

# Article 35A of the Indian Constitution: A Constitutional *Ignis Fatuus*

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### Abstract

Immediately after 15 August, 1947 Indians were being governed not under the Government of India Act, 1935, but the Government of India Act, 1935 as adapted under the Indian Independence Act of 1947. It would be more correct to say that a process for "the transition from the provisions of the Government of India Act, 1935 as adapted under the Indian Independence Act of 1947 to the provisions of Constitution of Indian Democratic and Republic had started. One can say that original Government of India Act, 1935 had ceased to exist; and Independent India Dominion and the process of integration of the acceded Native States (Princely States like Jammu & Kashmir) were governed by the adapted Government of India Act, 1935 as envisaged under the Indian Independence Act, 1947. The Indian Independence Act, 1947, and the Government of India Act, 1935, together with all enactments amending or supplementing the Government of India Act, 1935, were available as interim the working Constitution to Independent India till 26 January 1950.<sup>1</sup>

For explanation sake it could be said that when the draft of the Constitution of India was just being worked out after India attained independence in 1947 and Constitution was adopted in November 1949 there were many subjects that could have scope for change even after it was to be put in practice. So, in the initial stages among other provisions, particular/ different State and Union lists like work plans were drawn for the Indian State of Jammu & Kashmir. The procedures for operating upon the Jammu & Kashmir specific "State and Union" lists by the Parliament/ Union were also laid out in Article 370 of Constitution of India.<sup>2</sup>

Through 1927 and 1932 notifications, Dogra ruler of the princely State of Jammu & Kashmir, Maharaja Hari Singh imposed a law that defined State subjects and their rights. The law also regulated migrants to the State. Jammu & Kashmir joined India through instrument of accession signed by its ruler Hari Singh in October 1947. After Jammu & Kashmir's accession, another leader Sheikh Abdullah took over reins from Dogra ruler. In 1949, he negotiated Jammu & Kashmir's political relationship with New Delhi, which led to the inclusion of Article 370 in the Constitution of India. Article 370 provided for a temporary status to Jammu & Kashmir, restricting Union's legislative powers for the time being over three areas: defence, foreign affairs and communications. However, under the 1952 Delhi Agreement between Sheikh Abdullah and Jawaharlal Nehru, several provisions of the Constitution were extended to Jammu & Kashmir via Presidential order in 1954. Article 35A was inserted then. Jammu & Kashmir's Constitution was framed in 1956. It retained Maharaja's definition of Permanent Residents: "All persons born or settled within the State before 1911 or after having lawfully acquired immovable property resident in the State for not less than ten years prior to that date. All emigrants from Jammu & Kashmir, including those who migrated to Pakistan, are considered State subjects. The descendants of emigrants are considered State subjects for two generations."<sup>3</sup>

Permanent Resident's law prohibits non-Permanent Residents from permanent settlement in the State, acquiring immovable property, government jobs, scholarships and aid. It was also interpreted as discriminatory against Jammu & Kashmir women. It disqualified them from their State subject rights if they married non-Permanent Residents. But, in a landmark judgment in October 2002, Jammu & Kashmir High Court held that women married to non-Permanent Residents will not lose their rights. The children of such women don't have succession rights.

**Keywords:****Introduction of Article 35A in the Indian Constitution**

Before 1947, the State of Jammu & Kashmir was headed by a ruler. He was competent to make laws for his subjects. These laws included laws relating to employment, acquisition of property, settlement in the State etc. All other persons who were not residents of the State or subjects of the ruler were treated as foreigners. The ruler defined State Subjects by law and also conferred rights and privileges on his subjects.

After 1947, when the Constitution of India was being formulated, it was made applicable to all the States which had agreed to be part of Union and had merged with it. The Constitution granted and recognized rights of the people of federating States and made them uniformly applicable to all citizens.

The State of Jammu & Kashmir did not agree that the Constitution of India should be made applicable to it in the same manner as it was made applicable to other States. The Government of India, acknowledging limited nature of Accession, Resolutions of the United Nations and the dispute between India and Pakistan as regards territory and accession of the State, incorporated a temporary Article in the Constitution known as Article 370. The mechanism provided is that no provision of the Constitution of India would apply to the State of Jammu & Kashmir, unless the President of India notifies its application to the State and while doing so, the President is empowered to apply the provision with such "exceptions" and "modifications" as the President may notify.

**Review of Literature**

A.G. Noorrani authored an authoritative book titled "Article 370: A Constitutional History of Jammu & Kashmir" published by Oxford Scholarship Online, September 2 012. This book contains documents shedding light on accession to India, Kashmir- Union negotiations on Article 370, Jammu & Kashmir's Constituent Assembly, Negotiating the Delhi agreement, the wreck of Article 370, restoring the autonomy of J & K etc. This book is quite important to understand polity and constitutional relationship between India and Jammu and Kashmir.

A research project on Jammu & Kashmir has been framed by B.G Verghese titled "A J & K Primer-From Myth to Reality", published by Centre Policy Research, New Delhi (2007). This research book covered various areas such as Article 370, J & K Constitution, Presidential Order extending the Indian Constitution to J & K, further extension of Union powers etc.

In the book, " the Constitution of Jammu & Kashmir: Its Development and Comments" authored by A. G. Anand, published by Universal Book Traders, Delhi (1994), the entire Constitution has systematically been examined. The powers of various bodies are analyzed and conclusions recorded are free from super – imposition. The uniqueness of inter – constitutional relationship between Jammu & Kashmir and India is scrutinized in great detail.

