

## Article 35A: Implications for Jammu and Kashmir



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### I. Introduction

The Supreme Court on August 31st 2018 deferred for the fourth time a hearing on a petition challenging Article 35A. The Supreme Court has rescheduled it for second week of January 2019. This petition has led to wide spread protests all over Kashmir because the petition aims to scrap Article 35A which grants the right to the Jammu and Kashmir legislature to determine “permanent residents”. The permanent residents in turn enjoy special rights and privileges in regard to employment, acquisition of immovable property, settlements and scholarships.

In 2014, an NGO called *We the Citizen*, filed a petition contesting the constitutionality of Article 35A. This petition was supposed to be heard in August 2017 but since then it has been postponed several times owing to protest by the Jammu and Kashmir Government. The issue of Article 35A is being projected as a constitutional issue because the insertion of Article 35A took place through a Presidential order rather than the constitutional route of Article 368 which prescribes the procedure to amend the constitution. But the issue is not merely constitutional, it has political connotations as well because BJP clearly states in its manifesto released prior to the 2014 elections, its intention to scrap Article 35A and has stated several times that it will find a ‘permanent solution’ for Kashmir. In this cover story, we will begin first with the political background to Article 35A and Article 370 and then move on the legal arguments that have been presented. Any discussion on this is incomplete without a reference to the idea of federalism; this cover story also examines this Article in the light of the structure of federalism with regard to Jammu and Kashmir.

### Background

Jammu and Kashmir is the only state in India that has a constitution of its own drafted by the Constituent Assembly of the state and adopted in 1957, though its provisions broadly conform to the Constitution of India with regard to the structure of the government and the fundamental rights of the citizens. Article 370 (bii) limited the power of the Parliament to make laws for the state of Jammu and Kashmir only with regard to foreign affairs, defence and communications as specified in the Instrument of Access by dint of which the state joined the Union of India in October 1948.

The laws passed by the Parliament on subjects in the Union and Concurrent lists would not automatically be valid in the state unless the President of India in concurrence with the state government declared them applicable to the state.

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This was done in exercise of the powers conferred by clause (1) of Article 370. The Article 370 was introduced keeping in mind the situation in J and K. India offered integration on particular terms and conditions and with it exemption from application of all Indian laws. Gopalswamy Ayyengar, who moved the Article 370 in the Constituent Assembly, in 1949, mentioned the special conditions in the Jammu and Kashmir state as follows:

- 1. The war within the state-a ceasefire had held since the beginning of the year (1949) but conditions are still "unusual and abnormal", "normal life" not yet restored.**
- 2. Part of the state is still in the hands of "rebels and enemies".**
- "Entanglement" with the United Nations over the issue of J&K and the Government's commitment to giving the people of the State the opportunity to decide for themselves whether they wish to remain with the Republic or to leave it (including a plebiscite if the right conditions prevail)
- Agreement that the will of the people, through a Constituent Assembly, will determine the constitution of the state and the sphere of Union jurisdiction over the state.

Ironically, the first two special conditions are still a reality for Jammu and Kashmir's social and political condition considering the continuous deaths and protests it has been witnessing.

This has been affirmed by the Supreme Court as well in the case of *Prem Nath Kaul v Nath Kaul v State of J & K*<sup>1</sup>, *Sampath Kumar v State of J & K*<sup>2</sup>. Sampath Kumar stated that Art. 370 of the Constitution have never ceased to be operative," it held, "and there can be no challenge on this ground to the validity of the Orders passed by the President in exercise of the powers conferred by this Article."<sup>3</sup>

The state of J & K defined a "permanent resident" as a person who was born or settled in the state before May 14, 1954, or who has been a resident of the state for ten years and has "lawfully acquired" immovable property in the state. These rights of J & K that are being challenged in the petition are the product of a long struggle. In 1889, the state government changed the court language from Persian to Urdu which resulted in Punjabi Hindus replacing the Kashmiri Pandits in influential positions.<sup>4</sup> It was this phenomenon which led to a campaign against outsiders which led to the creation of criteria of permanent residence, including acquisition of immovable property and residence. In 1927, the Maharaja of J & K - Hari Singh, enacted the definition of Hereditary State Subject. This was instrumental in Kashmiri Muslims demanding more representation and opportunities.

