

ARTICLE 35A & ITS IMPLICATIONS: A QUEST OF STABILITY IN JAMMU & KASHMIR

(Paper is based on Research project granted by ICSSR)

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Abstract

A false narrative of Jammu-Kashmir confines to the views and wishes of a few districts of Kashmir and overlooks the hopes of vast majority of the other two regions as well as the frontier districts of Kashmir. J&K has a long painful battle of peace and security. The most debatable Article 370 and 35A of the Constitution, that are currently being challenged in the Supreme Court for affording Jammu and Kashmir Assembly legal sanction to provide special privileges to “permanent residents”, particularly by preventing non-State residents to enjoy citizenship rights in the State. The debate often portrayed as a question of “special status” of Jammu and Kashmir and the Article as some sort of unusual concession to the State. In this paper the reality behind the issue of J&K has to be found out.

Keywords: Jammu & Kashmir, Article 370, Article 35A, permanent residents

Jammu & Kashmir state which is generally referred as Kashmir, is in fact the representation of the large state by a comparatively small area of Kashmir valley instead of Jammu, Kashmir and Ladakh regions. A false narrative of Jammu-Kashmir confines to the views and wishes of a few districts of Kashmir and overlooks the hopes of vast majority of the other two regions as well as the frontier districts of Kashmir. J&K has a long painful battle of peace and security. J&K has been most popular amongst intellectuals like academicians, historians, politicians, defense analysts and media in the past few years. Instability, separatist movements and terrorism in J&K is being characterized to India's failure of complete integration of state in Union. There is a large battle of words on media screens but still the question of security and peace has been left unanswered. J&K has been a battle ground since years be it a border exercise or off-the-ground confrontation. In recent years, a common narrative on J&K has been revolving around regular unrest in Kashmir Valley extended to Jammu which is evident by various stone pelting, terror attacks and encounters between Indian security forces and separatists. Moreover, Pakistan's intension to annex the state forcefully and consistent promotion of terror activities in J&K and other states for its own interest has been a pain in the Arse for the future of J&K. The entire framework of terror and its network has the support of Pakistan which is being used for Pak-sponsored Proxy Wars like Uri, Pulwama etc. Furthermore, youth is being misguided and compelled towards stone pelting and revolts, with a false perception of Jihad.

Imposition of Article 370 in Indian Constitution providing ‘Temporary Special Status’ has been evident in prolongation of separatist environment. Basically, Article 370 provides that the articles of Indian Constitution dealing with the administration for the states in Indian territory are not applicable to J&K. and the power of Parliament to make rules for the state is limited (only Union and Concurrent list are applicable that too when declared by the president in consultation with the state government). Article 370 that was enacted for temporary period considering special conditions in the state J&K as moved by Gopala swami Ayyenger in 1949 but it is still operative which was affirmed by Supreme Court in the case of Prem Nath Kaul v State of J & K 1959 AIR 759, Sampath Kumar v State of J & K 1969 AIR 1153

Historical approach of Article 35A

J&K has been witnessing extensive protests and deaths in the state since years. To understand the Kashmir crisis it is essential to look at the historical aspects of J&K precisely. Jammu- Kashmir was a princely state

under British Empire in India and ruled by Dogra dynasty. Since 19th century Jammu had been the ruling place of Dogra Rajputs when Maharaja Gulab Singh was made a hereditary king by Sikh ruler Ranjit Singh. Maharaja Ranjit Singh had annexed this region from Afghan rulers in 1819. After the Sikh defeat in First Anglo-Sikh war (1845-1846) and under the Treaty of Amritsar (16 March 1846), Gulab Singh, Raja of Jammu purchased Kashmir from the East India Company for an indemnity payment of 7.5 million Nanakshahi rupees and became Maharaja of Jammu and Kashmir. Jammu-Kashmir became an independent princely state under the suzerainty of British Empire.¹

Maharaja Hari Singh, the last ruler of J&K was coronated in 1925. He was ruling the state at the time of independence also. In 1947, when British India was divided into India and Pakistan under the Two Nation theory and Indian Independence Act 1947 ending the suzerainty of British Empire. During British rule India was comprised of territories direct under British crown and 565 princely states. Princely states had control over their internal matters except defense and external affairs. The Government of India introduced the concept of the Instrument of Accession.² J&K became a place of contentions in 1947 when there was a question in front of princely states to join either India or Pakistan of which J&K was a part. As per the policy of Divide and Rule British Government gave the states this choice to join either India or Pakistan.³

After a long struggle of accession of princely states Junagarh, Hyderabad and J&K left with trouble. Later on Junagarh and Hyderabad also became the part of India as per the efforts of Sardar Patel with several formulae like contiguous territories to India and choice based upon the principal religion of the population. Exceptionally J&K had common boundaries with India and Pakistan both.

