance of its own interest. The third factor is the imposition of article 370 of Indian constitution and the addition of article 35A through the provisions of article 370. Article 35A of the Indian constitution is an article that empowers the J&K state legislature to define "permanent residents" of the state and provide special rights and privileges to those permanent residents. It was put up in the constitution through a presidential order i.e. the constitution {of Jammu and Kashmir} order 1954, issued by the President of India on may 14, 1954 in exercise of the powers conferred by clause (1) of article 370 of the constitution with the concurrence of the government of the state of Jammu and Kashmir. The special status granted to state of Jammu and Kashmir is believed to be the prime inhibiting factor in the complete integration of the state with the union.

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## I. BRIEF HISTORY

During British rule the map of India consisted of territories that came directly under the crown and also 565 princely states which while not being part of the crown possession. The princely state had the control over the internal affairs but control over Defense and external affairs rested in the hands of British government under the viceroy. The government of India act 1935 introduced the concept of instrument of accession wherein a ruler of princely state could accede his kingdom into the "Federation of India". Between May 1947 and transfer of power August 15 1947 the vast majority of states signed instrument of accession. This was facilitated by the congress with it leaders such as C, Rajagopalachari arguing that as paramountacy "came into being as a fact and not by agreement", it would necessarily pass to the government of independent India, as the successor of British. A few however held out. Among them were Hyderabad and Kashmir, which declared that they intended to remain independent. Hyderabad had a Muslim ruler and Muslim nobility in an overwhelming Hindu majority state. After "operation Polo" an Indian military action to restore order in the state, Hyderabad acceded to India and was absorbed into the union. The state of J&K however posed a challenge of an altogether different nature.

## II. 1947: THE SITUATION IN J&K

At the time of transfer of power, the state of J&K was ruled by Maharaja Hari Singh who had announced his intent to remain independent. Sheikh Abdullah the leader of Kahmir's largest political party, the national

conference was opposed to Hari Singh's rule and was vociferously demanded his abdication. Pakistan, in the mean time, tried to force in the hand of Maharaja and sent in raider assisted by Pakistan army, to annex the state by force. Being confronted by a military hopeless situation, the Maharaja sought India's help to push back the invaders. India required the signing of an Instrument of Accession and setting of an interim government headed by Sheikh Abdullah in return. The Maharaja complied but Nehru declared that it would have to be confirmed by a plebiscite, although there was no legal requirement to seek such confirmation. That was perhaps a blunder of epic proportions. Many more would be committed in the years to come. The Indian army was airlifted to Srinagar and the raiders were halted a few miles from the city. Then in a series of heroic action, the Indian army pushed back the Pakistan army- assisted raiders till the onset of winters halted the operations. Nehru now declared a ceasefire and sought UN Arbitration – a second blunder following the first, which effectively internationalized a bilateral issue. The UN sponsored ceasefire came into effect on January 01, 1949. At this time the parts of the state territory were under Pakistan illegal occupation. With the ceasefire coming into force, the state stood effectively divided and the opposing forces took positions across a line which came to be known as cease fire line (CFL). The plebiscite was never held as Pakistan did not withdraw from the areas it had forcibly occupied –a mandatory pre-condition for holding the plebiscite. The areas are now referred to as Pakistan Occupied J&K (POJ&K) and include the Mirpur-Muzzafarbad areas and the erstwhile northern areas now called Gilgit- Baltistan. When the constitution of India came into force on 26 January 1950 special provisions were made for the state of Jammu and Kashmir in the form of article 370, which was a temporary provision and remain so till date. In the fluid situation that obtained immediately after independence, Sheikh Abdullah nominated 4-member team to the Indian constituent Assembly. They declined to sit in the assembly but negotiated from outside the status of J&K vis-à-vis the Indian union. They insisted on acceding only those three subjects to the union that were included in the instrument of accession. Due to the prevailing situation in J&K the Constituent Assembly could not assemble. Thus when the rest of the nation was readying to adopt the constitution of India, there was a constitutional vacuum in J&K. To fill this vacuum article 370 was inserted in the Indian constitution in the hope that J&K, would once the situation normalized integrate like other states of the union( hence the use of term 'temporary provision' in the title of this article). The term of article 370 were negotiated by Kashmiri Muslims keeping solely there interest and sentiments in mind, which completely ignoring the sentiments and aspiration of the people of Jammu and Ladakh divisions, whose combined population was greater than that of Kashmiri Muslims. With the constitution of India coming into force on 26 January 1950 the constituent units were classified into Part A,B,C of the states. The former British provinces, together with the princely states that had been merged into them were the part A states. The princely union, plus Mysore and Hyderabad were part B states. The former Chief Commissioners Provinces and other centrally administered areas, except the Andaman and Nicobar Islands, were the part C states. In 1956, the State

Recognition Act reorganized the former British provinces and princely states on the basis of language. Simultaneously the 7<sup>th</sup> amendment to the constitution removed the distinction between part A and part B states both of which were now treated as states with part C being renamed as union territories.