Amitabh Hoskote and Vishakha Hoskote have written a scholarly article titled "Jammu & Kashmir and the Politics of Article 370: Seeking Legitimacy for the Illegitimate" published in International Journal of Social Sciences (Vol. 3, Issue 1, 4th May, 2017). In this article the authors have given various arguments relating to Genesis of Article 370 created inequality in India, retention of Article 370 allowed the contentious issue to faster etc.

Mr. Vishal Sharma authored an article titled "Critical Analysis of Fundamental Rights Marginalized Sections in Jammu & Kashmir with special reference to Constitutional order of 1954 as an implementation of Article 370" published in Galgotia's Journal of Legal Studies (Vol. 3, No. 1, 2015). In this article author has analyzed the interpretational limits of Article 370.

Mr. K.N. Bhat authored an article titled "A Layman's Guide to Article 35A" which has been published in Deccan Chronicle (August 18, 2017). In this article author has mentioned various pros and cons of Article 35A and intended to mention that this Article is arbitrary which threatened the various basic rights of the weaker section of Jammu & Kashmir.

An article published at <http://prepmate.in/app/uploads/2017/09/mpdf.pdf>. points out that Article 35A is only a "clarificatory provision" and does not in itself confer any special powers, seeking to scrap and it is pointless because any such action must also include all other presidential orders of 1954.

Yawer Gulzaar and Layeek Ahmad Sheikh in their research paper titled "Article 35A of Indian Constitution and daughters of Jammu & Kashmir" published in AGO International Journal of Research in Social Sciences and Humanities (Vol.6 No.6, Jan-June 2018) mentioned various factors of Article 35A which affects the life of daughters of J&K.

Dhruv C. Katoach authored an article titled "Article 35A and the Future of Stability in Kashmir" published in CLAWS Journal (Winter 2017). This article includes brief history of Article 35A, 1947: the situation in J&K, Article 370, Delhi Agreement 1952, Why Article 35A is retrograde, why Article 35A must go? This article is obviously important for present study.

**Aim of the study**

The general aim and objective of this study is:

1. To grasp that how Article 370 guarantees special status to J&K, restricting Union's legislative powers over three areas: defence, foreign affairs and communications. However, under the 1952 Delhi Agreement between Abdullah and Nehru, several provisions of the Constitution were extended to J&K via presidential order in 1954. Article 35A was inserted then.
2. To analyze that how 35A prohibits non-permanent residents from permanent settlement in the state, acquiring immovable property, government jobs, scholarships and aid.
3. To understand that how Article 35A is discriminatory against J&K women. It disqualified them from their state subject rights if they married non-permanent residents.

In the State of Jammu & Kashmir the Constituent Assembly was elected in October 1951. National Conference & those sympathetic to it won all the seats unopposed due to boycott by the *Praja Parishad*, main political party of Jammu. Constituent Assembly met for the first time on 31 October 1951. It was criminal culpability on the part of Nehru that he or his Home Minister did not stipulate any conditions for the State Constitution, had no say in the terms of reference of the State Constituent Assembly and did not insist on representatives as observers of the proceedings in the State Constituent Assembly to ensure that the State Constitution was in line with the basic structure of the Indian Constitution.<sup>4</sup>

However, it was evident that the Constituent Assembly would take its time in the production of a definitive document. Meanwhile Nehru decided to obtain from Sheikh Abdullah, some interim based definition of the kind of relationship between the Indian Union and the State of Jammu & Kashmir that would emerge in due course. A series of negotiations were held in Delhi between the representatives of Jammu & Kashmir (representing National Conference) and the Government of India. The results of the negotiations were finally announced in form of a document on 24 July 1952, known as Delhi Agreement. It should be noted that it had no Constitutional validity.<sup>5</sup>

In his Statement to the Lok Sabha on the Delhi Agreement, Nehru said:<sup>6</sup>

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. 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. 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.

Prior to Delhi Agreement the Constituent Assembly of India merely put the imprimatur of its approval, on 17<sup>th</sup> October, 1949 to a draft of Article 370 agreed between the Union and the State.<sup>7</sup> Article 370 came into force on 26th January, 1950 – the day on which the first Constitution (Application to Jammu & Kashmir) Order, 1950 was issued by the then President of India, in consultation with the government of Jammu & Kashmir, in exercise of the powers conferred by clause (1) of Article 370. On 23rd January, 1954, *Bakshi Ghulam Mohammad*, the then Prime Minister of the State of Jammu & Kashmir declared,<sup>8</sup> Jammu & Kashmir as a part of the Indian Union. The Constituent Assembly of the State of Jammu & Kashmir met for the first time on 31st October, 1951. In February, 1954 the Constituent Assembly of Jammu & Kashmir ratified the accession of the State of Jammu & Kashmir to India. In pursuance of this, in exercise of the powers conferred by clause (1) of Article 370, the President of India, with the concurrence of the Government of the State of Jammu & Kashmir, made the Constitution (Application to Jammu & Kashmir) Order, 1954.<sup>9</sup> The Order of 1954 implemented the Delhi Agreement as ratified by the Constituent Assembly of Jammu & Kashmir and also superseded the Order of 1950. It has been treated as a parent order as amended from time-to-time. It defines the Constitutional position of the State of Jammu & Kashmir *vis-à-vis* Indian Union. The Constitution (Application to Jammu & Kashmir) Order, 1954 placing on a final footing the applicability of the other provisions of the Indian Constitution to Jammu & Kashmir and accorded legal sanctity to Delhi Agreement. Sections 2(3) and 2(4) of the Order made Part II of the Constitution of India dealing with Citizenship and Part III dealing with Fundamental Rights applicable to the State of Jammu & Kashmir. However, it conferred powers to the State legislature to make exceptional provisions for the Permanent Residents of the State and for that purpose Section 2(4) (j) of the Order inserted Article 35A in the Constitution. Thus, contrary to popular belief it is the Presidential Order 1954 and Article 35A leading in turn to the State Constitution that provides special status to the State and debars other Indians from acquiring property in the State.<sup>10</sup>

