

Analyzing The Validity of The Special Status Accorded to Jammu & Kashmir

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“There are things you break that can't be put back together again, and Kashmir may be one of them.”

– Salman Rushdie

Relevant Provisions

Article 35A²

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 and Kashmir, and no law hereafter enacted by the Legislature of the State:

(a) defining the classes of persons who are, or shall be, permanent residents of the State of Jammu and Kashmir; or

(b) conferring on such permanent residents any special rights and privileges or imposing upon other persons any restrictions as respects—

(i) employment under the State Government;

(ii) acquisition of immovable property in the State;

(iii) settlement in the State; or

(iv) right to scholarships and such other forms of aid as the State Government may provide, shall be void on the ground that it is inconsistent with or takes away or abridges any rights conferred on the other citizens of India by any provision of this part.

Article 368³

Power of Parliament to amend the Constitution and procedure therefore

(1) Notwithstanding anything in this Constitution, Parliament may in exercise of its constituent power amend by way of addition, variation or repeal any provision of this Constitution in accordance with the procedure laid down in this article

(2) An amendment of this Constitution may

be initiated only by the introduction of a Bill for the purpose in either House of Parliament, and when the Bill is passed in each House by a majority of the total membership of that House present and voting, it shall be presented to the President who shall give his assent to the Bill and thereupon the Constitution shall stand amended in accordance with the terms of the Bill: Provided that if such amendment seeks to make any change in

(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 Legislature of not less than one half of the States by resolution to that effect passed by those Legislatures before the Bill making provision for such amendment is presented to the President for assent

(3) Nothing in Article 13 shall apply to any amendment made under this article

(4) No amendment of this Constitution (including the provisions of Part III) made or purporting to have been made under this article whether before or after the commencement of Section 55 of the Constitution (Forty second Amendment) Act, 1976 shall be called in question in any court on any ground

(5) For the removal of doubts, it is hereby declared that there shall be no limitation whatever on the constituent power of Parliament to amend

by way of addition, variation or repeal the provisions of this Constitution under this article
PART XXI TEMPORARY, TRANSITIONAL
AND SPECIAL PROVISIONS

Article 370⁴

Temporary provisions with respect to the State of Jammu and Kashmir

(1) Notwithstanding anything contained in this Constitution,—

(a) the provisions of article 238 shall not apply now in relation to the state of Jammu and Kashmir;

(b) the power of Parliament to make laws for the said state shall be limited to—

(i) those matters in the Union List and the Concurrent List which, in consultation with the Government of the State, are declared by the President to correspond to matters specified in the Instrument of Accession governing the accession of the State to the Dominion of India as the matters with respect to which the Dominion Legislature may make laws for that State; and

(ii) such other matters in the said Lists as, with the concurrence of the Government of the State, the President may by order specify.

Explanation: For the purpose of this article, the Government of the State means the person for the time being recognized by the President on the recommendation of the Legislative Assembly of the State as the Sadr-i-Riyasat (now Governor) of Jammu and Kashmir, acting on the advice of the Council of Ministers of the State for the time being in office.

(c) the provisions of article 1 and of this article shall apply in relation to that State;

(d) such 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:

Provided that no such order which relates to the matters specified in the Instrument of

Accession of the State referred to in paragraph (i) of sub-clause (b) shall be issued except in consultation with the Government of the State:

Provided further that no such order which relates to matters other than those referred to in the last preceding proviso shall be issued except with the concurrence of that Government.

(2) If the concurrence of the Government of the State referred to in paragraph (ii) of sub-clause (b) of clause (1) or in the second provision to sub-clause (d) of that clause be given before the Constituent Assembly for the purpose of framing the Constitution of the State is convened, it shall be placed before such Assembly for such decision as it may take thereon.

