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ARTICLE 35A OF THE CONSTITUTION- AN OVERVIEW

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ARTICLE 35A OF THE CONSTITUTION-AN OVERVIEW

INTRODUCTION

Article 35A is a unique provision of the Constitution of India. It is a part of the Constitution, but does not figure in the bare Act! One does not find Article 35A after Article 35 in the Constitution. Article 35 is followed by Article 36. But, 35A can be seen in Appendix i of the Constitution. (See **Annexure I**) It was conceived exclusively for the benefit of the State of Jammu and Kashmir through a Presidential Order issued in 1954. It empowers the Jammu and Kashmir State Legislature to define the State's 'permanent residents' and their special rights and privileges. It was specially devised to save the State subject laws that had already been defined under the Dogra ruler Maharaja Hari Singh's regime and notified in 1927 and 1932 (See **Annexure II**). However, this Article which came into force in 1954 without a place in the bare Act of the Constitution was unknown to the public. It came into limelight only when cases were filed in the apex court challenging its validity, thereby raising an intense debate.

HISTORICAL BACKGROUND

* Through the 1927 and 1932 notifications, Maharaja Hari Singh, the ruler of the princely state of Jammu and Kashmir, imposed a law defining the State subjects and their rights. The law also regulated migrants to the State. Following Independence, the State joined the Union of India through an instrument of accession to India signed by Hari Singh in October 1947.

* After Jammu and Kashmir's accession to India, Sheikh Abdullah who took over the reins from Hari Singh in 1949 negotiated the State's political relationship with New Delhi, which led to providing special status through the formulation of Article 370, the subject of intense debate for long.

* However, under the 1952 Delhi Agreement (**See Annexure III**) between Sheikh Abdullah and Jawaharlal Nehru, several provisions of the Constitution were extended to Jammu and Kashmir through the 1954 Presidential Order. Article 35A, not a part of the original Constitution, was conceived under the 1952 Delhi Agreement entered into by Jammu and Kashmir with India. In other words, it is a byproduct of Article 370 of the Indian Constitution.

* Article 370 guarantees special status to the State of Jammu and Kashmir as clause (1) (d) specifically states that 'such of the other provisions of this Constitution shall apply in relation to that State subject to such exceptions as the President may by order specify. Article 35A is one such exception issued through Presidential Order in 1954 known as Constitutional Order No. 48 which can be found as Appendix i to the Constitution.

* Jammu and Kashmir's Constitution was framed in 1956. It retained Maharaja Hari Singh's definition of permanent residents: All persons born or settled within the State before 1911 or after having lawfully acquired immovable property and resident in the State for not less than ten years prior to that date. All emigrants from Jammu and Kashmir, including those who migrated to Pakistan, are considered state subjects. The descendants of emigrants are considered state subjects for two generations.

* The permanent residents law prohibits non-permanent residents from permanent settlement in the State, acquiring immovable property, government jobs, scholarships and other aid.

* However, the Permanent settlement law was interpreted as discriminatory against the women of Jammu and Kashmir as it disqualified them from the state subject rights, if they married non-permanent residents. But, in a landmark judgment in October 2002, the Jammu and 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.

TEXT OF THE 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 and Kashmir, and 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'.

EFFECTS OF ARTICLE 35A

A most prominent feature of the Constitution of Jammu & Kashmir, as distinguished from the rest of India, is the provision for the special treatment of 'permanent residents' of Jammu & Kashmir.

The permanent residents are such persons as are declared so by any existing law of the State or by any future law enacted by the Legislature of the State. As stated in the Article, any such law may either confer special rights or privileges or impose restrictions upon the permanent residents with respect to employments under the State Government, acquisition of immovable property in the State, settlement in the State and the right to scholarships and other forms of aid as the State Government may provide.

Such legislation shall be valid notwithstanding that it is inconsistent with the Fundamental Rights conferred by the Constitution of India upon the other citizens of India [e.g. by Articles. 15(1), 16(1), 19(1) (e)-(f) of Part III of the Constitution dealing with the fundamental rights].

WHY ARTICLE 35A IS BEING DEBATED

A Delhi based NGO, 'We the Citizens', challenged the validity of Article 35A in the Supreme Court in 2014 on the grounds that it was not added to the Constitution through an amendment under Article 368. It was never presented before Parliament, and came into effect immediately, the petitioner argued. A two judge Supreme Court Bench comprising the then Chief Justice J.S. Khehar and Justice D.Y. Chandrachud referred it to a three-judge bench after the Attorney General opined that it raised constitutional issues. The court accepted the plea of the State Government that the challenges to the Article be heard after Diwali.

In another related case in the apex court, two Kashmiri women argued that the state's laws, flowing from Article 35A, had disenfranchised their children. They contended that this provision was gender biased and against Article 14 of the Constitution as a permanent resident status is denied to the children of a Kashmiri woman who marries a man from outside Jammu and Kashmir. However, it does not

apply to the children of a Kashmiri man marrying a woman from outside the State; this is discriminatory.