*[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 Jammu & Kashmir, and no law hereafter enacted by the Legislature of the State:*

1. Defining the classes of persons who are, or shall be, Permanent Residents of the State of Jammu & Kashmir; or
2. 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.*<sup>11</sup>

The scope and extent of power of the President to apply the Indian Constitutional provisions with or without "exceptions" or "modifications" has already been subject matter of the decisions of the Supreme Court of India. The question of consideration is whether the power of the President in the Application of Constitutional provisions with or without "exceptions" and "modifications" would be ruled to be co-extensive with the power to amend Constitution and includes the power to enlarge any existing provision or add new provision or required "concurrence" of the Government of Jammu & Kashmir and Parliament of India.<sup>12</sup>

If it is in line with this mechanism that in 1954, the President made an order called Constitution (Application to Jammu & Kashmir) Order with effect from May 14, 1954 and applied Article 35A to the State as a new provision in the Constitution, still it has to be in consonance with basic principles of the Constitution of India; e.g equality, freedom of religion, protection to minorities etc.<sup>13</sup>

#### **Article 35A poses many serious questions**

This Article provides that a person will be treated as a "Permanent Resident of Jammu & Kashmir" only in accordance with the law which was already in force in the State before May 14, 1954. In other words, a person who does not qualify as a Permanent Resident of the State under law as was applicable before May 14, 1954 cannot now become Permanent Resident of the State. The said law is also protected by the Constitution of Jammu & Kashmir.<sup>14</sup>

This Section further provides that the Permanent Residents will continue to enjoy Special Rights and Privileges in the matter of (1) Employment under the State (2) Acquisition of immovable property in the State (3) Settlement in the State (4) Scholarship and aid as the State Government may provide. Any law which gives these Special Rights and Privileges to the Permanent Residents of the State cannot be declared null and void by any Court on any ground.<sup>15</sup>

It retained Maharaja's definition of Permanent Residents: All persons born or settled within the State before 1911 or after having lawfully acquired immovable property resident in the State for not less than ten years prior to that date. All emigrants from Jammu & Kashmir, including those who migrated to Pakistan, are considered State Subjects. The descendants of emigrants are considered State Subjects for two generations. The definition of 'State Subject' of Class I, II, III was set out in the State Maharaja's Notification of 20/4/1927 read with the Notification of 27/6/1932. It was based on the criteria of year of birth in the State, on the period of Permanent Resident in the State and on the acquisition of the immovable property in the State. These definitions came into being because during the

rule of *Maharaja Pratap Singh* (1885-1925) when there was a huge outcry due to appointment of large number of western educated men from neighboring States in Kashmir. The agitation was so strong that the *Maharaja* was forced to issue an order that 'State Subjects' would be preferred to outsiders in cases of Government employment hence the definition of State Subject in 1927.<sup>16</sup>

In the monarchical system of governance prevalent in the twenties, the Maharaja of Jammu & Kashmir may have justifiably disregarded today's norms of democratic equality in order to offer special treatment to certain subjects in order to protect them from being economically exploited by their well-to-do neighbors. Are these laws defensible on the ground of equality in a sovereign democratic republic like India or on the ground of preventing some imaginary economic exploitation in a State i.e. an integral part of India? It is also not the case that the poverty levels in Jammu & Kashmir are higher than other parts of India, they are actually much lower. The definition of Permanent Resident violates the Preamble of the Jammu & Kashmir Constitution which reads 'EQUALITY of status and of opportunity, and to promote among us all'. With the blessings of Article 35A, the Jammu & Kashmir State Legislature enacted laws that confer benefits on Permanent Residents.<sup>17</sup> Sanjeev Nayyar further observes;<sup>18</sup>

1. One, over 2.5 lakhs refugees from West Pakistan (mostly Hindus and Sikhs belonging to Schedule Castes) who crossed over to Jammu & Kashmir during the period of 1944 to 1954 were denied Permanent Resident Certificates. Note that Government of India has permitted the setting up of Rohingya Muslim camps in Jammu city. Sooner than later they will become Indian citizens! Also 'the Sheikh Mohammad Abdullah led Government in the State granted citizenship rights to numerous Uyghur Muslim families in 1952 and, settled them in the Eidgah area of Srinagar with full citizenship rights. The Uyghur Muslims migrated from Xinjiang province of China to escape Communist Beijing's wrath.' Why double standards?
2. Two, these refugees can vote in Parliament but not in Assembly and Local body elections.
3. Three, these refugees are mostly Hindus and reside in Jammu region. If they are allowed to vote the number of voters in the region would increase and support claims for an increase in number of Assembly seats. This would eventually weaken control Kashmir Valley has over the State legislature.
4. Four, these refugees can't apply for jobs in the State; their children can't get higher education in the State, disqualified from being a member of a Village Panchayat.
5. Five, clause two is open to severe abuse. Does the State have a record of State subjects as described in 1947 and how does one prove that a resident of Jammu & Kashmir has migrated to Pakistan after 1/3/1947.
6. Six, it is the State Government (whose relations with the Centre have been mostly volatile) which

shall decide if the person is entitled to return under a scheme of resettlement. Such a person automatically becomes a citizen of Jammu & Kashmir and India. 'It will be observed that in this respect the State Legislature acts as a delegate of the Union Parliament'.

