

WILL THE ABROGATION OF ARTICLE 35A LEAD TO GREATER GENDER EQUALITY IN JAMMU & KASHMIR?

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In this legislative brief, I aim to examine whether the abrogation of Article 35A shall have any impact on gender equality in Jammu & Kashmir. Through the course of my analysis, I shall show that the abrogation of Article 35A shall in no way lead to greater gender equality in Jammu & Kashmir. I shall also propose certain measures that must be undertaken to remove prevalent forms of gender discrimination in the newly constituted Union Territories of Jammu & Kashmir and Ladakh.

On 5th August, the Central Government issued a Presidential Order¹ and passed a statutory resolution² which deleted clause (2) and clause (3) of Article 370, and amended clause (1). As per the amended clause (1) of Article 370, all provisions of the Indian Constitution shall be applicable to the newly constituted Union Territories of Jammu & Kashmir and Ladakh, without any modification or exception.³ One natural consequence of this amendment is the automatic abrogation of Article 35A of the Indian Constitution, which was inserted through a Presidential Order⁴ in the year 1954.

One of the arguments made by those who have been advocating for the abrogation of Article 35A is that it perpetrates gender inequality in Jammu &

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¹ Constitutional Order No. 272, Issued by the President of India, 5th August 2019, available at <http://egazette.nic.in/WriteReadData/2019/210049.pdf>, last seen on 04/12/2019.

² Statutory Resolution introduced in the Rajya Sabha to amend Art. 270, 5th August 2019, available at <http://164.100.47.5/newlobsessions/sessionno/249/S050819.pdf>, last seen on 10/9/2019.

³ The amended cl. (1) of Art. 370 is worded as – “*All provisions of this Constitution, as amended from time to time, without any modifications or exceptions, shall apply to the State of Jammu and Kashmir notwithstanding anything contrary contained in article 152 or article 308 or any other article of this Constitution or any other provision of the Constitution of Jammu and Kashmir or any law, document, judgement, ordinance, order, byelaw, rule, regulation, notification, custom or usage having the force of law in the territory of India, or any other instrument, treaty or agreement as envisaged under article 363 or otherwise.*”

⁴ The Constitution (Application to Jammu & Kashmir) Order, 1954, available at http://jklaw.nic.in/constitution_jk.pdf, last seen on 04/12/2019.

Kashmir.⁵ This argument of gender inequality was also implicit in the speeches given in Parliament by Ravi Shankar Prasad⁶ and Amit Shah⁷, during the debate on the statutory resolution that proposed amendments to Article 370. Even the petition filed in the Supreme Court challenging the constitutional validity of Article 35A had contended that Article 35A was in severe violation of Article 14, as it sought to provide protection to laws that were gender discriminatory in nature.⁸

Keeping this background in mind, I aim to analyze whether the abrogation of Article 35A shall have any impact on gender equality in Jammu & Kashmir.

I. ARTICLE 35A – CONFERMENT OF A VERY LIMITED IMMUNITY

As per the erstwhile Article 35A, no pre-existing or future law that defined the ‘permanent residents’ of Jammu & Kashmir and conferred upon them special privileges (with respect to settlement, acquisition of immovable property *etc.*) can be declared void on the ground that it abridges the fundamental rights conferred on the other citizens of India. The immunity conferred by Article 35A was limited in nature, and prevented citizens from the rest of India from claiming that their fundamental rights were violated by virtue of the special privileges granted to the ‘permanent residents’ of Jammu & Kashmir.

At this juncture, it is instructive to refer to the exact wording of Article 35A, which is quoted below:

“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-*

⁵ Ipsita Chakravarty, “Three challenges to the 63 year old law on ‘permanent residents’ in Jammu & Kashmir”, Scroll.in, 24th August 2017, available at <https://scroll.in/article/848147/anecdotal-evidence-three-cases-make-a-bouquet-of-arguments-against-article-35a-in-kashmir>, last seen on 10/9/2019.