Additionally, J&K had religious dichotomy between the rule of Dogra dynasty and the majority of population that was Muslim. This was the major issue related to the future of J&K. Before inception of October 1947 tribal incursions from North West Frontier Province, Maharaja intended to stay independent. But after besiege of significant towns when these tribesmen up surging towards Srinagar, Maharaja called for Military assistance from India which was provided under the conditions of accession to India with reference to the people. On October 26, 1947 the Maharaja offered a letter of accession to India, accepted by India without a vote by the Kashmiri people which led to a debate on legitimacy of accession.⁴

Before Independence (1927, 1932)

The debatable Article 35A of the Constitution, which is currently being challenged in the Supreme Court for affording Jammu and Kashmir Assembly legal sanction to provide special privileges to “permanent residents”, particularly by preventing non-State residents to enjoy citizenship rights in the State. The debate often portrayed as a question of “special status” of Jammu and Kashmir and the Article as some sort of unusual concession to the State.

In early 20th century, political movements in the state were emerged out against outsiders for a political identity of people living in Kashmir. “Kashmir for the Kashmiri” movement was hurled by Kashmiri Pandit community which was intensified by the continuing presence of ‘outsiders’ from then Punjab in government services. They raised a demand that only Kashmiris should only be employed in state government jobs.

On April 20, 1927, the then Maharaja of Kashmir, enacted Hereditary State Subject Order which granted the respective state subjects with the right to opportunities in government offices and the right to land use and ownership. These rights were extended solely to the state subjects and eliminated any availability of the same to the non-state subjects as order issued by Maharaja on June 27, 1932.⁵ Notification of 1927 by Maharaja prohibited the employment of non-state subjects in the public services; they were also not allowed to purchase land which was more common for the attraction of the houseboats to British holidaymakers. “Kashmir In Conflict: India, Pakistan and the Unending War”.⁶

Under the notification 1932, emigrants from J&K State to foreign territories shall be considered State subjects and also the descendants of these emigrants born abroad for two generations these nationals of Jammu and Kashmir State shall not be entitled to claim the internal rights granted to subjects of this State by laws. (Notification No. 13-L/1989, Issued by order of His Highness the Maharaja Bahadur dated Srinagar, the 27th June, 1932, 14th March, 1939, published in the Government Gazette dated 24th March, 1989).⁷

During Independence

In 1947, when British India was divided into two dominions India and Pakistan by Indian Independence Act 1947. This act lapsed the paramountcy of British Crown over the princely states in India and triggered the fire of division of the land. This was the stage when the states were free to choose any of the dominion either India or Pakistan or could stay independent. There were 565 princely states as recognized in British India. Almost all princely states acceded to either India or Pakistan peacefully except Hyderabad, Junagarh and Jammu-Kashmir. Later on, the annexation process was solved out for all three states but J&K. As per the demographic status of J&K, the state with majority of Muslim population was expected to join Pakistan but as per the secular roots of Kashmir valley and allies with Indian National congress it was expected to join India.⁸

A Standstill Agreement with Pakistan was signed to maintain trade and transportation as it was before. At the same time, J&K faced the rebellious invasion of Pashtun tribesmen from North West Frontier Province of Pakistan. Maharaja asked for assistance to India and Indian government was agreed to send army on the condition of accession of J&K to India.⁹ Eventually, Instrument of Accession was signed by Maharaja Hari Singh on 26th October 1947 which was added with a provision to be submitted to a plebiscite. Sheikh Abdullah recommended it as a provisional accession to be finalized by the decision of people of Jammu- Kashmir where they wanted to live.¹⁰