7. Seven, what are the legal and administrative safeguards to ensure that Pakistanis do not use this law to settle in India as ISI Agents or to effect demographic changes in the Valley or predominantly Hindu Jammu not to forget the rest of India?
8. Eight, since one of the parameters for deciding the number of seats in the State Assembly is population in respective regions; it opens a window of opportunity to the Valley's Muslims to increase the population (see actual census/voter numbers later) so as to retain more seats for Valley (46) as compared to Jammu (37).

The amazing thing is Article 35A was never presented before Parliament of India. Unlike other amendments, it appears in the Constitution as an appendix and is not listed in the list of amendments either. Article 35A enables the State Assembly to define 'Permanent Residents' and to give them special rights and privileges. As a consequence, no one except those defined as 'Permanent Residents' are entitled to property rights; employment in State government; participation in Panchayat, municipalities and legislative assembly elections; admission to government-run technical education institutions; scholarships and other social benefits.<sup>19</sup>

This effectively means, in this case, the President bypassed the amending procedure as laid out in the Constitution of India in order to add the new Article 35A. This also means that Article 368 of the Constitution, in its application to Jammu & Kashmir, also got amended. The President of India does not have legislative power, but in this case he appears to have performed the function of Parliament. The 1954 order States it is being issued in exercise of powers conferred by clause (1) of Article 370 of the Constitution, with the concurrence of the Government of Jammu & Kashmir. Article 370 does not state anywhere that it confers on the President executive powers so vast that he can amend the Constitution. It also does not state that the President can bypass Parliament, invoke executive powers so vast and devastating that neither the Lok Sabha nor the Rajya Sabha can do anything about the amendment being carried out. Strangely enough, this 'amendment' to the Constitution has been concealed from general audit by not mentioning the same in the text of editions of the main Constitution. Most Constitutional experts are completely unaware of this Article 35A and its implications<sup>20</sup>.

However, in *Puranlal Lakhanpal v. The President of India and Others*<sup>21</sup>, the Apex Court (Hon'ble Justice Gajendragadkar, P.B. Sarkar, A.K. Wanchoo, K.N., Gupta, K.C. Das, Ayyangar, N. Rajagopala) held:

That the word "modification" used in Art. 370(l) must be given the widest meaning in the context of the

Constitution and in that sense it includes an amendment and it cannot be limited to such modifications as do not make any "radical transformation". Whereas in the case of Article 35A the question is not of modification or even amendment of an existing Constitutional provision but it is a case of adding altogether a new article by amending the Constitution. It is not a case where the President has ordered some exceptions and modifications of some provisions of Constitution of India that exist in the first Constitution of India or have been incorporated in the Constitution of India using constituent power contained in Article 368 by Parliament of India at some later date for direct application with regard to Indian State of Jammu & Kashmir.

Similarly, in *Sampat Prakash v. State Of Jammu & Kashmir & Anr.*<sup>22</sup>, (Bhargava, Vishishtha Hidayatullah, M. (CJ) Shelat, J.M. Mitter, G.K. Vaidyalingam) in judgment delivered on 10 October, 1968 had observed to go with the judgment delivered by a larger bench in the case *Puranlal Lakhanpal v. The President of India*, 1962.<sup>23</sup>

Hon'ble Supreme Court has so far held the laws and provisions made in Jammu & Kashmir discriminating between citizens of India who are Permanent Residents of Jammu & Kashmir and those who are not valid under the cover of 'Article 35A' of Constitution of India even if it violates the fundamental rights of some as granted in Part III of the Constitution of India. But the debate that was actively initiated by persons like the writer in 2009 is a question on the Constitutional legitimacy of even the birth of Article 35A and there exist all reasons for taking up this issue before the Apex Court for consideration by a larger Constitutional bench pleading that Clause (1) of Article 370 of the Constitution of India confers no power of President of India to amend the Constitution of India simply with the concurrence of the Government of the State of Jammu & Kashmir so as to add a new Article in the Constitution of India by the name Article 35A after Article 35 of Constitution of India and such act is an amendment of the Constitution of India and only Parliament of India can do using the constituent power vested in Art 368 of Constitution of India<sup>24</sup>.