⁶ Speech given by Ravi Shankar Prasad in the Lok Sabha on the Jammu & Kashmir Reorganization Bill, 2019, 6th August 2019, available at <https://www.youtube.com/watch?v=kzw-mPS4rLtA>, last seen on 10/9/2019.

⁷ Home Minister Amit Shah’s reply in the Lok Sabha on the Jammu & Kashmir Reorganization Bill, 2019, 6th August 2019, available at <https://www.youtube.com/watch?v=6Sf3RybQWoY>, last seen on 10/9/2019.

⁸ *Supra* note 5.

(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."

From a bare reading of Article 35A, it is evident that Article 35A only acted as an enabling provision, and did not directly define the term 'permanent resident'. It also did not directly confer permanent residents with any special rights and privileges. The definition of 'permanent residents' is accordingly found in Section 6⁹ of the Jammu & Kashmir Constitution¹⁰ (**J & K Constitution**), which has to be read in consonance with two State Subject notifications issued in 1927¹¹ and 1932¹². These notifications sought to provide certain special privileges to permanent residents, and was a result of a strong campaign by Kashmiri Pandits who had protested against the hiring of Punjabi civil servants, as it affected their representation in the local administration.¹³

Under Section 6(1)(a) of the J & K Constitution, every person who was a citizen of India as on 14th May, 1954 shall be a 'permanent resident' if he was a "State Subject of Class-I or Class-II". Under Section 6(3), the expression "State Subject of Class-I or Class-II" is to have the same meaning as the one present in the 1927 and 1932 notifications. The State Subject notifications issued in 1927

⁹ S. 6 states that – "(1) Every person who is, or is deemed to be, a citizen of India under the provisions of the Constitution of India shall be a permanent resident of the State, if on the fourteenth day of May, 1954. (a) he was a State subject of class I or of class II: or (b) having lawfully acquired immovable property in the State, he has been ordinarily resident in the State for not less than ten years prior to that date.

(2) Any person who, before the fourteenth day of May, 1954 was a State subject of Class I or of Class II and who, having migrated after the first day of March, 1947, to the territory —now included in Pakistan, returns to the State under a permit for resettlement in the State or for permanent return issued by or under the authority of any law made by the State Legislature shall on such return be a permanent resident of the State.

(3) In this section, the expression "State subject of Class I or of Class II" shall have the same meaning as the State Notification No. I-L/84 dated the twentieth April, 1927, read with State Notification No. 13/L dated the twenty- seventh June, 1932".

¹⁰ The Constitution of Jammu and Kashmir, 1956, available at http://jklaw.nic.in/the_constitution_of_jammu_and_kashmir_1956.pdf, last seen on 04/12/2019.

¹¹ State Notification No. I-L/84, 20th April, 1927, available at https://www.satp.org/satporgtp/countries/india/states/jandk/documents/actsandordinances/State_Subject_Rules.htm, last seen on 04/12/2019.

¹² State Notification No. 13/L, 27th June, 1932, available at https://www.satp.org/satporgtp/countries/india/states/jandk/documents/actsandordinances/State_Subject_Rules.htm, last seen on 04/12/2019.

¹³ Express News Service, "Article 35A in Supreme Court today, Jammu & Kashmir watches closely", Indian Express, 30th October 2017, available at <https://indianexpress.com/article/india/article-35a-in-supreme-court-today-jk-watches-closely-4912980/>, last seen on 10/9/2019.

and 1932 accordingly continued to have legal force by virtue of Section 6(3) of the J & K Constitution.

Hence, Article 35A only *enabled* the State Legislature to frame laws that would define the permanent residents of Jammu & Kashmir, and confer upon them certain special rights and privileges. Article 35A only provided immunity to such laws from being challenged on the ground that they abridge the rights of the other citizens of India. The immunity conferred was limited in nature, and Article 35A does not provide any immunity if a law discriminates *inter se* between the permanent residents of Kashmir.