### III. ARTICLE 370

The insertion of article 370 was to define the applicability of the constitution of India in the state of J&K till the constitution of the state was not finalized. It was but an additional legislative mechanism to facilitate this transition. In 1950 itself the Government of India has clarified the effect of article 370 in a white paper of Indian states which among others include the following;

- The Constituent Assembly will be convened to go into the matters in detail
- When the assembly will come to the decision on all the matters it will make a recommendation to the president who will either abrogate Article 370 or direct that it shall apply with such modification as exceptions he may specify

The Constituent Assembly was elected in October 1951. The elections were however boycotted by the main political party of Jammu the Praja Parishad consequently lacking opposition, the national conference and those sympathetic to it won all the seats unopposed. When the constituent assembly met for the first time on October 31 1951, the Praja Parishad which represented Jammu Division remained unrepresented. There were also no observers from the centre. This was criminal culpability on the part of national leadership, which imposed no stipulations or conditions to ensure that the state constitution was in line with the basic structure of Indian Constitution.

Article 370 was drafted in part XXI of the constitution which related to temporary, Transitional and special provisions". Clause 3 of the article empowers the president of India on the recommendation of J&K constituent assembly to issue a notification for the abrogation of article 370, leaving some people to argue that article 370 had become a permanent fixture of the constitution of India, despite being titled a temporary provision in the constitution.

#### Delhi Agreement 1952

As the constituent assembly required time to produce a definitive document, Nehru as an interim measure decided to obtain from sheikh Abdullah a sense of the kind of relationship that would emerge between the Indian union and also the state of J&K. A series of negotiations were happened in Delhi between the representatives of J&K representing the national conference and also the government of India, the results that were encapsulated in a document called Delhi Agreement. Thus was announced on 24 July 1952 though it had no constitutional validity. The eight salient points included in the agreement were as under:-

- The head of the state of J&K would be a person recommended by the state legislature and recognized by the president of India and would be called the Sadar-i-Riyasat
- The Indian Flag would have the same status in J&K as in any part of the India, but the state flag would be retained.
- Citizenship would be common in two parts of the country, but the state legislature would have the power to define and regulate the rights and privileges of the permanent residents in Kashmir.
- The fundamental rights as laid down by the Indian constitution would be extended to Kashmir but these would not come into the way of the state's program of land reforms.
- The power to reprieve or commute death would belong to the President of India.
- The Indian president's power to declare a state of emergency in case of external danger or internal disturbances would be extended to Kashmir but in regard to internal disturbances it would be used only at the request of state government.
- Residuary power would be retained by the state but the state could transfer more rights to the union.
- The Supreme Court could adjudicate in regard to disputes between the state and the centre and other provincial governments and on fundamental rights agreed by the state.

#### IV. ARTICLE 35A

In February 1954, the Constituent Assembly legalized the state's accession to Asian nation. Thus, the assurance given to the people of India was fulfilled. In pursuance of this ratification, the president of India promulgated the constitution (Application to J&K) order 1954, placing on a final footing the applicability of the other provisions of the Indian Constitution to J&K and accorded legal sanctity to the Delhi agreement. Section 2(3) and section 2(4) of the order made part II of the constitution of India dealing with citizenship, part III of the constitution dealing with fundamental rights applicable to state of J&K. However it conferred powers to the state legislature to make special provisions for the permanent residents of the state and for that purpose section 2(4)(j) of the order inserted Article 35A in the Indian constitution. Thus contrary to popular belief it is the presidential order 1954 and article 35A leading in turn to the state constitution that provide special status to the state and debar other Indians from acquiring property in that state. The modification made to article 35, the inclusion of article 35A and the facts that Article 12 to 15 of the Indian constitution do not apply to the state of J&K is an attack on secular and democratic fabric of India. Under the Constitution of India the right to equality is the bedrock of democracy. This stands sacrificed in the terms of the provision of article 35A. J&K is the only state in the Indian union which has power to control the rights and liberties of other Indian citizens in

J&K. This is why there is denial of judicial redressal for the non-permanent residents of J&K. Article 35A sanctifies and legitimize this basic defiance of the Indian constitution. Most people in the legal profession remain ignorant of this aspect, since it was inserted as an appendix, which is not a part of official text of the constitution. It was never presented before the parliament as the sole authority to amend the constitution is vested only in the parliament of India. It is also quite astonishing that Sheikh Abdullah and his national conference the main architects of the state constitution, who were determined to abolish all symbols of Dogra rule were very keen to retain the state subject act 1927 enacted by Maharaja.

