



ASPIRE IAS

The Name Associated with Excellence

GUESS PAPER SERIES

SESSION - 12

DATE- 5 August 2019

**JAMMU AND KASHMIR
REORGANISATION BILL, 2019
ARTICLE 35A, ARTICLE 370**

Copyright © Aspire IAS All rights are reserved. No part of this document may be reproduced, stored in a retrieval system or transmitted in any form or by any means, electronic, mechanical, photocopying, recording or otherwise, without prior permission of Aspire IAS.

ARTICLE 35A & 370 AND RELATED ISSUES: Special Status to J&K

A recent central ordinance, which extends reservation to SCs and STs in J&K, throws the spotlight on Article 35A, as well as Article 370 from which it derives.

What are these two provisions?

WHAT IS ARTICLE 35A?

ARTICLE 35A (1954) was incorporated in the Indian Constitution through a Constitutional amendment even much before the Constitution of J&K came into existence (1956).

The Article allows the state of Jammu and Kashmir to grant special privi-

leges and rights to permanent residents but denies rights to several others who too have genuine claims.

It debars non-residents of J&K from buying land or property getting a government job or voting in Assembly elections in Jammu and Kashmir.

Analysis of Article 35 A

Article 35A is a provision incorporated in the Constitution giving the Jammu and Kashmir Legislature a carte blanche to decide who all are 'permanent residents' of the State and confer on them special rights and privileges in public sector jobs, acquisition of property in the State, scholarships and other public aid and welfare.

The provision mandates that *no act of the legislature coming under it can be challenged for violating the Constitution or any other law of the land.*

Historical Background

- **Article 35A was incorporated into the Constitution in 1954** by order of the then President Rajendra Prasad as advised by the Jawaharlal Nehru Cabinet. This controversial order of 1954 followed the 1952 Delhi Agreement entered into between Nehru and the then Prime Minister of Jammu and Kashmir Sheikh Abdullah, which led to the extension of Indian citizenship to the State subjects of Jammu and Kashmir.
- **It was under Article 370 (1) (d) of the constitution that this unique Presidential order was issued.** This provision allows the President to make certain exceptions and modifications to the Constitution for the benefit of State subjects of Jammu and Kashmir. In this way, Article 35A was added to the Constitution as a proof of the special consideration the Indian government bestowed upon the permanent residents of Jammu and Kashmir.

Legal Background of the Controversy

- Under **Article 368 of the Indian Constitution**, only the Parliament has been given the power to amend the Indian Constitution. But this route of lawmaking through the Parliament was side-tracked when the President incorporated Article 35A into the Constitution.
- This short-circuiting of the normal law-making process has raised uncomfortable political, legal and constitutional questions. Did the then President act outside his jurisdiction? Is Article 35A void because the Nehru government did not place it before Parliament for discussion?
- There has been an absence of political, legal and constitutional clarity on these vexed issues. There have been various judicial pronouncements on this

vexed issue. In March 1961 judgment in **Puranlal Lakhanpal vs. The President of India**, the Supreme Court, elaborated on the President's powers under Article 370 to make slight modifications in the Constitution. The apex court argued that the President could make modifications to an existing provision in the Constitution under Article 370. However, the judgment was silent as to whether the President can, without the Parliament's knowledge, introduce a new Article. This question remained open.

Again a writ petition filed by NGO We the Citizens questioned the validity of both Article 35A and Article 370. Questioning the reasonableness of both these articles, it provided various cogent arguments as under:-