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<sup>1</sup> 1959AIR 759

<sup>2</sup> 1969 AIR 1153

<sup>3</sup> ibid

<sup>4</sup> Srinath Raghavan, Article 35A conundrum: New Delhi must tread carefully. Retrieved from

<https://www.hindustantimes.com/columns/kashmir-s-article-35a-conundrum-new-delhi-must-tread-carefully/story-YHxSxHXCZo3J7oPPRKWpGJ.html> on Aug 31, 2018

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The former Advocate General of J &K, M.I. Qadri said the state subject law dates back to 1927 when the Dogras from Jammu approached the then Maharaja Hari Singh fearing that an influx of people from Punjab would lead to the latter's domination in government services. "These fears led to the issuance of a separate notification by the maharaja in 1927 and 1932 which defined the state subjects," said Qadri, adding that once the state constitution was framed in 1956, it retained the Maharaja's definition of permanent residents and the privileges enjoyed by them exclusively in matters related to employment, acquisition of immovable property, settlements and scholarships.

The Presidential Order was issued under the provisions of the Article 370 (1) (d) of the Constitution which allows the President to make certain "exceptions and modifications" to the Constitution for the benefit of 'State subjects' of Jammu and Kashmir.

### (b) Federal Structure

This privilege was accorded 65 years ago because the status of Jammu and Kashmir is rooted in the concept of Asymmetric Federalism. Before defining asymmetric federalism, we should define Federalism. William Riker, political scientist has explained federalism as: "Federalism is an outcome of rational bargain among various constituents. The bargain may be for political or economic gains. In the political bargain, the constituents give up political autonomy for security from external threat of public services by reaping economies of scale and catering to diverse preferences. However, while striking the bargain, the constituents try to preserve their valued identity and seek special status." (Riker, 1975)

Thus, at the core of federalism lies the rational bargain which the two parties, in this case, India and J & K, entered into in 1949 which resulted in rendering J & K a special status. Ar 370 was introduced on security reasons as J & K found itself in a dilemma of two surrounding nation states (India and Pakistan) and later integrated with India owing to the exemption from Indian laws which was conferred upon them.

Louis Tillin, political scientist writes that most authors who classify India as an asymmetrical federation do so because of the constitutional clause governing Jammu and Kashmir's relationship to the Indian Union (Burges 2001: 265, Stephan 2004). Govind Rao and Nirvikar Singh (2004) in their paper on asymmetric federalism state that smaller states may come together in a federation due to reasons of security, freedom, stability and strength. They further elaborate that asymmetric federalism is characterised by an unequal distribution of power in matters of administration, economy and political control.<sup>5</sup> Canada, Belgium and Spain are examples of countries with asymmetric federalism. This structure gives state the status under which they are given the freedom to preserve their tradition and culture.

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The Indian state recognised the different demography given Jammu and Kashmir's peculiar and sensitive geographical position and granted it the space and right to preserve their state's culture and tradition. This could be affected if Article 35A is declared unconstitutional. Apart from these, there are many more repercussions which unconstitutionality of this article shall end up creating which we will discuss in the following sections.

### III. Judicial understanding of the issue:

The petition puts forward two arguments - one that the article was not brought forward through Article 368 which is the legitimate way of bringing the amendment in the constitution. The other argument made is that it violates the basic structure. The Article apart from permitting J & K of defining "permanent residents" of the State also exempts such legislation being annulled on the ground that they infringe one or the other of the fundamental rights guaranteed of the Constitution. It is this immunity which is being contended against.

Basic structure refers to the basic corner stone of our constitution and consequently our nation. The judiciary in 1973 in *Kesavananda Bharati v State of Kerala*<sup>6</sup>, clearly states that basic features such as our Fundamental Rights, Secularism and Federalism cannot be changed. In a sense this limits the amending power of the Parliament. But, here amending power does not explicitly extend to Article 370 as well.<sup>7</sup>

Moreover, through a five judge bench in *Waman Rao v Union of India*<sup>8</sup>, the Supreme Court held that where constitutional amendments create vested rights in persons, an amendment made prior to the decision in *Kesavananda* cannot be susceptible to a basic structure challenge.

Even if Supreme Court through a setting up a more than five judge bench goes beyond *Waman Rao v Union of India* judgment, then we have to see the repercussions of the challenge in the petition.

This challenge has been brought forward after 65 years, which implies the petitioner has to prove that why the petition was not raised before and what is that criticality which has suddenly led to filing this petition. Moreover, several properties would have changed hands since the Article 35 a has been in force and a sudden change now would put J & K in a vulnerable situation and they would logically construe it as an attack on the special status they have been given. If merely the possibility of a hearing has created this tension and chaos, then if the article actually is scrapped it would aggravate the situation leading to further instability. Adjudicating for a state like the J & K where the state is in a continuous state of flux and mostly about grappling with chaos and violence, is not a "pure question of law" as has been put forward by Central Government.