(3) Notwithstanding anything in the foregoing provisions of this article, the President may, by public notification, declare that this article shall cease to be operative or shall be operative only with such exceptions and modifications and from such date as he may specify: Provided that the recommendation of the Constituent Assembly of the State referred to in clause (2) shall be necessary before the President issues such a notification

Introduction

The Indian Constitution established the biggest democracy in the world with the aims to achieve holistic national unity and progressive economic development. Over the years, with countless Legislative amendments and numerous Judicial decisions, the constitution has become a home to a matrix of non-derogatory principles and principles according to which the society is governed. However, the constitution does not remain without a few anomalies and one of such is the special status accorded to the state of Jammu & Kashmir (J&K), through constitutional provisions.⁵

The most prominent provisions relating to this issue are firstly – Article 35A⁶, this provision authorizes the state legislature of J&K to

describe as to who may considered as that state's 'permanent residents'. This is done to enable them to exercise certain special rights and. This article was added as part of a Presidential order in 1954 which took the form of an agreement between India and J&K. Secondly there is the existence of Article 370⁷ under the constitution which embodies J&K with a special status. It empowers the State to exercise significant autonomy unlike any other state in the country. Such autonomy has granted the state, a separate constitution for its own governance.

The provision of these articles hence proves to be a paradox within the Indian Constitution. In the early days of the inception of Article 370, the provision was supposed to be of impermanent/interim nature.⁸ However, the provisions hold their ground even after countless decades of their construction. The validity of such provision has been challenged on several instances in front of the Supreme Court across the years but the Court has remained static on their stance by always upholding the legitimacy of these provisions.⁹ Furthermore, all mandates calling for the abolishment of Article 35A and Article 370 have been countered for the restoration of J&K to its position before the accession to India. It is therefore safe to conclude that these Articles are among the most controversial provisions in the Indian Constitution.

History and Background

Through 1927 and 1932 notifications, Dogra ruler of the princely state of J&K, Maharaja Hari Singh imposed a law that defined state subjects and their rights. The law also regulated migrants to the state. After attaining independence from the colonialists, the Indian States were left with no option but to make one the three choices left with them – To accede to Pakistan, to accede to India or to remain as an independent state. The ultimate decision in making one of the abovementioned choices was vested in the hands of the respective

head/ ruler of each state. The state of J&K was among those states that shared border with both the nations. The (then) ruler of J&K – Maharaja Hari Singh did not choose to accede to either nation and thus remained as an independent nation after the official date of independence.¹⁰ One reason behind such a decision could be the fact that the Kashmir Valley was predominantly occupied by a majority of Muslim population whereas the Ladakh and Jammu regions remained a haven for the Buddhist and Hindu majorities.¹¹

However, shortly after attaining independence, Kashmir was invaded by a large tribal horde which caused huge devastation to the state, massive loss to life and property also took place. The Maharaja was however incapable to curb the atrocities being committed in his territory. He then proceeded to seek help from the Governor General of India and did so by ascribing the Instrument of Accession to India with the letter for acceptance by the Indian Government. J&K thus joined India in October 1947.¹²

Following the accession, the leadership of the state was taken over by Sheikh Abdullah who later took the initiative to discuss J&K's political association with the Center. Article 370 was initially conceived as the earlier draft Article 306-A¹³ (content similar to Article 370). The legislature debated on the issue of the anomaly of the State agreeing to the accession yet denying any control of the center on the state. However, with a mounting burden from Pakistan in the guise of infiltration and sending back Indian Hindus to Kashmir, Sheikh Abdullah compelled the center to provide the Article a permanent status in the Constitution so that the settling of Hindus in J&K would not prove to be a threat to the indigenous Muslim population in J&K. Now Article 370 grants a special status to the State of the J&K but confers the center, power to execute affairs on 3 sectors – communication, foreign affairs and defence.¹⁴

Article 35A again, empowers the state of J&K to give meaning to the term 'permanent residents' [of Jammu & Kashmir], and these permanent residents are entitled to exercise certain exclusive rights pertaining to transfer of property rights, scholarships, general public welfare etc. It was made part of the constitution as per Article 370(1)¹⁵, under the Delhi Agreement (1952) that took place between Sheikh Abdullah and Nehru wherein Article 35A was introduced as a presidential order.¹⁶

Nature of Article 370 and its Provisions.

This provision was introduced as an interim/temporary measure it was only due to the external circumstances that it was given a permanent position. The following highlights can be deduced from it:

The State autonomy can trump the center's authority over it. This also limits/restricts the application of the Constitution to itself.