#### **Effects of Article 35A of the Indian Constitution**

The State continues to enjoy autonomy in areas covered by the provisions of Constitution not extended to the State. Most of the provisions of the Constitution applied to the State are extended with exceptions and modifications to maintain and preserve special status granted to the State. To suit autonomy granted to the State, provisions like Article 35A and proviso to Article 253<sup>25</sup> and proviso to Clause 2 Article 368<sup>26</sup> have been added to the provisions of Constitution, as applied to the State. The Article 35A gives protection to existing laws in force in the State and to any law enacted after 1954 by the State legislature, defining the classes of persons treated as

Permanent Residents of the State, conferring on Permanent Residents any special rights and privileges or imposing upon other persons any restrictions as respects employment in the State Government, acquisition of immovable property in the State, settlement in the State or right to scholarship and other aids granted by the State. Proviso to Article 253 even guarantees a say or role to the Government of the State in decision affecting the disposition of the State. In terms of Proviso to Clause (2), Article 368 no amendment made to the Constitution is to have effect in relation to the State, unless applied by the order of the President under Clause (1) of Article 370.<sup>27</sup>

Article 35A allows the Jammu & Kashmir legislature to define the list of 'Permanent Residents' of the State, who are eligible to vote, can work for the State Government, can own land, buy property, can secure public employment and college admissions, etc. This Article has been criticized on the grounds that non-Permanent Residents are denied all these rights and this article is being challenged on the ground of gender discrimination. This is because a male resident will not lose the right of being a Permanent Resident even after marriage to a woman from outside. A woman from outside the State shall become a Permanent Resident on marrying a male Permanent Resident of the State. However, a daughter who is born State subject of Jammu & Kashmir will lose the right of being a Permanent Resident on marrying an outsider. It discriminates against women who marry outside the State from applying for jobs or buying property. This is said to be against the spirit of Article 14 of the Constitution which provides for equality before the law and the equal protection of the laws.<sup>28</sup> The following are the sufferers of Article 35A:

#### **Schedule Castes and Backward Classes**

This Article has denied certain basic rights to many communities living within Jammu & Kashmir for the past six decades. Predominant amongst these are the *Valmiki*s of Jammu & Kashmir. Historically there is a marginalized *Dalit* community found in almost all regions of India. In 1957, around 200 *Valmiki* families were brought from Punjab to Jammu & Kashmir, following a cabinet decision, specifically to be employed as *Safai Karamcharis* (sweepers). These families agreed to work in the State after being promised that the 'Permanent Resident' clause would be relaxed in their favour.<sup>29</sup>

After a lapse of five decades, families have grown. However, their plight is that they are 'Permanent Residents' of Jammu & Kashmir only to the extent of being *Safai Karamcharis*. Their children have studied up to graduation level and beyond but are not eligible to apply for government jobs and cannot get admission to government-run professional institutes. The educated youth from these *Valmiki* families are only eligible to be appointed as *safai karamcharis*. The educated *Safai-Karamcharis* already working in Jammu Municipality is now qualified for further promotions but they can only be employed as sweepers. These *Valmiki*s can vote for Lok Sabha elections, but not for State Assembly or municipality elections. The colony that was allotted to

them to live in (*Valmiki* Colony, Gandhi Nagar, and Jammu) has not been regularized till date. Is this not the worst kind of racism practiced in the modern world?<sup>30</sup>

#### **Migrants and Refugees**

Similarly, those who migrated from West Pakistan to the Indian State of Jammu Kashmir during Partition in 1947 have been living there since last 68 years. But over six decades later, they are still identified as 'refugees' and forced to live in 'camps'. Even their third generation is tagged as 'refugees' and denied rights and privileges that should have been immediately granted to those who were forced to migrate from Pakistan. Compare their situation with those who migrated from Pakistan to other parts of India such as Delhi, Mumbai, Surat etc. They were rehabilitated with a number of welfare measures such as allotment of houses, jobs etc. In fact, their integration into the mainstream was virtually seamless. Today, they are the rightful citizens of India, enjoying every right and privilege that the Constitution of India confers on all Indians. After over six decades of living like bonded labour, these families want to be free of the 'refugee' tag.<sup>31</sup>

Around 5,764 families consisting of 47,215 persons migrated from West Pakistan to different areas of Jammu Division. No land was allotted to them by the State Government. These refugees were able to occupy some land, which was later allowed to be retained by them without conferring upon them the title of land because of their non-Permanent Resident status. This means they can stay on this land, but cannot sell it or buy any other property. West Pakistan Refugees (WPR) is mostly from the deprived sections and more than 80% of them belong to the Scheduled Castes. The Jammu & Kashmir law for them means – they can be tillers, labourers, tenants but not land-owners and land-lords. After six decades, their population has grown manifold. By some estimates, it's about three lakh now. It's obvious that the land they could retain six decades ago cannot be sufficient now. Denial of 'Permanent Resident Status' in Jammu Kashmir, WPRs cannot get a job in the State Government. WPR families can't avail the benefits of various social welfare schemes launched by the State Government. No other benefits of any kind have been granted to them. Their children are not entitled to scholarships and fellowships available to Permanent Resident Certificate holders.<sup>32</sup>

Members of West Pakistan Resident families cannot get admissions in any State-run professional colleges. They are not even eligible to cast their vote for State Assembly elections. They have no participation in local village panchayats and other self-governing bodies up to the district level. This has brought them down to the level of second class citizens as they have no role in law-making at the State level. While the authorities at the Central and State levels took a number of steps to rehabilitate even the nomadic tribes by allotting them lands on permanent ownership basis, nobody cared for these 'refugees' from West Pakistan.<sup>33</sup>

Even the Hon'ble Supreme Court of India in the case of *Bachan Lal Kalgotra v. State of Jammu &*

*Kashmir and Others*<sup>34</sup> pertaining to 1947 West Pakistan Refugees settled in Jammu & Kashmir on 20 February, 1987 made observations in this regard with particular reference to Article 35A of the Constitution of India in the following words:

It is to be noticed here that these provisions are not open to challenge as inconsistent with the rights guaranteed by Part III of the Constitution of India because of "the Constitution (Application to Jammu & Kashmir) Order, 1954" issued by the President of India under 370 (1) (D) of the Constitution by which Article 35A was added to the Constitution in relation to the State of Jammu & Kashmir. In view of the peculiar Constitutional position obtaining in the State of Jammu & Kashmir We do not see what possible relief we can give to the petitioner and those situate like him. All that we can say is that the position of the petitioner and those like him is anomalous and it is up to the Legislature of the State of Jammu Kashmir to take action to amend legislation, such as, the Jammu & Kashmir Representation of the People Act, the Land Alienation Act, the Village Panchayat Act, etc. so as to make persons alike this can be done by suitably amending the legislations without having to amend the Jammu & Kashmir Constitution We do hope that the claims of persons like the petitioner and others to exercise greater rights of citizenship will receive due consideration from the Union of India and the State of Jammu & Kashmir. We are, however, unable to give any relief to the petitioners.

On a similar note, Gorkhas settled in Jammu & Kashmir in the 18th century and a majority of them were soldiers and families that fought in the ranks of Maharaja Ranjit Singh of Punjab, whose commander-in-chief was Gulab Singh, a landlord of Jammu. Their population numbers around one lakh and is spread across Jammu & Kashmir, including Kashmir Valley. They have resided in Jammu & Kashmir for over hundred years, since before Independence. There are innumerable instances of Gorkhas who have made supreme sacrifices for the integrity of India and the safety of Jammu & Kashmir. Unfortunately, however, they have never got the rights they deserve in independent and democratic India. The Gorkhas in fact feel their miseries have increased manifold since Independence. They face big hurdles in getting the Permanent Residence Certificate (PRC) of Jammu & Kashmir, without which educated young Gorkha boys and girls cannot get a government job or admission into educational institutes. Hence, they remain economically, socially and educationally backward.<sup>35</sup>

#### **Gender Biasness**

Article 35A is interpreted differently for men and women, and that is where the issues begin. For

instance, allied legal provision such as Section 6 of the Constitution of Jammu & Kashmir dissuades women from marrying a man of their choice. By restricting the basic right of a woman and her children to hold property rights if she marries a man not holding the Permanent Resident Certificate. Section 6, however, does not apply to men who marry non-resident citizens. The tacit interpretation of such a provision would simply be that women are considered chattel and property of the men who "own" them, and hence, if their geographical location changes, the status of their rights would too.<sup>36</sup>

The Basic question here is an inherent gender inequality within the State that is brought about by the provision of Article 35A. A similar matter has been dealt with by the Jammu & Kashmir High Court in 2002 in the case, *State of Jammu & Kashmir v. Sushila Sawhney and Ors.*<sup>37</sup> The High Court stated that the daughter of a Permanent Resident marrying a person outside the State would not lose the status of Permanent Resident of Jammu & Kashmir. However, after the Sushila Sawhney case, neither did the Parliament make an effort to explicitly change the language of the provision, nor did any organs of the State Government issue a clarification on the same. Moreover, the Sushila Sawhney judgment talks about women's permanent status in the State but leaves out the fate of her children, and the present case seeks to do just that.

Similarly, a Kashmiri woman, Charu Wali Khanna, has challenged the Constitutional validity of Article 35A before the Supreme Court, stating that it violated her right to equality under Article 14 enshrined in the Constitution. She stated: "Article 14 of Constitution gives a fundamental right to equality before law. But Article 35A is heavily loaded in favour of males because even after marriage to women from outside (Kashmir) they will not lose the right of being Permanent Residents. A woman from outside the State shall become a Permanent Resident on marrying a male Permanent Resident of the State but a daughter who is born (to a) State subject will loss the right on marrying an outsider." Because Khanna married out of her caste and settled outside of Jammu & Kashmir, she has been deemed a non-resident citizen and because of such "unreasonable classification between males and females" she decided to approach the Supreme Court.<sup>38</sup>

She wanted to buy land to build a house but the PDP-BJP government refused her permission citing this particular section of the Constitution. She pleaded before the Supreme Court that "Farooq Abdullah and his son Omar (National Conference leaders) are married to non-Kashmiris. The father and son not only do not lose Permanent Resident status, but their wives get a right to property too. At the same time, Sarah Abdullah, the daughter of Farooq Abdullah, who is married to Sachin Pilot (Congress leader), loses her Permanent Resident status and right to property too. This is where the gender inequality, a clear violation of right to equality lies. Likewise my client, who married outside the State, loses the citizenship and also property rights.<sup>39</sup> While Jammu & Kashmir's Non-Permanent Resident

Certificate holders can vote in Lok Sabha elections, the same individual is barred to vote in local elections in the State. In a related matter filed by Delhi-based NGO 'We The Citizens' challenging Article 35A of the Constitution, a bench headed by the Chief Justice had referred the case to a larger bench.<sup>40</sup>

A Bench of Justices Dipak Misra and A.M. Khanwilkar tagged Khanna's petition with a pending petition from 2014 where a Delhi-based NGO named "We are Citizens" had brought up a similar concern. The questions in these petitions shall be dealt by a Constitutional bench of five judges.