<sup>6</sup> 1973 SC 1461

<sup>7</sup> Suhrith Parthasarthy .Article 39A and Basic Structure. Retrieved from <https://www.thehindu.com/opinion/lead/article-35a-and-the-basic-structure/article24786741.ece> on Sep 5, 2018

<sup>8</sup> AIR 1981 SC 271

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We also have another petition filed by a Jammu and Kashmir native Charu Wali Khanna who has challenged the constitutionality of Article 35A on the basis that the article restricts her right to property if a native woman marries a man not holding a permanent resident certificate. Jammu and Kashmir is not the only state to put the restriction of buying property from outsiders. Himachal Pradesh, Andaman & Nicobar Island, Nagaland, Sikkim and Andhra Pradesh also have such restrictions. The question that arises here is whether we should review the restrictions in these states too.

It is important to refer here that through the order in *Jammu and Kashmir v Dr. Sushila Sawhney*<sup>9</sup> and others, J &K court said that the daughter of a permanent resident marrying a person outside the state would not lose the status of permanent resident of J &K but the right of the children in regard to property was not dealt with which remains to be decided by SC.

Regarding, this, A.G.Noorani, constitutional scholar, has stated that “Article 35A is beyond challenge. In India the lust for uniformity possesses communal-minded majoritarian. The incorporation of new Article namely Article 35A to the Constitution of India has been effected vide Constitution(Application to Jammu and Kashmir)order 1954 which is beyond the jurisdiction and power of Respondent No.1 inasmuch as the said provision namely Ar 35A is unconstitutional. ”

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<sup>9</sup> AIR 2003 J K 83

<sup>10</sup> AIR 2003 J K 83

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### IV. Is the Issue merely “pure question of law”?

The Central Government has portrayed the issue as involving ‘pure question of law’ but the media reports have put forth a different point of view. Till now, the central government has not filed any affidavit in court and refused to do so which would have made clear its stand on the issue. The central government ought to make its position clear on an issue as it has the potential to create drastic changes in the relationship of J & K with the rest of India. With Kashmir being at the face of continuous violence and unrest, shrugging the issue as merely ‘pure question of law’ is simplifying the issue and also inconsistent with how the ruling party has stated boldly that it aims to find a ‘permanent solution’ for Kashmir. This portrays a shallow understanding of the upheavals and protests taking place against the article in J & K. More importantly, repealing of Article 370 which accords special status to J & K was part of the BJP manifesto in 2014.

BJP member of legislative council Surinder Ambirdar Singh stated that “Article 35A is a constitutional mistake” and Arun Gupta called it as an “unconstitutional provision of law”. BJP’s party spokesperson in Jammu when PDP in alliance with BJP was ruling the state, termed the article as the one that has “done great harm by not allowing anybody from country to come and settle here”. As per news reports many BJP ministers expressed support to Article 35A, which is entirely contradictory to its earlier standing on the same issue. Recently, a petition was also filed in Supreme Court by Ashwini Upadhyay, BJP minister for scrapping Article 35A. While no official statement has been given by Central Government, the unofficial standing of BJP is clear to some extent on this issue.

The issue of legality of the article has been witnessing protests whenever it is up for hearing in Supreme Court. In this scenario the Central Government needs to dig deeper and understand that by choosing to shift the responsibility to the judiciary, it is firstly not taking a clear stand on an issue of national importance and then secondly it is shifting responsibility because in the event of any upheaval, protests and violence, it would conveniently place the blame on the judiciary. More importantly, now that the ties with People’s Democratic Party (PDP), has been severed by the central government it can then argue in the future that it is not responsible for the conditions in Jammu and Kashmir on Article 35A. The track record of BJP on this is also of concern due to its previous stand and current act of not filing an affidavit, uncertainty regarding how the situation shall be handled in future has added to the tensions.

As we have stated that judiciary and government do not have a clear stand on Article 35A, it creates a complex situation considering how complex politically charged Kashmir always is, scrapping Article 35A would not be wise situation. The decision to include Article 35A through a presidential order was a political decision and portraying the removal of it as a purely decision of law, is a gross underestimation of the political complications in J & K and also conveniently shifts the responsibility to the judiciary. It also amounts to going back on the principles on which J & K integrated with India through which autonomy was promised to them. Moreover, it directly attacks the idea of asymmetric federalism as has been mentioned above as a result of which J & K and north-east states of country have been rendered power to determine their laws.