Subsequently, Indian armed forces proceeded to J&K to counter invaders which led India Pakistan War till 1948. At the same time in December 1947 Kashmir issue was referred to United Nations Security council. A special commission for investigating the issue was established by UNSC that recommended plebiscite to resolve the matter as on April 1948. After long-drawn-out dialogues and negotiations in the last days of 1948, a cease fire was agreed to by India and Pakistan which was adopted by UN on 5th January 1949 and on its acquiescence a plebiscite was to be held to decide the future of J&K territory and its people which was never conducted.¹¹

Special Status

The Accession of Jammu and Kashmir to Union of India on 26th October 1947 extended the control of Union government over defense, external affairs and communications as ceded by Maharaja. Hence the original accession of Jammu and Kashmir like other states was on these three aforesaid matters. In furtherance, states were encouraged to set up constituent assemblies for their own states. Most states but Saurashtra, Travancore and Mysore were not able to setup constituent assemblies and accepted the Constitution of India as their own constitution eventually in 1949 and a uniformity of legislature by states and union was established across India.¹²

If we go through the proceedings of the Constituent Assembly it is clear that the issues concerning Jammu and Kashmir were discussed twice – first on 27 May 1949, and again on 17 October 1949. While discussing the Article 306 A of the draft constitution, a Muslim member of the Constituent Assembly, Maulana Hasrat Mohani, had warned that the grant of special status to Kashmir (on the score of religion) would enable it to “assume independence afterwards.”¹³ Ultimately on 17 October 1949, Indian Constituent Assembly adopted Article 370 as produced draft article 306 by Gopalswamy Ayyenger of the Constitution ensuring special status and internal autonomy to Jammu and Kashmir due to special conditions. Being a disputed territory, a fair and impartial plebiscite was required to be held in the state as per the UN mandate.

Hence, a special status was given to the state that clearly provides that the provisions of this Article with respect to the State of J&K are only ‘temporary’ and not permanent. The Article came into force on 17 November 1952. Article 370 was formulated to protect the rights of state to draft its own constitution and to decide the additional powers to extend to the Union Government. Additionally, this article had a grave feature not to be amended or abolished by either of Union or State unilaterally.

Article 370 postulated that the articles of Indian Constitution empowering the Union Government over J&K would only be applied to the state with the concurrence of the State's constituent assembly. This was a "temporary provision" which is intended to be applicable till the formulation and adoption of the State's constitution. This article itself provides the method of its amendment or revocation in the constitution, that the Article will cease to be operative on the recommendation of Constituent Assembly of the State.¹⁴

Jammu & Kashmir National Conference, the largest political party of state endorsed convening the state constituent assembly on 27th October 1950. Elections for the Constituent Assembly of J&K were held in

September- October 1951 and State's Constituent Assembly was convened on 31st October 1951 ending the concurrence power of the State Government. Constituent Assembly accomplished its mission on 17th November 1956 with the formulation of State Constitution that came into force on 26th January 1957. Finally, Jammu Kashmir State's Constituent Assembly was dissolved on 25th January 1957 without recommending any amendment in Article 370 or its revocation from the constitution of India. Hence, the temporary provisions of this article were deemed to have become a permanent feature of the Indian Constitution.¹⁵

Presidential Orders

As of clause (1) of the Article 370 deliberates the power to President to be exercised with the concurrence of state government of Jammu & Kashmir. President of India passed a number of orders as applied to Jammu & Kashmir.

The Presidential order of 1950 as indicated The Constitutional (Application to Jammu & Kashmir) Order, 1950 enacted on 26th January 1950 recognized the articles of the Indian Constitution corresponding to the Instrument of Accession as identified by the clause b (i) of Article 370. It provides that legislative power of parliament will be limited to those matters in Union List and the Concurrent list that are declared to correspond to matters specified in Instrument of Accession by the President in consultation with the state government. Eight subjects of union list and ten out of twenty two parts of the Indian Constitution were extended to J&K with some immunities as conferred by the state government.¹⁶

Delhi Agreement, 1952

An agreement between Sheikh Abdullah and Jawaharlal Nehru, finalized on 24th July 1952, often referred to as the 'Delhi Agreement'. Delhi Agreement was the result of discussions on Centre- State relations between Union government and the delegation from J&K held after the memorandum submitted to President by Jammu Praja Parishad demanding the complete application of Indian Constitution to the state. Delhi Agreement established the sovereignty as stated in Instrument of Accession will reside in the state, and residuary powers of legislature specifically in case of J&K will be vested in the State itself.