## V. WHY ARTICLE 35A IS RETROGRADE

Article 35A violates the terrible idea of equality enshrined in the Constitution of India. Its treatment of non-permanent residents of J&K, is akin to treating its own people as second rate citizens. They cannot buy immovable property in J&K, are not eligible for employment by the state government, cannot contest or vote in local body or assembly elections, cannot avail of scholarships and alternative grants offered by the government to its permanent residents and, above all, cannot seek redress in any court, local or national. Most importantly, it deters the corporate sector from investing in the state as sans the provisions to buy immovable property, such investments make little business sense. The state, thus remains dependent on the Centre for financial assistance, its economy being dependent for the most part on government jobs and doles from the Centre to enable the state to meet its obligations.

The provisions of Article 35A also violate the principle of gender equality. Section 6 of the Constitution of J&K which derives its power from article 35A discriminates against women residents of the state. The children from such unions are not entitled to the Permanent Resident Certificate (PRC) or the benefits consequent thereupon, such as the right to acquire immovable property and a government job. The same, however, does not apply to the offspring of a male who marries a woman from another state. This provision has been challenged in the High Court of J&K by Parabhjit Kour Modi, who has been continuously living and working in the state after her marriage, along with her non- J&K resident husband and two children who plead that Section 6 of the State Constitution be declared *ultra virus* of the Constitution of India. The response to the above petition by then Law Secretary Mr.Mohammed Ashraf Mir merely confirmed the discrimination. “Legally and technically”, he said, “her children are the children of her husband who is from a different state; are not entitled to the permanent resident certificate or the benefits consequent thereupon.” Earlier women such as Parabhjit Kour Modi used to completely lose the ‘permanent resident status’.

After a long legal battle, in 2002, the women of the state won the right to retain their permanent resident status after marriage. But the discrimination continues because their children are still not eligible for the PRC, which means they cannot and cannot apply for state government jobs. They also cannot inherit their mother’s property

themselves. Such a situation is particularly traumatic and extraordinarily painful for women who marry ‘outsides’ and later get widowed or divorced. They face added trauma as their children have no future in the state of J&K.

It is also a travesty of justice that the Balmikis and Gorkhas who have been staying in the state for generations as also the West Pakistan refugees have been denied the permanent resident status with all its attendant benefits. In may 2017, a petition was filed by Charu Wali Khanna, a lawyer and former member of the National Commission for Women, and Seema Razdan Bhargav, a doctor. The petitioners ask a 2003 judgment by the Jammu and Kashmir High Court, which notes that the state legislative assembly had not enacted any law shapping permanent residents. So, underneath the pretext of Article 370 and Article 35A, the man and ladies of state subjects are subjected to completely different treatments. The contention of the petitioners in this case is that since Article 6 supersedes her and her children’s basic rights of residence, education and employment, as guaranteed to them as ‘citizens’ of India underneath Article 14 of the Indian Constitution, therefore, 35A is unconstitutional and, hence, deserves to be declared invalid.

As illustrated earlier, it was on the strength of Article 35A that the J&K Assembly adopted Article 6 for this purpose in 1956. A Jammu based Non-Governmental Organization (NGO).

We the Citizens, has challenged the constitutional validity of Article was introduced in the Indian Constitution in 1954 only through a Presidential order. As per the NGO, although it is within the rights of the president to pass such orders, yet any such orders can become a part of the Indian Constitution only after it gets approval of both Houses of Parliament by a majority vote. The NGO has accordingly questioned the intentions of the erstwhile central government for including this Article only as an “Annexure” of the constitution and not incorporating it in the main text of the Constitution.

The case is now being heard in the Supreme Court of India, which has bunched together all such petitions and convened a constitution bench to review the constitutional validity of Article 35A. Should Article 35A be declared unconstitutional , then the special powers of the J&K Assembly to separate formulate laws on permanent residents will be held ultra virus as will Article 6 of the J&K Constitution, which effectively blocks the inflow of people from other parts of the country into the state with the Indian union. The impact of Article35A has been to impose a sense of exclusivity and separation from the rest of the country, which has led to confrontation and religious extremism, with violence focused against non –Muslim residents of Kashmir an unfortunate consequence of Article 35A – which led to nearly half a million Pandits being forced out of their homes. To make matters worse, Pakistani Infiltrators and Wahhabi Maulanas from Uttar Pradesh and Bihar made their way into the Valley, which consequently led to the radicalisation of large segments of the population. Article 35A, thus, the one defining Article which acts as a hindrance to the holistic development of

J&K, affecting every sector. It has created a constitutionally – approved apartheid, giving special political, administrative and legal powers to the ruling elite of J&K, and , at the same time, being discriminatory against women and the non- Kashmiri population in J&K and their supporters in the rest of India. Its repeal will go a long way righting a historical wrong and would be an important step in bringing peace to the region, though Kashmiri politicians will oppose the same.