- Four representatives from Kashmir were part of the Constituent Assembly involved in the drafting of the Indian Constitution. Originally, the State of Jammu and Kashmir was never accorded any special status in the Constitution.
- Article 370 was only supposed to be a temporary provision meant to bring normalcy in Jammu and Kashmir by strengthening democracy there. It was not the intention of the framers of the Indian Constitution that Article 370 would become a politically motivated tool to bring permanent amendments, like Article 35A, in the Constitution.
- Article 35 A is against the very spirit of oneness of India as it creates a class within a class of Indian citizens. It arbitrarily restricts citizens from other states of the Indian Union from accessing employment opportunities or buying property within Jammu and Kashmir. This discrimination is a clear-cut case of violation of fundamental rights under Articles 14, 19 and 21 of the Indian Constitution.
- Recently the Supreme Court bench (led by Justice Dipak Misra) has indicated that the validity of Articles 35A and 370 may ultimately be decided by a

Constitution Bench. A three-judge bench is currently hearing whether the petitions challenging Article 35A should be referred to a Constitution Bench for an in-depth analysis.

- It was through the Instrument of Accession signed by its ruler Hari Singh in October 1947 that J&K became a part of the Indian Union. Sheikh Abdullah (the then ruler of J&K) cleverly negotiated the contours of political relationship of J&K with India via Article 370 in the Indian Constitution. This article ensured that the specific concerns of J&K were accommodated under India's **asymmetrical federalism** wherein all the states are not treated equally, but their different contextual requirements are fulfilled through special arrangements. Twelve other states of the Indian Union also enjoy special status but only in certain minor matters. Article 370 guarantees special status to Jammu and Kashmir.

Who is a Permanent Resident of J&K?

The issue of the definition of the permanent resident of J&K is at the heart of the controversy surrounding Article 35A. The 1956 Jammu and Kashmir Constitution actually defines a Permanent Resident as one who must be a citizen of India and a state subject on May 14, 1954, or a resident of the state for ten years, and owns immovable property in the state.

Supporters of this arrangement say that it is necessary to protect the demographic profile of the state. But its critics say that it goes against the spirit of oneness and equality of Indian citizenship.

Negative Aspects of Article 35A

- It forbids Indian citizens from settling in the state, acquiring immovable properties, seeking employment in the state.

- The critique of this article from the angle of women's rights is equally strong. If a native woman marries a man not holding a permanent resident certificate of Jammu & Kashmir, then she would lose her property right and their children also become ineligible to claim the property of their mother.
- It undermines the rights of West Pakistan refugees. Persons who migrated from Pakistan to India in 1947 have been denied the permanent resident status of J&K. This is an issue worth looking from a humane perspective but despite assurances from the government at periodic intervals. However, The Resettlement Act of 1982, passed by the Jammu and Kashmir legislature, tried to partially rectify the situation. This act bestowed upon such persons and their children the rights of permanent residents in J&K. However, the issue is politically very sensitive in J&K because of the clash of ideological positions, claims and counter-claims of different stakeholders. Hence, the permanent resident certificate has not been granted to these people. The issue must be resolved amicably by giving due rights to these people as they were uprooted from their ancestral roots in 1947 and then looked upon India as a beacon of hope.
- It conflicts with (rather violates) fundamental rights under Articles 14, 19 and 21 of the Constitution
- Critics also allege that Article 35A has catalysed in radicalization and ghettoization and aids separatist ideology.
- Not granting permanent resident status to the West Pakistan refugees is very inhuman and grossly undermines their well-being. It also undermines their faith in the goodness of India as well as its impartial judicial system.
- Article 35A also adversely affects the economic development of the state.

Why scrapping Article 35A would be a bad idea?

- Some experts say that the removal of Article 35A would change the demography of Kashmir. The separatist might fan anti-India feelings in the valley by politically misusing the issue. The hardening of the posture by the separatists will consequently disturb normalcy in the state.
- Asymmetrical federalism has been quite successful in India in preserving its unity and integrity. The Indian constitution purposefully mandates differential treatments for different units of the Indian Union. The Indian Constitution grants special status to J&K via Article 370 which together with the Instrument of Accession has been the cornerstone of J&K's successful incorporation into the Indian Union. In this context, scrapping Article 35A would be violative of Article 370 as well as the instrument of accession.
- The removal of Article 35A would also indirectly impact the special provision bestowed upon Mizoram, Nagaland etc. under Article 371.
- Critics also allege that it will lead to erosion of Jammu and Kashmir's autonomy.
- The rights of the legislature of J&K are not unlimited. The legislature can grant preferential treatment only in selective cases regarding property rights, employment, settlement and scholarship.