State legislature was given power to legislate deliberating special rights and privileges to the 'State subjects' in the light of State subject notifications of 1927 and 1932. State legislature was empowered to make laws for 'state subjects' returned to Kashmir who had gone to Pakistan in 1947. The position of Sadar-i-Riyasat was agreed upon who will be elected by legislature itself. The whole chapter of 'Fundamental Rights' of Indian Constitution could not be made applicable to the state. Only appellate jurisdiction of Supreme Court is applicable to the state. State delegation opposed the proclamation of general emergency on account of internal disturbance.¹⁷

The Presidential order of 1952 was passed on 15th November 1952 on the request by J&K state government amending the Article 370. This order represented the abolition of monarchy in Jammu and Kashmir.

At the same time a nationwide campaign from the Hindus was upraised with high demands for integration of Kashmir. Bakshi Ghulam Mohammed came into power in August 1953 who was in favor for integration with India. Sooner or later, January 1954 witnessed a new agreement negotiated between Centre and J&K, which was passed by the Kashmir Constituent Assembly and in due course introduced through a Presidential Order 1954. The Presidential Order 1954 introduced a historical Article 35A in the constitution, which is propelling nationwide hullabaloo of disputes. This order ornamented the State with enormous powers and autonomy.¹⁸

Article 35A

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 Constitutional (Application to Jammu and Kashmir) Order of 1954 trailing the 1952 Delhi Agreement between Centre and J&K state, which extended Indian citizenship to the 'State subjects' of Jammu and Kashmir. Article 35A is a unique provision of the Constitution of India though it is a part of the Constitution, but does not figure among the articles of the constitution. It is not found after article 35 in the constitution but in Appendix I of the Indian constitution.

Article 35A empowers the Jammu and Kashmir State Legislature to define the rights and privileges of State's 'permanent residents' and their special rights and privileges. It was specially formulated to protect the State subject laws that had already been defined under the Dogra ruler Maharaja Hari Singh's regime and notified

in 1927 and 1932. Nevertheless, this Article which came into force in 1954 without any presence in between the articles had been bizarre to the public of India right before the petitions raised in the Supreme Court of India challenging its constitutional validity.

A Jammu based Non-Governmental Organisation (NGO), “We the Citizens,” West Pakistan Refugees Action Committee and finally a petition filed in May 2017 by Charu Wali Khanna, a lawyer and former member of the National Commission for Women, and Seema Razdan Bhargav, a doctor. They referred to a judgment by the Jammu and Kashmir High Court in 2003, which transcripts that the state legislature had not sanctioned any law defining permanent residents. So “under the guise of Article 370 and Article 35A, the men and women state subjects are subjected to different treatments.” It thereby upraised an intense debate amongst all levels of intelligentsia.

A woman resident of J&K Parabhjit Kour Modi, has been continuously living and working in the state after her marriage, along with her non-J&K resident husband and two children had appealed in High court of J&K against the provision of Article 35A violating the principles of gender equality by discriminating against women residents of the state who marry a person from another state. Her children are not entitled to the Permanent Resident Certificate (PRC) or the benefits of the state subject in J&K like the right to acquire immovable property, getting admissions to professional colleges and employed under government jobs. In 2002, the women of the state won the right to retain their permanent resident status after marriage. But the discrimination continues with their children are still not eligible for the PRC. They still cannot inherit their mother’s property.¹⁹

Article 35A proved to be the symbol of Kashmiri Separatism that discriminated the rest of people living in India from those belong to Kashmir. Introduction of Article 370 and 35A are an attack on the secular and democratic fabric of India.