## VI. WHY ARTICLE 35A MUST GO

In a situation bordering on farce, the prospect of article 35A being struck down by the Supreme Court has brought together all political, militant, religious and the other activist groups in the valley that have been traditionally at war with each. Now, in support of Article 35A, all such disparate groups-the National Conference (NC), People’s Democratic Party (PDP), Congress Party and Hurriyat – have come together, to support the most regressive clause in the state’s history. Fearing political marginalisation, PDP leader and Chief Minister Mehbooba Mufti was the first to warn the centre that “there will be no one left in Kashmir to give a shoulder to the Indian tricolour if 35A is struck down”. Her arch rival, Farooq Abdullah, the former Chief Minister and head of the temerity to warn New Delhi, “kashmiris will make you forget the upheaval of the Amarnath movement when they rise up against mollifying of 35A. Leaders of the Hurriyat and other fanatic groups too have launched new calendar of hartals (public strikes) and other warned New Delhi of a bloodbath if the Supreme Court gives such a verdict. Obviously, abrogation of Article 35A is seen by such people as the first step to rolling back the communal agenda followed for decades and the start of a new phase of participatory democracy, which ill suits their political purposes. Article 35A is a symbol of “Kashmir colonialism” over the rest of J&K. In a memorandum to the Union Home Minister and to the National Human Rights Commission, the Jammu & Kashmir People’s Forum presented cases of the communities whose fundamental rights have been “legally” snatched by the state government- the right to property; right to vote; right to employment; right to marriage by choice; right to higher education; right to be a member of a panchayat or a cooperative society; right to avail bank loans. These communities are;

- Refugees from POJ&K who were forced to live and settle outside J&K after they crossed over to Jammu in 1947.
- Kashmiri Pandits and Sikhs who were forcibly pushed out of Kashmir Valley.
- West Pakistan Refugees (WPR) who migrated to adjoining Jammu in 1947.
- Families displaced due to regular firing along the Line of Control (LOC) with Pakistan.
- Balmiki community members who were persuaded by Shiekh Abdullah to migrate from Punjab to J&K to undertake the scavenging of night soil.

- Descendents of Gorkha soldiers of the Maharaja's Army.
- Women of J&K who married men from other states. The children born of such offspring too are denied from all rights. No such provision exists for the men who marry non – state subjects, making it a gender biased issue.
- The people of Ladakh who have to live at the mercy of the Kashmiri administration.

Except for the exiled Pandits families and the people of Ladakh, all other communities mentioned in this list have been denied the status of permanent residents or state objects because of article 6 of the J&K Constitution, which draws its power from Article 35A of the Indian Constitution.

It is a matter of shame the weakest strata of society the balmikis continue to be the subject to the worst form of human rights abuses. As per the rules of the state, the resident certificate issued to such persons, even if they are third or fourth generation settlers, brands them as” “eligible only for the job of a scavenger”, so , even if a young lady from the community holds an MBBS degree, she can only be employed in the state as safai karamchari (cleaning staff). Such abuse would put even Hitler's Nazis to shame. But the masses in India remain ignorant of such provisions.

In 1981, the J&K State assembly used its absolute Kashmiri majority to pass a law, the J&K Resettlement Act, which opened the doors for those Kashmiris and their descendents who had migrated to Pakistan, or POJ&K during partition in 1947, to return to J&K as legitimate citizens and take charge of their ancestral properties. However, refugees from POJ&K and their descendants, numbering about 1.5 million today, have not only been kept out of his legal provision but the state government has consistently refused to let them or their descendents their right to those 24 seats in the assembly which are left vacant in the name of POJ&K. Ironically, the Muslim refugees from Xinjiang and Tibet, who had migrated to Kashmir following the Chinese occupation of their countries in 1949 and 1959, respectively, have been granted “ state subject” status, along with voting rights in the assembly by the J&K government. The communal agenda of previous state administrations was, thus, clear. The state was being turned into a state for Muslims only and Article 35A was the instrument used to carry out such a nefarious act.