#### **Worsening Politics**

In 2004, the State High Court, in the case of *State of Jammu & Kashmir v. Sheela Sawhney*<sup>41</sup>, declared that there was no provision in the existing law dealing with the status of a female PR who married a non-resident. The provision of women losing their Permanent Resident status after marrying outside the State, therefore, did not have any legal basis. This decision was historic because it corrected an administrative anomaly and brought relief to women who married outside the State.<sup>42</sup> The order had raked up a public debate and a political controversy with the ruling People's Democratic Party (PDP) being criticized for not helping maintain the State's autonomy by converting notification into a law. Subsequently, Minister for Law & Parliamentary Affairs Muzaffar Hussain Baig consulted legislators from various political parties, including the National Conference and Communist Party of India-Marxist and drafted legislation. He tabled it in the lower house and the House unanimously passed the Permanent Resident (Disqualification) Bill, 2004. The law minister, however, clarified that the proposed law does not alter the legal position of female descendants of Permanent Residents in the matter in heritance, which will continue to be in accordance with the relevant personal laws.<sup>43</sup> The aims and objects of the legislation as set out in the preamble were: "A Bill to provide for disqualification from being a Permanent Resident of the State on marriage of a female Permanent Resident with a non-Permanent Resident"<sup>44</sup>.

But soon it snowballed into a big crisis. As the BJP raised the issue at the national level, the Congress, the major party in the coalition, withdrew its support to the Bill as hastily as it had offered. It proposed that it be referred to a select committee. Demonstrations for and against the Bill started in Srinagar and Jammu. Rarely the politics of the State was so sharply divided between the principal regions and communities of the State. Interestingly same facts and arguments are being used on both sides. Kashmir based parties - the People's Democratic Party and the National Conference - describe any criticism of the Bill, including by the Prime Minister, the Deputy Prime Minister and Congress President, as threat to special status of the State under Article 370; under which the law on Permanent Residents of the State as a part of the State Constitution, promulgated in January 1957 was enacted and which incorporates the safeguards for the citizens of the State provided in the State

subject law promulgated by the Maharaja Hari Singh in 1927.<sup>45</sup>

It is noteworthy that the two main rival political parties of the State, the ruling PDP and opposition party National Conference (NC), voted together on this Bill. There were massive protests in the Jammu region against this Bill. Under immense pressure from the people and both the BJP (opposition party) and the Congress (coalition partner of PDP), the Bill was not passed in the Legislative Council as the House was adjourned *sine die* suddenly on March 11, 2004. The Bill lapsed and could not become a law. Had it been passed, it would have come into force retrospectively with effect from October 7, 2002, the day the High Court delivered its judgment.<sup>46</sup>

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The Bill was again brought in the Upper House by PDP in March 2010, again raising the tempers. While the rest of the world was celebrating the 100th anniversary of International Women's Day in March, a process of disempowering women was initiated in Jammu & Kashmir with the introduction of the Jammu & Kashmir Permanent Residents (Disqualification) Bill, 2010. Introduced as a private member's bill, it laid down that a woman who marries outside the State would lose the status of Permanent Resident (PR) — including the right to hold property, securing jobs in State services, voting for the legislative assembly or contesting elections.<sup>48</sup>

There are many in Kashmir who genuinely believe that the bill is needed in order to buttress the larger political cause for which Kashmiris are fighting and who believe that raising the issue of the women's rights is an unnecessary diversion that could fragment the movement. There are also many who argue that Kashmiri identity would have to be redeemed before women can be granted equal rights. But there are women in the State who decry this hierarchical ordering of rights. They argue that Kashmiri identity is inclusive and a woman is as much a part of this identity as a man is. When the bill came up this time, they questioned its patriarchal bias which renders women as secondary members in society. They demanded to know how there could be full empowerment of the Kashmiri 'people' without the empowerment of women? Isn't the empowerment of Kashmiri women very much a part of the 'greater cause' of Kashmiri empowerment? The bill has been dropped for the moment. But in the absence of a

women's movement in the State and given, in particular, gender insensitivity within the political class, politicians in search of emotive issues can at any point rally once again around this biased and retrograde bill.<sup>49</sup>

### Conclusion

The Indian Constitution protects certain sections of the society which have faced injustice historically. In the similar vein, the Indian Constitution protects certain States to immune from the Constitution under Part XXI titled "Temporary, Transitional and Special Provisions" from Articles 369 to 392. In this Part, the Indian Constitution provides temporary provisos to the State of Jammu & Kashmir (Art 370). The Indian Constitution also provides special provisions to State of Maharashtra and Gujarat (Art.371), Nagaland (Art. 371A)Nagaland (Art. 371A), Assam (Art. 371B), Manipur (Art. 371C), Andhra Pradesh (Art. 371D), Sikkim (Art. 371F), Mizoram (Art. 371G), Arunachal Pradesh (Art. 371H), Goa (Art. 371-I) and Karnataka (Art. 371 J). The object behind to provide "special" and "temporary" provision to the certain States was to protect these State's autonomy in some areas. The Constituent Assembly of India spare enough time on these provisions to make India more democratic and inclusive. Among all these provisions Article 35A is contesting at present political juncture in India. Article 35A was inserted in the Indian Constitution by the Presidential Order of 1954. Article 35A yields special rights and immunities to the Permanent Residents of the Jammu & Kashmir from the rest of Indian citizen. In the light of this Article a non-Permanent Resident of Jammu & Kashmir cannot enjoy any Government facilities. There are two reasons behind the contesting of Article 35A, first, the Constitutionality of insertion of Article 35A, and second the conception of equality among the Indian citizen.