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### V. Way forward:

One of the biggest concerns of the locals is that they are seeing this move by the Government as a part of a strategy towards permanent inclusion of J & K into India. Article 35 A if removed would see outsiders acquiring property in J and K thereby changing the demography of the whole state. Further, challenging this article also opens the possibility of challenging the validity of all the 41 presidential orders through which government of India has extended more than 90 entries in union list to J & K and made applicable over 250 articles of Indian Constitution to the states. Taking into consideration the crisis which Kashmir has been going through, it is a mockery on their situation to decide a case which would open it to Indian states because Article 370 already as has been pointed out by A.G.Noorani has been “eroded over the past years”. For example the extension of Reserve Bank of India and the Supreme Court was extended to them without regard to Article 370.

Louis Tillin after going through the court’s judgments has concluded that Court *has over time, helped to strengthen the role of the Presidents as guardian of the spirit of autonomy, rather than acting itself to protecting Jammu & Kashmir’s differential autonomy from political intervention on the basis of its distinctive constitutional settlement.*

Additionally, there are special provisions for Assam, Meghalaya, Tripura, Mizoram mentioned in Ar 371 and Article 371-A to 371-I. What is of concern is that challenge to Ar 370 cannot be done away with because it would be a direct attack on J & K’s constitutionally protected status so perhaps the less narrow route of Ar 35A is being adopted to deal with the Kashmir issue by the central government. This opens the possibility in future of eroding the autonomy status given to other states as well. It is the political tension of dealing with two nation states and in midst of it, trying to protect it’s special status and culture which J & K has been grappling with for years which has aggravated the protests in J & K.

A judgment that would keep aside the special status of J & K would be contradictory to the Article 370 which in past has been recognised by the SC. If the perspective of federalism would be considered as we have mentioned, then court might view the issue beyond the legality of presidential order which inserted Article 35A. As *Waman Rao v Union of India* laid down that where constitutional amendments create vested rights in persons, an amendment made prior to the decision in *Kesavananda* cannot be susceptible to a basic structure challenge.

This matter if handled well by the Central Government can be an ideal opportunity to deal better with the protests in Kashmir over scrapping of Article 35A.

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Importantly, though the right of the women from permanent residents marrying outside would not be lost now, but the right of the children has not been discussed by court.

It is high time that Central Government realises that while postponing the hearing of the case is a temporary solution but in long run, it merely increases the anxiety of people of J & K.

The protests over scrapping of article would increase in future and not decrease. The solution lies in assessing the Ar 35A from the possible repercussions it will bring in future and till now, the situation does not look hopeful. Central Government needs to take a clear standing so that uncertainty among J & K people reduces and they do not have to resort to shut down to show their protest. In the midst of all this, importance of federalism as a structure embedded in our constitution should not be undermined especially in regard to Jammu and Kashmir.

## Governance and Development

### **Apply land acquisition act 2013 while relocating tribals from tiger areas: National Commission for Scheduled Tribe (NCST)**

**(DNA, Aug 31, 2018)**

NCST has asked to be compensated according to the land acquisition act 2013 and has flagged the recommendation made by the task group chaired by additional chief secretary of forest and environment department, Odisha. According to NCST, the figure 15 lakh as compensation recommended by the task group does not correspond with its own recommendation of January and December last year. NCST in January had recommended the amount to be increased from 10 lakh to 20 lakh per family for voluntarily relocating from tiger habitat.

Read More: <https://www.dnaindia.com/india/report-apply-land-act-to-relocation-of-tribals-from-tiger-areas-2654721> Retrieved on 31st August, 2018.

### **Madras High Courts directs National highway Authority of India (NHA) to provide separate lane for VIPS and Judges.**

**(Outlook India, Aug 31, 2018)**

The Madras High Court on Wednesday directed the NHA to take steps for providing a separate lane at toll plazas for VIPS, including sitting judges across the country. A bench comprising justices Hulavadi G Ramesh and MV Muralidharan warned NHA that the court will issue show cause notice to the authorities unless the circular was issued.

Read More: <https://www.outlookindia.com/website/story/provide-separate-lane-for-vips-judges-at-toll-plazas-across-india-directs-madras/315775> Retrieved on 31st August, 2018.