If any law *inter se* discriminates between male permanent residents and female permanent residents of Kashmir, such a law would anyway not be granted any immunity under Article 35A. It was hence fallacious in the first place to claim that Article 35A directly perpetrated gender equality between the permanent residents of Jammu & Kashmir. Keeping this in mind, we may now refer to one controversial provision of the 1927 State Subject Notification, which defined a 'permanent resident'. As per Note III of this Notification –

“Note-III: The wife or a widow of the 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 outside the State”.

It was contended that by virtue of Note III, a woman shall cease to be a permanent resident if she marries a man who is not a permanent resident. It was also contended that this provision is gender discriminatory, as the same deprivation does not take place if a Kashmiri man marries a woman who is not a permanent resident.

II. THE *SUSHEELA SAWHNEY* JUDGMENT

This controversy regarding the applicability of Note III was settled by a Full Bench of the Jammu & Kashmir High Court in *State of J&K v. Susheela Sawhney*.¹⁴ Here, the Court adjudicated upon a slew of petitions filed by Kashmiri women, who were deprived of their permanent residency status by the State Government after they married an outsider i.e. a male who was not a permanent resident of the State. A Reference was made to a Full Bench of the High Court, which had to examine whether a Kashmiri woman will cease to be a permanent resident upon marriage to an outsider.

The Full Bench held that as Note-III uses the term 'acquires', it only applies to a female who is not a permanent resident, and marries a man who is

¹⁴ *State of J&K v. Susheela Sawhney*, 2002 SCC OnLine J&K 34 : AIR 2003 J&K 83.

a permanent resident. In this scenario, the woman will 'acquire' the status of a permanent resident as long as she seeks to permanently reside in the State of Jammu & Kashmir. It was held that Note-III cannot be interpreted to mean that a woman who is a permanent resident shall lose her status as a permanent resident if she marries a man who is not a permanent resident. It was also held that the son or daughter of such a woman shall also not lose her permanent residency status.

The *Susheela Sawhney* decision however does not directly deal with two other forms of gender discrimination that may continue to exist. *Firstly*, if a married woman or a widow leaves Jammu & Kashmir to permanently reside in another State, she will lose her permanent residency rights as per Note-III, while the same consequence shall not occur to a married man who permanently leaves the State. The second form of discrimination, which was also hinted at in the *Susheela Sawhney* judgment¹⁵ is in a situation where an unmarried woman who happens to be a permanent resident leaves the State to settle in another State.

In such a scenario, the question arises as to whether the unmarried woman shall also lose her permanent residency rights. As Note-III only deals with loss of permanent residency rights of a female, a male definitely does not lose his permanent residency rights in such a situation. Such forms of gender-based discrimination amount to a textbook violation of Article 14 and Article 15(1) of the Indian Constitution, and may be litigated upon in future.

At this juncture, it is also instructive to note that female permanent residents who marry outsiders continue to be deprived of their permanent residency rights as the *Susheela Sawhney* judgment has not been implemented in letter and spirit.¹⁶ Prior to the *Susheela Sawhney* decision, the permanent resident certificates issued to women mentioned that the certificates were 'valid till marriage'.¹⁷ This meant that if the women subsequently married an outsider, the certificate shall cease to have legal force. This practice has unfortunately continued even after the decision, as a result of which female permanent residents who marry outsiders continue to be deprived of their permanent residency rights.¹⁸ Non-implementation of the *Susheela Sawhney* judgment has also led to instances where the children of such female permanent residents have lost their permanent residency status.¹⁹

¹⁵ *Ibid.*, at para 69.

¹⁶ Dr. Ganesh Malhotra, "Discrimination with women in J & K", [dailyexcelsior.com](http://www.dailyexcelsior.com), available at <https://www.dailyexcelsior.com/discrimination-women-jk/>, last seen on 10/9/2019.