This anomalous provision confers powers upon the J&K government that are not enjoyed by any other state in the Union.

As per the provisions of the Indian Constitution, the legislative amendments rolled out by the parliament shall have an equal application on all states. However, the same is not the case with J&K— while an amendment may be made applicable to the State, provided that there is complete concurrence with the state government or when the President of India is of the same view. We can therefore conclude from this observation that the President of India acts as fulcrum or as a direct bond between the Union and the State of J&K and thereby defining the very relationship between the same. This is the basic interpretation garnered from Article 370(1) (d).

Now, Article 370(1)(d) also includes the term – 'modification', this is indicative of the fact that the President commands the jurisdiction that to change/modify any provision of the constitution

as he may deem fit for its application to J&K. Furthermore, Article 368 also cannot act as a restraint on the President's power (in regard to Article 370).¹⁷In the case of *Puranlal Lakhanpal v. Union of India*¹⁸, the Court held that the word 'modification' needs to be awarded with the widest interpretation possible to include any dynamic reforms that may be brought to J&K.

It thus pertinent to note that while the Constitution bars J&K from fully integrating with India, Indian administration has allowed the state to reap benefits of its economic and industrial policies to allow its progression to development. This provision further violates the intent of the constitution makers, which is clear from the provision of Article 1¹⁹²⁰ which clearly claims India to be a 'Union of States', thus proving the constitution to be a fallacy within itself.²¹

The Union List²² provided in the constitution lists out certain matters upon which, the center has the sole rights of framing laws/ rules. Article 370(1)(b)(i) states that if a certain subject matter of the Union List corresponds to the Instrument of Accession then the laws applicable in the territory of India shall be applicable similarly in J&K. Therefore, the administration of J&K is still strictly conducted within the framework set up by the Instrument of Accession. Thus, India and J&K still function strongly on the lines of the agreement signed many years ago, making the past events reiterate themselves with further rigour.²³ Whereas the clause (1)(b)(ii) hopes for the development of cordial and relations between the President of India and J&K for the reason that it provides that any other laws can also be enacted by Indian Union for the State, wherein the state of J&K and the President deem it necessary that such matters should be legislated by Indian Parliament. The rationale behind this is to maintain the harmonious relation between the J&K state administration and the Center.²⁴

Analysing the Special Status and its Implications

1. There are allegations of the special status of J&K being in grave violation of the fundamental rights of the constitution. Furthermore, there is great debate whether the special status is a part of the essence of the basic structure of the constitution or against it.²⁵

The most prominent issue is that of the special status of J&K awarding permanent citizenship to selective individuals on the sole basis of place of birth [as under Article 35A] and no other reasonable nexus. This issue has come to the public attention after a Kashmiri woman - Charu Wali Khanna²⁶, challenged the constitutional validity of Article 35A, on the ground that it was in violation of her right to equality guaranteed under Article 14^{27,28}. She alleged that Article 35A was a provision deeply imbedded in the gender bias because males retain their citizenship [of Jammu & Kashmir] even after marriage outside the state whereas women do not derive the same right as they will lose their permanent citizenship on marriage to a man outside the state. Furthermore, a woman marrying a permanent citizen shall automatically gain permanent citizenship but the same is not true, the other way around. Khanna is a victim of such a provision for marrying outside her state. Therefore, there is clear indication of the fact that no reasonable nexus has been used in this legislation and fulfills no purpose in larger public interest.²⁹ While the State Judiciary has tried to contain this situation in the case of State of Jammu & Kashmir vs. Dr. Sushila Sawhney & Ors³⁰, there has been no follow up by activists or the State Legislature.