### **Government owes two lakh crore to the Food Corporation of India**

**(Down to Earth, Aug 31, 2018)**

According to a news report in Down to Earth, a senior official on the condition of anonymity disclosed that the government has not been paying FCI its full dues. The amount has been estimated around 2 lakh crore. Owing to this, FCI has been borrowing money with a high interest rate. Lack of funds will directly affect the procurement and supply of the harvest.

Read More: <https://www.downtoearth.org.in/news/agriculture/rs-2-lakh-crore-this-is-what-government-owes-the-food-corporation-of-india-61476>

### **Government plans to alter intermediary rules for platform liability**

**(Medianama, Aug 31, 2018)**

Government is planning to change its intermediary rules for online websites to make platforms like Facebook, whatsapp more liable for its users' content. The change will come as a guideline to section 79 of the Information Technology Act, and will not require parliamentary approval. The change will require the social media companies to appoint a grievance officer and ensure traceability for content posted for users.

Read More: [https://www.medianama.com/2018/08/223-india-intermediary-rules-sc-notice-to-whatsapp/?utm\\_source=feedburner&utm\\_medium=feed&utm\\_campaign=Feed%3A+medianama+%28Medianama%3A+Digital+Media+In+India%29](https://www.medianama.com/2018/08/223-india-intermediary-rules-sc-notice-to-whatsapp/?utm_source=feedburner&utm_medium=feed&utm_campaign=Feed%3A+medianama+%28Medianama%3A+Digital+Media+In+India%29) Retrieved on 30<sup>th</sup> August, 2018

### **India should be wary of China's geopolitical ambitions being channeled through Belt and Road Initiative: Research paper**

**(Carnegie India, Aug 31, 2018)**

A paper by Darshana Baruah, associate director of Carnegie India, suggests that clash of strategic interests between India and China is inevitable as the latter looks to expand its presence and profile in South Asia. The paper suggests that India should deepen its ties with other allies to build and upgrade its infrastructure and create an alternative to Chinese-led connectivity.

Read more: <https://carnegieindia.org/2018/08/21/india-s-answer-to-belt-and-road-road-map-for-south-asia-pub-77071>

Brief of the paper: <https://www.livemint.com/Politics/TZRhWkg064W9XbXbVLDuYI/Why-India-is-wary-of-Chinas-Belt-and-Road-Initiative.html> Retrieved on 30st august, 2018.

### **Malaysia shows its stand against China's policies by halting projects**

**(New York Times Aug 20, 2018)**

At the end of a five-day visit in Beijing, Malaysia's new leader Mahathir Mohammad, announced that two major Chinese-linked projects, worth more than \$22 billion will be halted. The newspapers stated that his predecessor's government signed bad deals with China to bail out a graft-plagued state investment fund and bankroll his continuing grip on power. Mr. Mahathir said "We do not want a situation where there is a new version of colonialism happening because poor countries are unable to compete with rich countries".

To read more: <https://www.nytimes.com/2018/08/20/world/asia/china-malaysia.html?rref=collection%2Fspotlightcollection%2Fchina-reach>

## Environment

### **Commercial activities in parks of London are leading to degradation of environment and society (New York Times, Aug 31, 2018)**

Findings presented at the Royal Geographical Society's annual conference shows that London parks are being increasingly rented out to private companies as councils seek to boost revenue to fund key services. The councils are getting over-reliant on them for generation of income. Intense commercial activity in the park over successive years has had far-reaching impacts, including degradation of the ground and birdwatchers reporting fewer sightings. "This also results in the public being denied access to the space on an almost permanent basis", said the society.

To read more: <https://www.nytimes.com/2018/08/27/world/asia/myanmar-rohingya-genocide.html?ref=collection%2Fsectioncollection%2Fworld>

### **Brazil's State Museum was reduced to ashes by fire, destroying thousands of artifacts (New York Times, Sep 3, 2018)**

The stately national museum, once home to Brazil's royal family, caught fire and thousands of significant artifacts had been reduced to ashes on Sunday night. The fire wiped out years' worth of research by botanists, marine biologists, paleontologists and entomologists. The hall that held a 12,000-year-old skeleton known as Luzia, the oldest human remains discovered in the Americas, was destroyed. Officials said the blaze may have been caused by a paper balloon propelled by a small flame that may have landed on the museum's roof. Investigators were also exploring whether a short circuit in a laboratory may have been the culprit.

To read more: <https://www.nytimes.com/2018/09/03/world/americas/brazil-museum-fire.html?action=click&module=Top%20Stories&pgtype=Homepage>