¹⁷ *Ibid.*

¹⁸ *Ibid.*

¹⁹ *Ibid.*

III. WILL ABROGATION OF ARTICLE 35A AUTOMATICALLY END SUCH GENDER DISCRIMINATION?

As mentioned above, Article 35A never provided immunity to laws (or delegated pieces of legislation such as notifications) which led to inter-se discrimination between the permanent residents of Jammu & Kashmir. The immunity provided was only against such a law (that defined permanent residents and conferred them special privileges) being struck down as unconstitutional on the ground that it abridged the fundamental rights of the other citizens of India. As Article 35A was never responsible for perpetration of such forms of gender discrimination, abrogation of Article 35A shall not automatically end the same. Moreover, the State Subject Notifications of 1927 and 1932 derived their legal validity from Section 6 of the J& K Constitution, and not from Article 35A.

Now, as the amended Article 370(1) extends all provisions of the Indian Constitution to Jammu & Kashmir, there may exist some confusion with respect to whether the J & K Constitution continues to have legal force. As the statutory resolution that proposed the deletion of clause (2) and clause (3) of Article 370 does not in any way talk about the abrogation of the J & K Constitution, there is no complete clarity in this regard. Even if we assume that the provisions of the Indian Constitution have replaced and substituted the J & K Constitution, it shall be incorrect to automatically assume that Section 6 of the J & K Constitution lacks legal force.

This is because there is no corresponding provision in the Indian Constitution that defines and enlists criteria to be a permanent resident of Jammu & Kashmir. Section 6, along with the 1927 and 1932 notifications are the only legal provisions which providesuch definitions and criteria. Moreover, Section 8²⁰ of the J & K Constitution states that the State Legislature has the power to make laws that would define the 'classes' of persons who shall be the permanent residents of Jammu & Kashmir. Until such a law is enacted, Section 6, along with the 1927 and 1932 notifications shall continue to govern the field. Their legal validity shall remain unaffected by the abrogation of Article 35A.

It is accordingly fallacious to claim that the abrogation of Article 35A shall automatically pave the way for greater gender equality in Jammu & Kashmir. Until a new law is enacted by the State Legislature to define the permanent residents of the State, the legal position shall continue to remain the same even after theabrogation of Article 35A. Furthermore, until the *Susheela Sawhney* decision is implemented in letter and spirit, female permanent residents who marry outsiders shall continue to be deprived of their permanent residency rights.

²⁰ S. 8 states that –“Nothing in foregoing provisions of this part shall derogate from the power of the State legislature to make any law defining the classes the persons who are, or shall be permanent residents of the State”.

IV. CONCLUDING REMARKS - THE ROAD AHEAD

Through Section 95, Section 96 and the Fifth Schedule of the Jammu & Kashmir Reorganization Act, 2019²¹, a total of 106 Central legislations have been made applicable in Jammu & Kashmir from 31st October 2019.²² These legislations include the Hindu Succession Act 1956, the Hindu Marriage Act 1955, and the Muslim Women (Protection of Rights on Divorce) Act, 1986. Substantive gender equality can only be achieved if such Central legislations which strive to achieve gender equality in matters such as marriage, inheritance and succession are effectively implemented in Jammu & Kashmir.

This can be supplemented with two additional measures – (i) effective implementation of the *Susheela Sawhney* decision, to safeguard the rights of Kashmiri women who marry outsiders; and (ii) a suitable law passed in future by the Jammu & Kashmir State Legislature, which aims to make permanent residency rights completely gender neutral. Until these measures are undertaken and effectively implemented, gender equality in Jammu & Kashmir shall continue to take a backseat.

²¹ Jammu and Kashmir Reorganization Act, 2019, available at http://www.prsindia.org/sites/default/files/bill_files/Jammu%20and%20Kashmir%20Reorganisation%20Act%2C%202019.pdf, last seen on 10/9/2019.

²² Ministry of Home Affairs Notification, S.O. 2889(E), 9th August 2019.