The laws that are not applicable (altered) in the state of Jammu & Kashmir:-

1) Indian Penal Code is not applicable in the state. Instead of IPC, they have RPC which stands for **Ranbir Penal Code**. The Assembly of Jammu & Kashmir is for 6 years whereas for rest of India it is 5 years. Also till 1965, J&K had a **Sadr-e-Riyasat** for Governor and **Prime Minister** in place of Chief Minister.

Indian Penal Code is not applicable in J & K. They have RPC which stands for Ranbir Penal Code

2) Prevention of Corruption Act of 1988 is not applicable in the state. This act was passed to fight against corruption in government agencies and public sector businesses in India.

3) The Religious Institution Act of 1988 is not applicable in the state. This law prohibits religious institutions from allowing their premises for the promotion of political activity and storing of Arm and Ammunition.

The Religious Institution Act of 1988 is not applicable in Valley and therefore many of the mosques were used for political activities and militants used loud-speakers to threaten Kashmiri Pandits

4) The Delhi Special Police Establishment Act of 1946 is not applicable. The power of CBI is derived from this act and thus J&K is outside the preview of CBI.

5) The Right of Children to free and Compulsory Education Act of 2009 is again not applicable in the state of J & K. This act describes/implements the importance of free and compulsory education for children between the age of 6 and 14 in India.

The Right of Children to free and Compulsory Education Act of 2009 which guarantees compulsory education for children is not applicable.

6) Only Permanent Resident (P.R) of the state are allowed to purchase immovable property in the state. Although the residents of Jammu & Kashmir are allowed to own property outside the state and the important thing is that the definition of Permanent Resident is itself biased. The State of Himachal Pradesh has a similar restriction but those are none when compared to J & K. It is to be noted that a person who is not permanent Resident of J&K is denied State Employment, right to scholarship, and cannot vote in the state legislature election. Refugees can vote in parliament but not in Assembly or Local body's election.

The Definition of Permanent Resident (P.R) of the state is very biased and draws a lot of criticism. Image Source: dailymail.co.uk

7) The **Political Reservation of Scheduled Tribes** is not there in J& K though there is 11.9% ST in the state.

8) The State has refused to accept the 42nd Constitutional Amendment Act by which the word "**Secular**" was added to the Preamble of India Constitution.

The preamble of the constitution of India and Jammu and Kashmir. It is easily noted that the word "SECULAR" is missing.

9) The Central driven laws like the Wealth Tax, Gift Tax, and intermarriage with other Indian Nationals cease to exist in J & K. The Service Tax is not applicable in J&K, it has its own Service Tax.

10) Discrimination against Women of State: Women in the state faces the most discrimination because if a woman holds a P.R (**Permanent Resident**) certificate and marries a man who does not have a PR (Non-Kashmiri/Indian Citizen) then she loses her P.R certificate and if she is working with state government then her services are terminated. Surprisingly women from outside of J&K who do not hold PR Certificate get one by marrying men from the state. It is to be noted here if a woman marries a man who does not hold a PR certificate then she can retain the property but same cannot be transferred to her heirs. In 2002 High Court ruling made it clear that a woman will remain a PR even after marriage to a non-PR, and enjoy all the rights of a PR. But then **People's Democratic Party** government, led by **Mehbooba Mufti**, passed a law to overturn the court judgment by introducing a Bill styled "**Permanent Residents (Disqualification) Bill, 2004**". Not only Mufti's but also Omar Abdullah's party, the **National Conference**, backed this Bill and got it passed in the lower house of the assembly.

The J&K laws clearly discriminate between men and women. If a woman marries a man who does not hold a PR certificate then she can retain the property but same cannot be transferred to her heirs.