The issue of consideration is, besides giving assent to the Bill passed by the Both Houses (Lok Sabha and Rajya Sabha), President of India has sole legislative power under article 123 to make ordinance when either house of the Parliament is not in session. These legislative powers of the President have only six-month effect; in other words, it is the authority to make laws without discussion in the Parliament in urgency for a shorter period. It is an exception in the making law not a general rule or a permanent measure. In the Constitutional scheme, the President of India has no legislative power to amends the Constitution by bypass the democratic process. President's legislative, executive and judicial power is subjective to aid and advice by the Council of Minister (Art 74), but all these powers do not allow to the President to go beyond the spirit of the Constitution.

Nowhere in the Article 370 mentions that President of India has the power to amend the Constitution or insert a new Article in the Constitution? The Article 370 only states that the President can make any exceptions and modifications with the concurrence of the Government of the State. Sub-clause 1 (d) of the Article 370 states that: "Such power of the other provisions of this Constitution shall apply in relation to that State subject to such

exceptions and modifications as the President may by order specify."

Article 368 is the only way to amend the Constitution, not the President. The marginal note of Article 368 States "Power of the Parliament to amend the Constitution and procedure, therefore" which means it is the Parliament that has the power to amend the Constitution. Sub-clause 2 of the Article 368 states that: "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 majority of the total membership of that House and by a majority of not less than two-third of the members 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 Bill". Further proviso to Article 368 (2) mentions "Provided that if such amendment seeks to make any change in— (a) article 54, article 55, article 73, article 162 or article 241, or (b) Chapter IV of Part V, Chapter V of Part VI, or Chapter I of Part XI, or (c) any of the Lists in the Seventh Schedule, or (d) the representation of States in Parliament, or (e) the provisions of this article, the amendment shall also require to be ratified by the Legislatures of not less than one-half of the States by resolutions to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent."

It is quite clear that Article 368 is the only ways that amend the Constitution by way of addition, variation or repeal any provisos of the Constitution and this power is vested with legislature not with President.

In 2014, a non-governmental organization, "We the Citizens", filed a petition in the apex court seeking that Article 35A should be abrogated and the provision was "unconstitutional" and approved without any debate in the parliament. This PIL has been combined with the petition filed by Charu Wali Khanna who challenged Article 35A of the Indian Constitution and Section 6 of the Jammu and Kashmir Constitution which deal with the "permanent residents" of the state.

The Supreme Court on Monday (August 14, 2017) stated that a Constitution Bench might examine whether it is gender-biased and violative of the basic structure. The Apex Court indicated that if Article 35A relating to special rights and privileges of the citizens of the Jammu & Kashmir whether it violates the basic structure of the Constitution or if it is *ultra vires*, the issue may be dealt with by a five-judge Constitution bench.<sup>50</sup>

Advocate Shoeb Alam, appearing for the Jammu & Kashmir government, said the issue has already been "*prima facie* settled" by the full bench of the High Court in its verdict in 2002 in *Dr. Susheela Sawhney v. State of Jammu & Kashmir*. In that case, the full bench of High Court in its majority view had held that a daughter of a Permanent Resident marrying a non-Permanent Resident would not lose the status of Permanent Resident of the State of Jammu & Kashmir. The Petitioner has challenged

Section 6 of the Jammu & Kashmir Constitution, which deals with the "Permanent Residents" of the State. The plea has challenged certain provisions of the Jammu & Kashmir Constitution, which deny property rights to a woman, and her children who marry a person from outside the State. The Petitioner said that as per the provisions, if a woman marries a person outside Jammu & Kashmir, then she loses property rights as well as employment opportunities in the State. While Jammu & Kashmir's Non-Permanent Resident Certificate holders can vote in Lok Sabha elections, the same individual is barred to vote in local elections in the State.<sup>51</sup>

Why discriminatory laws have survived even after independence in the Indian State of Jammu & Kashmir even after independence under the garb of provisions 'enshrined' in 'Article 35A' of the Constitution of India inspite of there being provisions available in Jammu & Kashmir Constitution (Section 8 and 9) and even after there were some advisory notes made by even the Supreme Court of India could be valid question. A humble debate on Article 35A of the Constitution of India pointing out that going by the text of C.O 48 of 1954, Article 35A of the Constitution of India is not a modification of some Article or modification or part of Article 35A but it is all together a new Article added in the Constitution of India after Article 35 through a Presidential executive order and so 'even' the birth or the very existence of this Article comes under a question mark.

### Conclusion

Jammu & Kashmir as a State different than other Indian States, to the extent, that even some better provisions have not been extended to common people of Jammu & Kashmir by those who have been taking pride in 'Vision Naya Kashmir' as well as claiming to have obtained special welfare law concessions. In this regard the denial of basic human rights to choose a life partner of choice even to a woman, an Indian citizen, who is a Permanent Resident of Jammu & Kashmir could be quoted, what to talk of those who are not Permanent Residents of Jammu & Kashmir as defined in Section 6 of Jammu & Kashmir Constitution. In case a woman Permanent Resident of Jammu & Kashmir marries a person from Punjab or UP her husband & children shall not be having Permanent Resident Status under the present laws. Sections 8 and 9 could be well used at least for removing this discrimination but even that has not been done. It may hurt some but it will not be wrong to say that over last 7 decades Delhi has trusted only Kashmiri leadership and the Kashmiri leadership has instead preferred to keep Jammu & Kashmir involved in controversies of Nationalities and citizenship. This way it could be said that Art 35A has been used less for the benefit of Indian citizens living in Jammu & Kashmir but more for indirectly harming them.

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