Secondly, Article 370 has turned Indian federal structure subservient to decentralisation and a rise in insularity in J&K. The reason being straight forward – the status of double citizenship awarded to the permanent residents of J&K i.e. a person staying in J&K is not only citizen of India

but of the state as well a practice not seen in any state. Furthermore, the core fundamental rights of Article 19(1)(e)^{31,32} and Article 19(1)(g)^{33,34} which permits the citizens of India to reside freely in any part of the country has been taken away.³⁵ The damage dealt by this violation is not only borne by the general Indian public but also by the economy of the state of J&K – incorporation of companies and gaining working licenses/permits becomes excruciatingly complex, hence proving to be hinderance to be

Another issue arises in the sphere of class discrimination: A prominent example arises in the case of Ashok Kumar v. State of Jammu & Kashmir. In this case, Section 6³⁶ of the Jammu & Kashmir Reservation Act along with section 9³⁷ and section 34³⁸ of the Jammu and Kashmir Reservation Rules were challenged for granting reservation to scheduled castes and tribes for public employment. Furthermore, for the reason that the state legislature defines residents as anyone who has had ownership of immovable property in the state for at least ten years at the time of the inception of the J&K constitution or has been living permanently before 1911. Therefore, the helpless refugees of partition are thus not considered permanent residents and are denied part of the public welfare, public jobs, voting rights etc.

The basic structure doctrine however attains support from both sides of the argument in this regard. Firstly, the very existence of this Article acts as a threat to the federal spirit of the Union as is mentioned in the preamble. In the case of Keshavnanda Bharati v. State of Kerala³⁹, the Apex Court held that all provisions of the constitution, including the fundamental rights can be amended. However, the Parliament cannot alter the basic essence or structure of the constitution, this essence included the principles which formed the foundation of our constitution i.e. democracy, federalism, separation of powers etc. Furthermore, the term 'secularism' (part

of the basic structure now⁴⁰) which was added to the preamble as a part of a constitutional amendment⁴¹, has been expressly excluded from its application to J&K for the reason that it did not come out of a presidential order. However, the argument in favour of this provision comes that it is a product of an instrument that was negotiated between the people of the state and the Union. It is thus beyond the reach of any authority for the purpose of modification or repeal and thereby retains itself as a part of the basic structure. Result of freely negotiated contract between the people and constitutional authority of India. It cannot be touched by the provisions laid down in Article 368⁴² (power of parliament to amend the constitution).

International Law on the other hand gives a perspective contrary to the domestic view point. Here comes in – the right to self-determination, it is a collective right under which the people native to a region are at liberty to determine their own political status and adopt their own path to attain economic and social development. This principle has also been related to the de colonization process that followed the inception of the UN Charter in 1945.⁴³ Furthermore, The International Court of Justice has held that this right can only be exercised by a region/ people but not by the government of a state. The requirements for exercising such a right in the international forum include the presence of a history of independence/ self-rule before their accession in a defined territory, a clear capability of self-governance and a common culture followed by the residents. It is clear therefore that the residents of Jammu & Kashmir are eligible to exercise their right of Self Determination, which is now recognized as a jus cogens principle (non – derogable parent norms, they command the highest stature in international law). Also, Article 1 of the International Covenant on Civil and Political Rights provides that '*All peoples have the right of self-determination. By virtue of that*

right they freely determine their political status and freely pursue their economic, social and cultural development.'. Since Article 370 laid down the terms and conditions for the accession of Jammu & Kashmir, clearly this provision is thus identifiable with the immutable Right of Self Determination. While the Union claims the defence of territorial integrity⁴⁴ and maintain its sovereign borders, the fact is that International law does not authorise the unilateral secession of a territory from the state to which it pertains but the prohibition of unilateral declarations of independence is not implicit in the principle of territorial integrity. There is no prohibition of unilateral secession in international law.

Assessing Solutions to Curb the Kashmir Conflict

Political Independence for Jammu & Kashmir

Reports across various media streams have clamored for the polls being conducted in the State of J&K demanding for complete political independence for the State. However, the fact is that such polls have mostly come from the Kashmir Valley where a substantial majority roots for the independence, this view is differed in other regions of J&K eg. Leh, Ladakh, Jammu and Kargil wherein the support behind this cause is minimal.⁴⁵ Therefore, it is difficult to move towards the fulfillment of such demand in the state owing to such polarity in attitudes inside the region itself towards independence.⁴⁶ This is further indication of the fact that garnering support outside the region would be an even harder task. Therefore, a plebiscite is highly unfeasible and can may result in extreme repercussions.