11) In the State every legislator and Judge, including the Chief Justice and Chief Minister is required to *swear by the constitution of Jammu & Kashmir* and not that of India.

12) It is due to article 370 that Indian Parliament cannot increase or reduce the borders of the state. Due to this India is not able to settle the case related to **Aski Chin** as it is a territory of J & K.

13) After the **Delhi Gang Rape of 2012** parliament passed the **Criminal Law** which is again not applicable in J&K.

14) RTI (Right to Information) is not applicable in the state and it has its own RTI.

15) Part of Indian Constitution that are not applicable in Jammu & Kashmir

1. Article 31C with respect to Directive Principles of State Policy.
2. Article 36-51 relates to Uniform Civil Code.
3. Article 51A which lays down the fundamental duties of every citizen of India.
4. Article 332 which deals with reservation of Scheduled Caste/Tribes in the State legislature.

Analysis of Article 370

Arguably, Article 370 is the most controversial provision of the constitution of India. It deals exclusively with the state of Jammu and Kashmir. This article has been the subject of controversy right since its inception. Some sections demand the abrogation of this article for a complete merger of J&K with the Union of India. However, some sections, especially from the Kashmir valley, argue for the continuation of this article saying that it was an article of faith undergirding the Instrument of Accession under which J&K came into the Indian Union.

Under Article 1 of the Indian constitution, Jammu and Kashmir is a constituent state of Indian Union, and its territory forms an integral part of the territory of India. However, Article 370 gives it a special status, and consequently, all the provisions of the constitution of India are not applicable to it. The state of J&K is also unique in the sense that it has its separate state constitution.

Article 370 is a temporary provision. The President of India can declare that Article 370 ceases to be operative or operates with exceptions and modifications. However, this can be done by the President only on the recommendation of the Constituent Assembly of the state of Jammu and Kashmir.

Criticism of Article 370

- **Critics say that Article 370 is a case of special appeasement** and it should be deleted for J&K's complete merger with India in the interest of larger national integration.
- **There is a legal provision in India that places of religious worship cannot be misused for political purposes. But this provision does not apply to J&K,** according to one scholar, this results into a practical situation where the state does not come within the ambit of secularism. It leads to a situation where

separatism gets legally recognised. The government remains a mere spectator when separatist leaders give anti-India speeches from the ramparts of the mosque routinely after Friday prayers.

- **Corruption corrodes developmental processes in India, and the situation of J&K is no different. The jurisdiction of institutions like CAG, Lokpal, CBI etc. do not extend to J&K due to Article 370.**
- **RTI is not applicable to the state.** Hence, the people of the state are deprived of the right to information. It means that an important aspect of democracy, transparency and accountability remains missing from the State. The civil society of the state lacks this RTI tool to fight corruption.
- **Separatist politics in J&K has a negative bearing on inter-communal relations and perceptions in other states of the Indian Union.**

Conclusion

The issues related to Article 35A and Article 370 are very complex as well as sensitive. The Supreme Court is likely to consider all aspects of these issues, and hence it has referred the matter to a larger Constitution bench.

- **The political parties of J&K are also key stakeholders in these issues. They should refrain from inflaming popular passions on these sensitive issues.**
- **There is a need to adopt a humane approach as far as solving the problems of permanent residence certificate faced by West Pakistan refugees.**
- Other stakeholders should also understand the negative implications of doing politics over the demand for complete abrogation of Article 370 on the successful asymmetrical model of federalism practised by India.
- **Abrogation of Article 370 would also create negative perceptions for other states enjoying special states like Mizoram and Nagaland.** It might

complicate centre-state relations in these border states with likely negative repercussions on national security. Hence, the matter should be best left to the wisdom of the Honourable Supreme Court of India.

- The stakeholders should not be creating law and order issues in Jammu and Kashmir by **doing negative politics on these sensitive matters** as the issue is sub-judice now.