- Non-permanent residents of J&K itself cannot buy immovable property in J&K.
- They are not eligible for employment in the state government jobs of J&K.
- Non-permanent residents cannot contest or vote in local bodies or Legislative Assembly elections.
- Those who have no state subject cannot avail of scholarships and other grants offered by the state government to its permanent residents.
- They cannot pursue any appeal for compensation of their rights in any court, local or national.
- Right to Equality and liberty, the core of democracy in Indian Constitution has been wiped out under the provisions of Article 35A. It limits the rights and liberties of other Indian citizens in J&K.
- The provisions of Article 35A violate the principles of gender equality by discriminating against women residents of the state who marry a person from another state.
- Their children are also not entitled to the Permanent Resident Certificate (PRC) or the benefits of the state subject in J&K like the right to acquire immovable property and employed under government jobs.
- Article 35A discourages the corporate sector from investing in the state due to the provisions preventing them from buying immovable property.
- Since this Article 35A was inserted as an Appendix, which is not a part of the official text of the Constitution after Article 35. It was never presented before the Parliament as the sole authority to amend the Constitution is vested only in the Parliament of India.
- Article 370 limited central legislative powers over the state only to the matters of defense, foreign affairs and communications.
- Other constitutional provisions of Central Government are extended to J&K State only with State Government’s consensus.
- State Government’s authority to give its ‘concurrence’ was only until the State Constituent Assembly was commenced.
- Article 370 itself holds the provision to be repealed or amended only upon the recommendation of the State’s Constituent Assembly but it was dissolved without making any changes in Article 370.
- Residual Power remains with the state of Jammu & Kashmir except all other states of the Indian Territory.
- Central Government has applied various provisions with the consent of State Government.

- The Union Government of India lacks the power to proclaim Financial Emergency under Article 360 in the state.
- The Centre can declare emergency in the state only in case of War or External Aggression.
- Except other states of India emergency on the grounds of internal disturbance or forthcoming danger thereof may be proclaimed in the J&K state without request or the concurrence of the government of the state. In December 1964, Articles 356 and 357 were extended to the state.
- Fundamental Duties and Directive Principles of the Constitution of India are not applicable to J&K State.
- Fundamental rights, Articles 19(1)(f) and 31(2) of the Constitution are still applicable to the permanent Residents of J&K State; therefore the Fundamental Right to property is still guaranteed in this state.
- The major implications of Article 370 that it has built emotional and psychological blockades between the people of Jammu and Kashmir and the rest of India, thus encouraging a psychology of separatism and alienation.

To study the reality behind the narrative of J&K as prevailing since years and the desire of people living in the state regarding the provisions and benefits of Article 370 and 35A, a few residents of J&K State were interviewed which is as follows:

When Mudasir Ahmed, permanent Resident of J&K, from Pulwama, worked as Skill Development Trainer in Srinagar was asked about the facilities in J&K as compared to other states provided that he had been to Rajasthan, Maharashtra etc.. He replied that J&K is lagging behind in terms of facilities like ITI concepts, skill development programme in villages, economic resources due to high level of corruption in the state. Youth is absolutely misguided in the state because of no development policies by government in the direction of employment. Impossible manifesto of internal autonomy by political parties without any agenda of development of the state and repeated failures of government has led the state into downfall.

Another respondent of interview, Fayaz Ahmed Meer, a businessman of traditional Hand-made wooden items in Srinagar believed that the reason of stone-pelting is unemployment and terrorism. People of Srinagar can hardly earn their bread and butter from small unskilled business for 2-3 days in a week due to massive terrorist activities during the week. Both of them believed that Article 370 should be removed and the state should be developed like other states of India through increasing monetary investments therein.

On the other side, Dr. Farooq, an Ayurvedic medical officer didn't want Article 370 and 35A to be removed because it can cause scarcity of resources due to inflow of people from other states. . He added that being a doctor he can hardly earn from his clinic because of massive terror activities and subsequent 'Band or strikes'. He believed that there should be an efficient think tank to sort out the problems of the state.

Dr. Asif Ahmed, an assistant professor of a college was against the removal of Article 370 and 35A as he believed that it would take the jobs of Kashmir residents and the situations will be worst when people will come from other states. But he had a heart-warming truth of difficulties being faced by the people during terror situations.

Conclusion

A harsh reality of implications of Article 370 and 35A that breaks the narratives about the circumstances in J&k. there is a need to change the situations of J&K by introducing extensive developmental policies and providing equal rights to the society of J&K state. All the victims of state may get justice on the removal of discriminatory provisions of Article 370 and 35A. These are the women of J&K who choose to marry outside the state and in doing so, lose the right for their offspring to be state subjects. The migrants from West Pakistan who came in 1947 and settled in Jammu Division and the Valmikies (Safai Karamacharies) who still suffer and looking forward to justice. An independent largest democratic nation should think over the fundamental rights of the citizens and should remove the inequitable laws to maintain harmony and peace. Here is the need to establish equality for the comprehensive growth of the state that requires the Article 370 and 35A to be removed so that the youth of state may find the job opportunities and gel with the citizens of India from other states.

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