POSITION OF THE STATE AND UNION GOVERNMENTS

The Central Government is of the view that the matter in the apex court is more 'procedural in nature' rather than a substantive issue on the desirability of the law. The Union Home Ministry is not directly addressing the issue and would not be filing an affidavit. The Attorney General will undertake the task and explain the Government's stand on the matter. The Union Law Officer would reiterate the legal aspects as they exist in the Constitution.

The Union Home Minister Shri Rajnath Singh has assured the Kashmiri people on the legal challenge to Article 35A and said that the Centre would not do anything that would hurt the sentiments of the people of Jammu and Kashmir. However, questions pertaining to this Article are pending before the apex court which has to pronounce a verdict on its constitutionality.

The Jammu and Kashmir Government on its part has taken a stand seeking dismissal of the petition. Further, it has argued that the State has powers under Article 370(1) (d) to apply the Constitution of India to Jammu and Kashmir with exceptions and modifications as the President may by order specify, that is in keeping with Article 35A which was issued as a Presidential Order in 1954 under Article 370 of the Constitution.

RECENT DEVELOPMENTS

On 30th October, the Supreme Court deferred by three months the hearing in this case, after the Centre said that it had appointed Dineshwar Sharma as an

interlocutor to hold negotiations with various stakeholders in the State and requested to adjourn the matter for six months.

Sources Consulted:

1. *State Subject Definition Notifications dated the 20th April, 1927 and the 27th June 1932.*
2. *Delhi Agreement, 1952.*
3. *The Constitution (Application to Jammu and Kashmir) Order, 1954.*
4. *Commentary on the Constitution of India by D.D. Basu, Vol.-3 (2008).*
5. *Article 35A petition: J&K government has to be extra cautious; legal experts warn, Greater Kashmir dated 28-07-2017.*
6. *Article 35A and its significance, The Times of India dated 08-08-2017.*
7. *Plea against Article 35A cites gender bias, sent to larger SC Bench, Indian Express dated 15-08-2017.*
8. *A layman's guide to Article 35A, The Asian Age dated 18-08-2017.*
9. *West Pakistan refugees in J&K move SC challenging Article 35A, The Hindu dated 10-09-2017.*
10. *Article 35A: The debate is on, Deccan Chronicle dated 20-09-2017.*
11. *PIL in SC on Article 35A procedural in nature: Centre, The Week dated 10-10-2017.*

Annexure-I

THE CONSTITUTION (APPLICATION TO JAMMU AND KASHMIR) ORDER, 1954 (Portion dealing with Article 35A)*

After article 35, the following new article shall be added namely : -

"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 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."

****Constitution of India, Appendix i***

Annexure-II

State Subject Definition Notifications dated the 20th April, 1927 and the 27th June 1932[@]

No. I-L/84. - The following definition of the term "State Subject" has been sanctioned by his Highness the Maharaja Bahadur (vice Private Secretary's letter No. 2354, dated the 31st January, 1927 to the Revenue Member of Council) and is hereby promulgated for general information.

The term State Subject means and includes -

Class I. - All persons born and residing within the State before the commencement of the reign of His Highness the late Maharaja Ghulab Singh Sahib Bahadur, and also persons who settled the rein before the commencement of samvat year 1942, and have since been permanently residing therein.

Class II. - All persons other than those belonging to Class I who settled within the State before the close of samvat year 1968, and have since permanently resided and acquired immovable property therein.

Class III. - All persons, other than those belonging to Classes I and II permanently residing within the State, who have acquired under a rayatnama any immovable property therein or WIZO may hereafter acquire such property under an ijazatnama and may execute a rayatnama after ten years continuous residence therein.

Class IV. - Companies which have been registered as such within the State and which, being companies in which the Government are financially interested or as to the economic benefit to the State or to the financial stability of which the Government are satisfied, have by a special order of His Highness been declared to be State subjects.

Note I. - In matters of grants of the State scholarships State lands for agricultural and house building purposes and recruitment to State service, State subjects of Class 1 should receive preference over other classes and those of Class II, over Class III, subject, however, to the order dated 31st January, 1927 of his Highness the Maharaja Bahadur regarding employment of hereditary State Subjects in Government service.

Note II. - The descendants of the persons who have secured the status of any class of the State Subjects will be entitled to. become the State Subject of the same class. For example, if A is declared a State Subject of Class II his sons and grand sons. will ipso facto acquire the status of the same Class (II) and not of Class I.

Note III. - The wife or a widow of a State Subject of any class shall acquire the status of her husband as State Subject of the same Class as her husband, so long as she resides in the State and does not leave the State for permanent residence out-side the State.

Note IV. - For the purpose of the interpretation of the term 'State Subject' either with reference to any law for the time being in force or otherwise, the definition given in this Notification as amended up to date shall be read as if such amended definition existed in this Notification as originally issued.

NOTIFICATION

(Issued by order of His Highness the Maharaja Bahadur dated Srinagar, the 27th June 1932, (14th Har, 1989, published In Government Gazette dated 24th Har, 1989).