Formal Partition of Kashmir

The possible solution behind this is by either make a formal international border between the 2 states of India and Pakistan and thereby giving both parties a final closure over their demarcated

territories of Jammu and Kashmir or⁴⁷ by making the existing Line of Control (LOC) a formal status of a national border between the states.⁴⁸ This could perhaps also bring in a system of soft borders between the states with effective de-militarisation between both the sides as step towards reducing militancy in the region and perhaps promote peace. This however bring in the issue of both the states again having conflicting views on this issue i.e. India would demand LOC as an international border with no negotiation whereas Pakistan would demand a re-negotiation with respect to the LOC so as to accommodate the Muslim populated regions of the Kashmir into its own territories. Furthermore, in a study conducted, it was found that most residents of the Kashmir Valley would not prefer acceding to Pakistan owing to the fact that they have accepted moderate religious views and even adopted some Hindu rituals and norms into their daily lives, this would make a stark contrast with extreme Islamic orientation and military ideology of Pakistan.⁴⁹ Therefore, these proposals for partition are incapable of providing a concrete solution to find a solution to this dispute.⁵⁰

Implementation of Soft Borders and thereby Autonomy for J&K

This approach calls for the implementation of soft border between the states of India and Pakistan – this will mean a complete demilitarisation of the border.⁵¹ Furthermore, all administrative control over the state of J&K shall be forgone by both the nations, barring certain sectors like military and foreign affairs. Now being a culturally and religiously diverse region, the question arises as to who gains autonomy of the state. Two routes may be approached in this scenario: Firstly, that the Kashmir is divided into its major provinces eg Azad Kashmir, Jammu, Ladakh etc. with each province gaining autonomy over its territory (with a constitution for each territory) this shall be accompanied

with a free movement access to all regions for their mutual benefit, however the other sectors like military shall be administered by the state of either India or Pakistan through some agreement or treaty. The other option is the formation of an economic union with a single unified territory of Jammu and Kashmir with free access to either state of India and Pakistan, with foreign affairs and military control being exercised by either state though mutual agreement. However, this hinges on the factor that both Pakistan and India agree to demilitarise their national borders and make the LOC inconsequential.⁵²

Much of the conflict in the Kashmir is the consequence of the bitter partition between the states. The fact that militant extremist groups have continued conducting their acts of terrorism in India over the years demanding the secession of Kashmir of India have only grown tensions between the two states. Furthermore, the ISI (Pakistan Intelligence Agency) has also been under fire on multiple occasions for backing terror attacks in India and thereby influencing political relations between the states. Therefore, while the methods may be present, any dialogue and thereby any means of conciliation between India and Pakistan have failed. While the future is unpredictable, this surely sets a precedent and drains out any possible outcome for solving the Kashmir Valley dispute.

Current Situation and Concluding Remarks

India has been most aware of the Tibetan situation with respect to protest for cessation or independence from occupying state. With little to no hope left for the occupied state to contest its occupation and suppression of its culture in the Tibet, the residents of J&K had no precedent to follow. Until the recent Catalanian referendum. Catalonia, a district in Spain with the highest average gross income among all the districts, acted as a milking cow for Madrid for the reason that very disproportionate welfare came in form of government expenditure. With

different culture, and separate history and entirely alien language to Spanish, Catalan residents have long demanded for their independence from Spain. However recently, against much opposition from the Spanish center, Catalonia successfully conducted a referendum for a move for independence wherein a staggering 90% vote came in favour of the Catalans.⁵³ Catalonia's experiment is being talked about in Kashmir as an example of realisation of this right irrespective of its denial by the controlling state for a region, and without the involvement of an impotent world body.⁵⁴ While this may inspire a spark in the Kashmir Valley, the recent Article 35A has come in the sight of the Supreme Court wherein the very constitutionality of the special status provided to the State of J&K shall be thoroughly dissected and assessed. Now this again shall renew the age-old debate regarding the autonomy of the state and vicious cycle shall continue.

(Endnotes)

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- 6 Article 35A. Constitution of India, 1949. Government of India.
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(1) India, that is Bharat, shall be a Union of States.
(2) The States and the territories thereof shall be as specified in the First Schedule.
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Prohibition of discrimination on grounds of religion, race, caste, sex or place of birth
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