Way ahead:

This matter requires the ***active participation of all stakeholders***. It is necessary to give confidence to the residents of J&K that any alteration in status quo will not take away their rights but will boost J&K's prosperity as it will open doors for more investment, resulting in new opportunities. Article 35A, which was incorporated about six decades ago, now requires a relook, especially given that J&K is now a well-established democratic State.

JAMMU AND KASHMIR REORGANISATION BILL, 2019

AND CONSTITUTION (APPLICATION TO J&K) ORDER, 2019

Amid Opposition uproar, the government today introduced the **Jammu and Kashmir Reorganisation Bill, 2019** in the Rajya Sabha. It also moved a resolution revoking Article 370 from Jammu and Kashmir.

Following Home Minister's proposal, President Ram Nath Kovind promulgated **Constitution (Application to Jammu and Kashmir) Order, 2019**, stating that the provisions of the Indian Constitution will henceforth be applicable to J&K.

The Order, 2019 comes into force "at once", and shall supersede the Constitution (Application to Jammu and Kashmir) Order, 1954.

The presidential promulgation says: "**All the provisions of the Constitution shall apply in relation to the state of Jammu and Kashmir.**"

For the purpose, a **clause 4 has been added to Article 367** which will introduce following changes:

- "The references to the person for the time being recognised by the president on the recommendation of the Legislative Assembly of the State as the Sadar-i-Riyasat of Jammu and Kashmir, acting on the advice of the Council of Ministers of the state for the time being in office, shall be construed as references to the Governor of Jammu and Kashmir", said the order.
- It added: "References to the Governor of Jammu and Kashmir shall be construed as including references to the Governor of Jammu and Kashmir acting on the advice of his Council of Ministers".

- The order further said that in the proviso to clause (3) of Article 370, the expression "Constituent Assembly of the State referred to in clause (2)" shall read "Legislative Assembly of the State".

IMPACT OF THE MOVE

After Kashmir's special status is gone, people from anywhere in India be able to buy property and permanently settle in the state. This has fuelled **fear in the mind of Kashmiris** — they think it would lead to the state's demographic transformation from majority Muslim to majority Hindu.

A separate Union Territory will be created for Jammu & Kashmir with legislature, Home Minister has revealed via a notification. "Keeping in view the prevailing internal security situation, fuelled by cross-border terrorism in the existing state of Jammu & Kashmir, a separate Union Territory is being created", the notification said.

Under the notification, the **Ladakh region is also being given the status of a Union Territory, without legislature**. The Ladakh division has a large area but is sparsely populated with a very difficult terrain. There has been a long-pending demand of people of Ladakh to give it a Union Territory status to enable them to realise their aspiration, according to the notification.

WHAT HAS CHANGED IN J&K?

Before	Now
Special powers exercised by J&K	No special powers now
Dual citizenship	Single citizenship
Separate flag for Jammu & Kashmir	Tricolour will be the only flag
Article 356 not applicable	Article 356 applicable
Article 360 (Financial Emergency) not applicable	Article 360 will be applicable
No reservation for minorities	Minorities will be eligible for reservation
Indian citizens from other states cannot buy land or property in J&K	People from other states will now be able to purchase land or property in J&K
RTI not applicable	RTI will be applicable
Duration of Legislative Assembly for 6 years	Assembly duration in Union Territory of J&K will be for 5 years

GOVERNMENT'S STAND

The government has justified the repeal of Article 370, saying that the people of Jammu and Kashmir are not getting any benefits and the politicians are allowing corruption to flourish. Article 370 never helped Jammu and Kashmir join India and Jammu and Kashmir was already a part of India much before Article 370. Article 370 was accepted with the idea that it will eventually be removed but no political party had the will to do it.

OPPOSITION STAND

The government's action has invited mixed response. Opposition parties and state parties of Jammu and Kashmir are strongly opposing the imposition of curfew in the state, house arrest of political leaders, tightening the grip of Centre, altering the key provisions of the Constitution, etc.