No.13L/1989. - -Whereas it is necessary to determine the status of Jammu and Kashmir State Subjects in foreign territories and to inform the Government of Foreign States as to the position of their nationals in this state, it is hereby commanded and notified for public information, as follows:

That all emigrants from the Jammu and Kashmir State to foreign territories shall be considered State Subjects and also the descendants of these emigrants born abroad for two generations. Provided that, these nationals of the Jammu and Kashmir State shall not be entitled to claim the internal rights granted to subjects of this State by the laws, unless they fulfill the conditions laid down by those laws and rules for the specific purposes mentioned therein.

The foreign nationals residing in the State of Jammu and Kashmir shall not acquire the nationality of the Jammu and Kashmir State until after the age of 18 on purchasing immovable property under permission of an ijazatnama and on obtaining a rayatnama after ten years continuous residence in the Jammu and Kashmir State as laid down in Notification No.-1-L. of 1984, dated 20th April, 1927.

Certificates of nationality of the Jammu and Kashmir State may, on application, be granted by the Minister-in Charge of the Political Department in accordance with the provision of section I of this Notification.

@http://www.satp.org/satporgtp/countries/india/states/jandk/documents/actsandordinances/State_Subject_Rules.htm

Annexure-III

Delhi Agreement, 1952[#]

- i. In view of the uniform and consistent stand taken up by the Jammu and Kashmir Constituent Assembly that sovereignty in all matters other than those specified in the Instrument of Accession continues to reside in the State, the Government of India agreed that, while the residuary powers of legislature vested in the Centre in respect of all states other than Jammu and Kashmir, in the case of the latter they vested in the State itself;
- ii. It was agreed between the two Governments that in accordance with Article 5 of the Indian Constitution, persons who have their domicile in Jammu and Kashmir shall be regarded as citizens of India, but the State legislature was given power to make laws for conferring special rights and privileges on the 'state subjects' in view of the 'State Subject Notifications of 1927 and 1932 (Notification No.1-L/84 dated 20-04-1927 and 13/L dated 27-06-1932) the State legislature was also empowered to make laws for the 'State Subjects' who had gone to Pakistan on account of the communal disturbances of 1947, in the event of their return to Kashmir;
- iii. As the President of India commands the same respect in the State as he does in other Units of India, Articles 52 to 62 of the Constitution relating to him should be applicable to the State. It was further agreed that the power to grant reprieves, pardons and remission of sentences etc; would also vest in the President of India;
- iv. The Union Government agreed that the State should have its own flag in addition to the Union flag, but it was agreed by the State Government that the State flag would not be a rival of the Union flag; it was also recognised that the

Union flag should have the same status and position in Jammu and Kashmir as in the rest of India, but for historical reasons connected with the freedom struggle in the State, the need for continuance of the State flag was recognised;

- v. There was complete agreement with regard to the position of the Sadar-i-Riyasat; though the Sadar-i-Riyasat was to be elected by the State Legislature, he had to be recognised by the President of India before his installation as such; in other Indian States the Head of the State was appointed by the President and was as such his nominee but the person to be appointed as the Head, had to be a person acceptable to the Government of that State; no person who is not acceptable to the State Government can be thrust on the State as the Head. The difference in the case of Kashmir lies only in the fact that Sadar-i-Riyasat will in the first place be elected by the State legislature itself instead of being a nominee of the Government and the President of India. With regard to the powers and functions of the Sadar-i-Riyasat the following argument was mutually agreed upon:

- a. the Head of the State shall be a person recognised by the President of the Union on the recommendations of the Legislature of the State;
- b. he shall hold office during the pleasure of the President;
- c. he may, by writing under his hand addressed to the President, resign his office;
- d. subject to the foregoing provisions, the Head of the State shall hold office for a term of five years from the date he enters upon his office;
- e. provided that he shall, notwithstanding the expiration of his term, continue to hold the office until his successor enters upon his office"

- vi. With regard to the fundamental rights, some basic principles agreed between the parties were enunciated; it was accepted that the people of the State were to have fundamental rights. But in the view of the peculiar position in which the State was placed, the whole chapter relating to 'Fundamental Rights' of the Indian Constitution could not be made applicable to the State, the question which remained to be determined was whether the chapter on fundamental rights should form a part of the State Constitution or the Constitution of India as applicable to the State;
- vii. With regard to the jurisdiction of the Supreme Court of India, it was accepted that for the time being, owing to the existence of the Board of Judicial Advisers in the State, which was the highest judicial authority in the State, the Supreme Court should have only appellate jurisdiction;
- viii. There was a great deal of discussion with regard to the "Emergency Powers"; the Government of India insisted on the application of Article 352, empowering the President to proclaim a general emergency in the State; the State Government argued that in the exercise of its powers over defence (Item 1 on the Union List), in the event of war or external aggression, the Government of India would have full authority to take steps and proclaim emergency but the State delegation was, however, averse to the President exercising the power to proclaim a general emergency on account of internal disturbance.

<http://jklaw.nic.in/delhi1952agreemnet.pdf>